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Daniel Finnegan

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LOOKING FOR A SILVER LINING: HOW THE COVID-19 PANDEMIC FORCES NEW YORK TO RECKON WITH ITS AFFORDABLE HOUSING CRISIS

ABSTRACT

Since the Great Depression, the United States government has failed to find an adequate remedy to a nationwide housing shortage amongst low- and moderate-income individuals and families. The COVID-19 public health crisis has exacerbated this ongoing, nation-wide housing crisis, and has highlighted the racial inequities present in our housing market. Furthermore, it has pushed New York State’s residential housing market into a uniquely precarious position. Dramatic legislation is required at the state level to address the housing crisis caused by the massive growth in income-insecure and housing-insecure individuals that resulted from the pandemic, as well as the widespread departure of high-earning individuals out of the city. Despite the recent federal and state-wide moratoriums on evictions, further action is needed at the state level to address pernicious, exclusionary practices creating these housing shortages. By following the leads of other jurisdictions attempting to remedy their own housing crises, New York State should preempt local government restrictions on new developments, and further incentivize property owners to convert their housing into affordable units. Given the number of vacant market-rate units in New York City as well as the ongoing suburban housing boom, the real estate market is particularly ripe for New York State to remedy longstanding inequities and injustices.

INTRODUCTION

“Fair housing for all—all human beings who live in this country—is now part of the American way of life.”¹

New York State has long been at the center of the conversation around the failures of the United States’ housing system.² In particular, New York City has a long, storied history of enacting some of the largest and most progressive housing measures in the nation.³ These measures, while significant in their scale and their ideology, have inadequately met the city’s

1. See VICKI BEEN, DEP’T FOR HOUSING AND ECON. DEV., WHERE WE LIVE NYC 4 (2020) (quoting Lyndon B. Johnson’s proclamation after he enacted the Fair Housing Act of 1968).

2. Nicholas Dagen Bloom & Matthew Gordon Lasner, AFFORDABLE HOUSING IN NEW YORK: THE PEOPLE, PLACES AND POLICIES THAT TRANSFORMED A CITY 1–8 (2016) (discussing the stark contrast between New York’s crowded, substandard, costly housing, and the “aggressive responses by reformers” working to fix these conditions).

3. *Id.* at 6–8.

housing demand,⁴ and in some instances actually perpetuated New York State's history of segregation.⁵ That history of economic and racial segregation dates back to the post-war suburban construction boom,⁶ and the racially-restrictive covenants included in these newly-developed suburbs.⁷ Recently, judiciaries and legislatures at the state and local level have attempted to address housing discrimination within their jurisdictions.⁸ However, these measures have largely been performative and fail to adequately address the problem.

The onset of the COVID-19 pandemic has only further exacerbated these inequalities.⁹ While recent federal and state legislation provides low and middle-class residents with the tools to cope with certain short-term impacts of COVID-19,¹⁰ the various economic effects of the pandemic are nevertheless propelling hundreds of thousands of low-income New Yorkers into debt and housing insecurity.¹¹ Additionally, further compounding the

4. Luis Ferré-Sadurní, *The Rise and Fall of New York Public Housing: An Oral History*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/interactive/2018/06/25/nyregion/new-york-city-public-housing-history.html>.

5. See, e.g., Brian Purnell & Jeanne Theoharis, *How New York City Became the Capital of the Jim Crow North*, WASH. POST (Aug. 23, 2017, 6:00 AM), <https://www.washingtonpost.com/news/made-by-history/wp/2017/08/23/how-new-york-city-became-the-capital-of-the-jim-crow-north/>; Joy Resmovits, *The Nation's Most Segregated Schools Aren't Where You Think They'd Be*, HUFFINGTON POST (Mar. 26, 2014, 11:01 AM), https://www.huffpost.com/entry/new-york-schools-segregated_n_5034455; Sally Goldenberg, *50 years after Fair Housing Act, New York City still struggles with residential segregation*, POLITICO (Apr. 23, 2018), <https://www.politico.com/states/new-york/albany/story/2018/04/23/50-years-after-fair-housing-act-new-york-city-still-struggles-with-residential-segregation-376170>.

6. See Purnell & Theoharis, *supra* note 5; see also Bruce Lambert, *Rethinking the Nation's First Suburb*, N.Y. TIMES (Dec. 25, 2005), <https://www.nytimes.com/2005/12/25/nyregion/nyregionspecial2/rethinking-the-nations-first-suburb.html>.

7. See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* at 78 (2017) (examining the lasting social and economic effects of the post-war housing boom, and the role government policies played in both establishing and exacerbating segregation).

8. U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty., N.Y., 712 F.3d 761, 767-770 (2d Cir. 2013) (employing the federal False Claims Act to enforce a County's previously agreed-to obligation to develop affordable housing); Mhany Mgmt., Inc. v. Cty. of Nassau, 819 F.3d 581 (2d Cir. 2016) (finding that a local municipality's zoning ordinance violated the disparate-treatment provision of the Federal Housing Authority); Daniel Hampton, *Nassau Unveils New Anti-Housing Discrimination Plan*, PATCH (Nov. 22, 2019), <https://patch.com/new-york/mineola/nassau-unveils-new-anti-housing-discrimination-plan>.

9. Oksana Mironova & Thomas J. Waters, *A sudden shock to an overburdened system: NYC housing & COVID-19*, CSSNY (Apr. 6, 2020), <https://www.cssny.org/news/entry/nyc-housing-covid-19>.

10. See, e.g., Coronavirus Economic Stabilization (CARES Act), 15 U.S.C. §§ 9057, 9058 (2020) (providing for a temporary moratorium on eviction filings and providing for forbearance of residential mortgage loan payments for multifamily properties with federally backed loans).

11. CUNY GRADUATE SCH. OF PUB. HEALTH AND HEALTH POLICY, *COVID-19 SURVEY OF NEW YORK CITY RESIDENTS* (2020).

issue are the thousands of wealthy New Yorkers who fled the city¹² and created a suburban housing boom in the “outer-boroughs” of New York.¹³ This inflated the real estate market,¹⁴ and further segregated New York City’s suburbs.¹⁵

Despite millions of New Yorkers feeling the pandemic’s impact,¹⁶ it also provides the state with a unique opportunity to remedy long-standing inequities in the housing market. As federal funding for existing affordable housing programs continues to dwindle each year,¹⁷ the New York State legislature should look to other jurisdictions for the creative solutions needed to craft a proactive remedy for the state’s housing needs. Just as the Great Depression caused lawmakers to expand the government’s role in the provision and financing of housing, the combined influence of the Black Lives Matter movement and the economic impact of the COVID-19 pandemic has forced lawmakers to reconsider the government’s role in providing for the housing needs of low-income Americans.

In Part I, this Note will examine the history of the housing crisis in the United States, and how actions taken by federal, state, and local governments have worked to create our current, flawed system. Part II examines the economic effects of COVID-19, the government’s response, and the suburban housing boom that consequently occurred. Next, Part III details specific remedies that other states and municipalities instituted to mitigate the housing crisis and the positive steps that New York has taken. Lastly, Part IV will propose certain measures the New York legislature must take to adequately combat both the effects of COVID-19 and the long-standing inequities present in the current housing system.

12. See, e.g., Joshua Chaffin, *New York City Lite: after coronavirus, will business flock to the suburbs?*, FIN. TIMES (Aug. 16, 2020), <https://www.ft.com/content/87bf5383-dbc4-48d6-928f-18371c55425b>.

13. Graham Rapier, *Sales of pricey New York City apartments plunge as the suburbs become cool again*, BUS. INSIDER (Aug. 8, 2020), <https://www.businessinsider.com/nyc-apartment-sales-plunge-coronavirus-new-york-exodus-suburbs-connecticut-2020-8>; Lisa Prevost, *5 Ways the Coronavirus Has Changed Suburban Real Estate*, N.Y. TIMES (July 17, 2020), <https://www.nytimes.com/2020/07/17/realestate/coronavirus-suburbs-real-estate.html>. In this Note, the “outer-boroughs” refers to Nassau, Suffolk, and Westchester Counties.

14. Graham Rapier, *Sales of pricey New York City apartments plunge as the suburbs become cool again*, BUS. INSIDER (Aug. 8, 2020), <https://www.businessinsider.com/nyc-apartment-sales-plunge-coronavirus-new-york-exodus-suburbs-connecticut-2020-8>.

15. Talmon Joseph Smith, *New York is Dead ... to Whom? We’ve Seen New York’s White Flight Before*, THE ATLANTIC (Aug. 26, 2020), <https://www.theatlantic.com/culture/archive/2020/08/new-york-dead-to-whom/615673/>.

16. See Mironova & Waters, *supra* note 9; see also, *The Coronavirus in New York, by the numbers*, CITY & STATE N.Y. (Feb. 18, 2021), <https://www.cityandstateny.com/articles/politics/new-york-state/new-coronavirus-numbers.html>.

17. See NATIONAL LOW-INCOME HOUSING COALITION, CHANGING PRIORITIES: THE FEDERAL GOVERNMENT AND HOUSING ASSISTANCE, 1976–2007, (2002), <https://nlihc.org/library/other/periodic/changing-priorities-1976-2007>.

I. THE HISTORY OF ZONING: INVISIBLE LINES THAT DIVIDE OUR NEIGHBORHOODS

In 1926, the United States Supreme Court presided over two landmark cases that forever altered the racial composition of American cities and suburbs.¹⁸ In *Village of Euclid v. Ambler Realty Co.*, the Supreme Court ruled that local governments hold the power to implement zoning ordinances through their police power so long as the ordinance serves the public's best interest.¹⁹ While not explicitly racial in their description, the local governments of upper-class municipalities have used the powers granted to them under *Euclid* to implement zoning ordinances that exclude low-income residents²⁰ and ultimately maintain racial segregation.²¹ In *Corrigan v. Buckley*, the Supreme Court authorized the use of racially-restrictive covenants in housing deeds.²² During a period of unprecedented government intervention in the housing market, local governments, under *Euclid* excluded low-income residents from moving in.²³ Additionally, under *Corrigan*, individual citizens dictated the future owners of their homes based on race. While *Corrigan* was overturned 22 years later,²⁴ private, racially-restrictive agreements remained in effect until the Fair Housing Act of 1968 made them unlawful.²⁵

The combined effect of these two Supreme Court decisions was to establish predominantly white towns, populated with single-family homes,²⁶ that possessed the power to prevent the development of any multi-family dwellings, including apartments, duplexes, and additional dwelling units

18. See CLEMENT VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP AND THE RESTRICTIVE COVENANT CASES 17-18, 51-52 (Berkeley: University of California Press, 1959) (detailing the role racially-restrictive covenants, and *Corrigan*, played in establishing our segregated cities and suburbs); see generally Rothstein, *supra* note 7 (discussing the effects of *Euclid* and racially-restrictive covenants on the development of American suburbs).

19. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926) (declaring that apartment houses in the suburbs are parasites and are attempting to take advantage of the attractions that single-family homes provide).

20. See, e.g., John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 827 (2019); Richard D. Kahlenberg, *The Walls We Won't Tear Down*, N.Y. TIMES (Aug. 3, 2017), <https://www.nytimes.com/2017/08/03/opinion/sunday/zoning-laws-segregation-income.html>.

21. See, e.g., Rothstein, *supra* note 7, at 53.

22. *Corrigan v. Buckley*, 271 U.S. 323 (1926).

23. See, e.g., Rothstein, *supra* note 7, at 52, 53.

24. See *Shelley v. Kraemer*, 334 U.S. 1 (1948) (overturning *Corrigan v. Buckley*, and the finding the judicial enforcement of racially-restrictive covenants to be unconstitutional).

25. Fair Housing Act of 1968, 42 U.S.C. § 3604.

26. See generally Sarah Shoenfeld & Mara Cherkasky, 'A Strictly White Residential Section': *The Rise and Demise of Racially Restrictive Covenants in Bloomingdale*, D.C. POLICY CENTER (Apr. 3, 2019), <https://www.dcpolicycenter.org/publications/racially-restrictive-covenants-bloomingdale/> (detailing the long term effects *Corrigan v. Buckley*, and racially-restrictive covenants had on Washington D.C.).

(ADU).²⁷ While racially exclusive covenants have since been deemed unconstitutional,²⁸ their segregating effects are still evident today.²⁹ Over the past forty years, home values increased in the United States by 145%.³⁰ For those who owned homes then, this increase has expanded their wealth by approximately a third.³¹ For those who were unable to purchase homes before 1980, due to racially discriminatory policies and practices, “buying one’s first home has become increasingly burdensome.”³² Furthermore, while the average appraised home value in white neighborhoods rose by \$73,000, the average appraised value of homes in Black and Latinx neighborhoods fell by \$22,000.³³

A. NEW YORK CITY HOUSING: ZONING’S POWERFUL EFFECT ON DEVELOPMENT

Common law has long recognized the right of local communities to challenge the developments of certain uses of property by deeming them undesirable and a nuisance.³⁴ In New York, communities have used this power to prevent the development of multi-family housing, and thus to maintain the racial and economic segregation of a past era.³⁵ In *Euclid*, the Supreme Court held that a local government may “forbid the erection of a building of a particular kind or for a particular use ... by considering it in connection with the circumstances and the locality.”³⁶ The decision established the now-customary requirement that a zoning ordinance bears a “substantial relation to the public health, safety, morals, or general welfare.”³⁷ In New York City, zoning laws are required to be undertaken “in

27. See generally Rothstein, *supra* note 7, at 52–54 (discussing the wide range of methods local governments used to enforce their police power); see Kahlenberg, *supra* note 20.

28. See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

29. Laurie Goodman, Jun Zhu & Rolf Pendall, *Are gains in black homeownership history?*, URB. INST. (Feb. 14, 2017), <https://www.urban.org/urban-wire/are-gains-black-homeownership-history> (detailing the effects of the modern housing crisis on the black community).

30. See Brentin Mock, *A Neighborhood’s Race Affects Home Values More Now Than in 1980*, CITYLAB (Sept. 21, 2020), <https://www.bloomberg.com/news/articles/2020-09-21/race-gap-in-home-appraisals-has-doubled-since-1980?sref=OH7mKQXK>; see also, Michela Zonta, *Racial Disparities in Home Appreciation*, CTR. FOR AM. PROGRESS (July 15, 2019), <https://www.americanprogress.org/issues/economy/reports/2019/07/15/469838/racial-disparities-home-appreciation/>.

31. See Mock, *supra* note 30.

32. *Id.*

33. *Id.*

34. See generally PATRICK J. ROHAN, *ZONING AND LAND USE CONTROLS* (Matthew Bender, 1997) (cataloguing local zoning laws across the nation).

35. See Lisa W. Foderaro, *Housing Bias Outlasts Ruling in a Long Island Village*, N.Y. TIMES (Apr. 23, 2016), <https://www.nytimes.com/2016/04/24/nyregion/housing-bias-outlasts-ruling-in-a-long-island-village.html> (detailing how Garden City, a suburb of New York City, used its local authority to illegally block the development of multifamily housing, and the potential for minorities to move into the community).

36. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

37. *Id.* at 394.

accord with a well-considered plan”³⁸ or “in accordance with a comprehensive plan.”³⁹ A typical zoning commission contains numerous layers of oversight to ensure the legality of their proposals.⁴⁰ However, there is clear evidence that zoning laws are often impermissibly used to the detriment of the overall public.⁴¹ Because of this, zoning regulations have been at the center of endless disputes in New York City since their inception.⁴² Despite the positive connotation of requiring a zoning ordinance to be for the “general welfare,” in the near-century since *Euclid*, a substantial amount of economic⁴³ and legal literature⁴⁴ has been written, decrying the “pernicious effects that restrictive land use regulations” have on the affordability and availability of decent housing.⁴⁵

Zoning ordinances in the United States began in 1916 with New York City’s Zoning Resolution.⁴⁶ In an attempt to address overcrowding in lower Manhattan, health and safety hazards posed by the growing height of buildings,⁴⁷ and the blurred boundary between residential and manufacturing spaces,⁴⁸ the city imposed certain height and setback requirements, and it banned commercial development from newly-established residential areas.⁴⁹ The resolution led to the widespread embrace of low-rise buildings and plazas, particularly in the residential neighborhoods that had secured exclusionary zoning ordinances.⁵⁰

As New York City implemented its first governmental restrictions on real estate development, a greater need for government intervention developed

38. N.Y. GEN. CITY LAW § 20(25) (McKinney 2020).

39. N.Y. TOWN LAW § 263 (McKinney 2020).

40. See generally EDWARD M. BASSETT, ZONING: THE LAWS, ADMINISTRATION, AND COURT DECISIONS DURING THE FIRST TWENTY YEARS (1940) (detailing the basic procedural steps of implementing a zoning ordinance); James A. Coon, N.Y. STATE DEP’T OF STATE, ZONING AND THE COMPREHENSIVE PLAN 3 (1999).

41. See Infranca, *supra* note 20, 823-27 (cataloguing the history of zoning ordinances in America, and their effects on housing development).

42. See Cait Etherington, *Understanding How 100 Years of Zoning Has Shaped New York City*, CITYREALTY (Oct. 19, 2018), <https://www.cityrealty.com/nyc/market-insight/features/future-nyc/understanding-how-100-years-zoning-has-shaped-new-york-city/7063>; see, e.g., *Matter of Hart v. Town Bd. of Town of Huntington*, 980 N.Y.S.2d 128 (N.Y. App. Div., 2nd Dept., 2014).

43. See generally, e.g., Joseph Gyourko et al., *A New Measure of the Local Regulatory Environment for Housing Markets: The Wharton Residential Land Use Regulatory Index*, 45 URB. STUD. 693 (2008) (analyzing regulations on housing markets in different U.S. jurisdictions).

44. See, e.g., Infranca, *supra* note 20; Roderick M. Hills, Jr. & David Schleicher, *Balancing the “Zoning Budget,”* 62 CASE W. RES. L. REV. 81 (2011).

45. See Infranca, *supra* note 20, at 830.

46. See Sara Cottle, *A comprehensive guide to NYC zoning: Past, present and future*, MILROSE CONSULTANTS (Sept. 24, 2019), <https://www.milrose.com/insights/-nyc-zoning-history>

47. *Id.*; see also Etherington, *supra* note 42.

48. See Etherington, *supra* note 42.

49. David W. Dunlap, *Zoning Arrived 100 Years Ago. It Changed New York City Forever*. N.Y. TIMES (July 26, 2016), https://www.nytimes.com/2016/07/26/nyregion/new-yorks-first-zoning-resolution-which-brought-order-to-a-chaotic-building-boom-turns-100.html?_r=0. A setback is the minimum distance which a building must be set back from a street.

50. *Id.*

with the onset of the Great Depression and the collapse of the United States' housing market.⁵¹ In 1929, following the stock market crash, the construction of new homes came to a halt, repairs of rundown housing went unfinished, and slums began expanding throughout all major American cities.⁵² Congress responded by passing measures intended to relieve distressed homeowners and the banks that had financed the acquisition of these homes. This included legislation like the Home Loan Bank Act of 1932, which allowed government-sponsored banks to assist in home financing and community lending, and the National Housing Act of 1934, which created the Federal Housing Administration (FHA).⁵³

The purpose of the FHA was to encourage lending, protect private lenders from losses by insuring their mortgages, and protect loan recipients by regulating interest rates and down-payment requirements.⁵⁴ Before the FHA, most mortgages were short-term, with no amortization, and were therefore inaccessible to working-class families.⁵⁵ With the FHA, the government slowed the rates of homeowner defaults⁵⁶ and kickstarted the development of new housing.⁵⁷ The FHA-insured lending increased the number of Americans who could afford down payments and monthly mortgage payments by providing them mortgages with term lengths of twenty or more years, thus expanding the market for single-family homes.⁵⁸ However, these benefits were restricted to white Americans.⁵⁹

As federally-funded and federally-subsidized suburbs developed around the country, black people were blocked out as the developers used racially-restrictive covenants in the housing deeds to exclude nonwhites.⁶⁰ Furthermore, the federal government restricted these developments by not providing loans to the black community.⁶¹ As these programs revived the housing market on an exclusionary basis, the federal government required appraisers to give better property and zoning ratings to neighborhoods that avoided "infiltration by inharmonious racial or nationality groups."⁶²

51. ALBERT MONROE, *HOW THE FEDERAL HOUSING ADMINISTRATION AFFECTS HOMEOWNERSHIP* 1–6 (Harv. Univ. Press 2001).

52. *See generally* Rothstein, *supra* note 7, at 18–25 (detailing the Great Depressions' effect on the housing market).

53. *See* Monroe, *supra* note 51.

54. *1934: Federal Housing Administration Created*, BOS. FAIR HOUS. ORG., <https://www.bostonfairhousing.org/timeline/1934-FHA.html>, (last visited Dec. 27, 2020).

55. *See* Monroe, *supra* note 51.

56. *See* John Griffith, *The Federal Housing Administration Saved the Housing Market*, CTR. FOR AM. PROGRESS (Oct. 11, 2012, 3:04 AM), <https://www.americanprogress.org/issues/economy/reports/2012/10/11/40824/the-federal-housing-administration-saved-the-housing-market/>.

57. *See* Rothstein, *supra* note 7, at 9, 10.

58. *See* Monroe, *supra* note 51.

59. *See generally* Rothstein, *supra* note 7, at 9.

60. *Id.* at 76–79.

61. *Id.* at 25–29.

62. *Id.* at 65 (quoting the FHA's underwriting manual).

Between 1934 and 1968, Black Americans received only 2% of all federally insured home loans.⁶³ At the same time, New York City's Housing Authority segregated its own housing developments.⁶⁴ With homeownership recognized today as Americans' predominant source of financial security and wealth accumulation,⁶⁵ these policies have acted as one of the foundations for the wealth divide between white and Black Americans.⁶⁶ While these programs were instrumental in establishing the guidelines for government involvement in housing, their legacy of racial segregation endures.⁶⁷

B. RECENT STEPS TO ALLEVIATE THE CRISIS

Scholars have noted the negative effects land-use regulations have on the general welfare of the public, including on economic and social mobility,⁶⁸ racial integration,⁶⁹ economic growth,⁷⁰ education,⁷¹ and a variety of environmental concerns.⁷² In New York City, recent mayoral administrations have each attempted to address the negative effects of zoning through their own housing initiatives.⁷³ However, many felt that these housing programs failed to address the city's most pressing housing needs, and, despite iterative

63. See Thomas W. Hanchett, *The Other 'Subsidized Housing': Federal Aid to Suburbanization, 1940's - 1960's*, PENN. ST. UNIV. PRESS 163, 166 (2000).

64. See NICHOLAS DAGEN BLOOM & MATTHEW GORDON LASNER, *AFFORDABLE HOUSING IN NEW YORK: THE PEOPLE, PLACES AND POLICIES THAT TRANSFORMED A CITY* 1437 (2016) (finding that NYCHA segregated their first two developments based on race).

65. U.S. DEP'T OF HOUSING AND URB. DEV., *WEALTH ACCUMULATION AND HOMEOWNERSHIP: EVIDENCE FOR LOW-INCOME HOUSEHOLDS* (2004).

66. See Courtney Connley, *Why the homeownership gap between White and Black Americans is larger today than it was over 50 years ago*, CNBC (Aug. 21, 2020), <https://www.cnbc.com/2020/08/21/why-the-homeownership-gap-between-white-and-black-americans-is-larger-today-than-it-was-over-50-years-ago.html>.

67. See Richard Rothstein, *The Making of Ferguson*, ECON. POL'Y INST. (Oct. 15, 2014), <https://www.epi.org/publication/making-ferguson/>.

68. Alana Semuels, *The Barriers Stopping Poor People from Moving to Better Jobs*, THE ATLANTIC (Oct. 12, 2017), <https://www.theatlantic.com/business/archive/2017/10/geographic-mobility-and-housing/542439/>.

69. Jonathan T. Rothwell, *Racial Enclaves and Density Zoning: The Institutionalized Segregation of Racial Minorities in the United States*, 13 AM. L. & ECON. REV. 290, 291 (2011)

70. See, e.g., *Space and the City*, THE ECONOMIST (Apr. 4, 2015), <https://www.economist.com/leaders/2015/04/04/space-and-the-city>.

71. See, e.g., Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 624 (2002); see also Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1829 (2003).

72. See, e.g., Edward Glaeser, *Reforming Land Use Regulations*, BROOKINGS INST. 1, 5-6 (Apr. 24, 2017), <https://www.brookings.edu/research/reforming-land-use-regulations/>; see also 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).

73. See, e.g., Diane Luebs, *Mandatory Inclusionary Housing Program: Summary of New Zoning Regulations*, MILROSE CONSULTANTS (July 25, 2016), <https://www.milrose.com/insights/mandatory-inclusionary-housing-program-summary-of-new-zoning-regulations> (detailing the specifics of DeBlasio's mandatory inclusionary housing program).

attempts at improving these policies, they remain a collection of individual programs that lack any cohesive strategy.⁷⁴

Various mayoral administrations have implemented their own affordable housing programs over the years, each with varying degrees of success. However, collectively, these programs have failed to address the racial segregation at the heart of New York City's housing infrastructure. In 1985, Mayor Ed Koch implemented the Ten-Year Plan for Housing, which spanned more than 100 programs and was based around three policy tools: (1) provide low-interest loans for homeowners to make upgrades and repairs, (2) provide subsidies for new construction projects, predominantly through public-private partnerships, and (3) use community development corporations and nonprofits to address the needs of the poor in New York City.⁷⁵ Koch utilized several sources to finance his plan, including the Housing Development Corporation, a public benefit corporation that issues bonds to raise capital for affordable housing developments.⁷⁶ Mayor Michael Bloomberg's plan, which ran from 2003–2014, was devised as a partnership between nonprofits, public agencies, and the private sector.⁷⁷ Using a mixture of public and private financing, Koch and Bloomberg's plans together created 332,106 new units.⁷⁸ While Bloomberg often touted his program as a series of rezonings for developers to add more housing, studies indicate the number of downzones (reductions in density) outnumbered upzones (increasing allowed density) during his administration.⁷⁹ In fact, two-thirds of the units developed under Bloomberg were not affordable to low-income individuals and families.⁸⁰

In 2016, Mayor Bill De Blasio enacted his Mandatory Inclusionary Housing (MIH) program to succeed Bloomberg's expanded Voluntary

74. See Elizabeth J. Mueller & Alex Schwartz, *Reversing the Tide: Will State and Local Governments House the Poor as Federal Direct Subsidies Decline?*, 74 J. OF THE AM. PLAN. ASS'N. 122–135 (2008); see also Ed Sullivan & Karin Power, *Coming Affordable Housing Challenges for Municipalities After the Great Recession*, 21 J. OF AFFORDABLE HOUS. & CMTY. DEV., 297 (2013).

75. FURMAN CENTER FOR REAL ESTATE & URB. POL'Y, HOUSING POLICY IN NEW YORK CITY: A BRIEF HISTORY 3–6 (2016).

76. Bakry Elmedni, *The Mirage of Housing Affordability: An Analysis of Affordable Housing Plans in New York City*, 8 SAGE OPEN at 2 (2018).

77. See Press Release, Mayors Office, City will reach 160,000 affordable units by year's end (Dec. 21, 2013), <https://www1.nyc.gov/office-of-the-mayor/news/428-13/mayor-bloomberg-city-will-reach-160-000-units-affordable-housing-financed-under-new/#/0>.

78. FURMAN CENTER FOR REAL ESTATE & URBAN POLICY, HOUSING POLICY IN NEW YORK CITY: A BRIEF HISTORY 3–6 (2016).

79. See Daniel Hertz, *The politics of grand housing bargains: NYC*, CITY OBSERVATORY (2016) <https://cityobservatory.org/the-politics-of-grand-housing-bargains-nyc/>.

80. See ASS'N FOR NEIGHBORHOOD & HOUSING DEVELOPMENT, INC., AN EVALUATION OF THE BLOOMBERG HOUSING PROGRAM & RECOMMENDATIONS TO STRENGTHEN AFFORDABLE HOUSING POLICY (2012).

Inclusionary Housing program.⁸¹ MIH allowed an area to be rezoned to permit more housing so long as the private developers agreed to include a certain percentage of affordable units.⁸² For example, 190 blocks of East New York, Cypress Hills, and Ocean Hill were rezoned to allow for 2,500 new units of housing, including 1,300 affordable units.⁸³ While the program has been praised for its vision and attempt to remedy the city's housing situation, its effects have been limited by powerful neighborhood coalitions opposing rezoning within their districts.⁸⁴ This well-funded, well-organized opposition and the powerful city council members representing them, have historically restricted these initiatives to specific areas of New York City and New York State.⁸⁵ This limited implementation often leads to overcrowding and further segregation of low-income neighborhoods.

Recently, non-profit organizations have successfully remedied some housing inequities in federal and state courts.⁸⁶ For example, in *Anti-Discrimination Center v. Westchester County*, the Anti-Discrimination Center sued Westchester for failing to adequately address the fair housing issue in its overwhelmingly white villages and towns, while still collecting millions of dollars a year in federal housing aid.⁸⁷ The U.S. Court of Appeals for the Second Circuit ultimately found that the county had misrepresented its desegregation efforts and entered a consent decree calling for Westchester to build or acquire 750 units of affordable housing, 630 of which were to go in towns where Black residents were less than 3% of the population.⁸⁸ As a result, the federal government is withholding further federal housing aid until

81. See ERIC KOBER, *De Blasio's Mandatory Inclusionary Housing Program: What is Wrong, and How It Can Be Made Right*, MANHATTAN INSTITUTE (2020), <https://www.manhattan-institute.org/deblasios-mandatory-inclusionary-housing-program>.

82. *Id.*

83. See Sadeef Ali Kully, *Six Down, One to Go: Where de Blasio's Rezoning Stand*, CITY LIMITS (Sept. 10, 2020), <https://citylimits.org/2020/09/10/six-down-one-to-go-where-de-blasios-rezonings-stand/>.

84. See Kober, *supra* note 81; see also, Benjamin Schneider, *CityLab University: Inclusionary Zoning*, BLOOMBERG CITYLAB, (July 17, 2018), <https://www.bloomberg.com/news/articles/2018-07-17/inclusionary-zoning-everything-you-need-to-know>.

85. See Pablo Zevallos, *To increase racial justice, upzone for equity*, CITY & STATE N.Y. (July 23, 2020), <https://www.cityandstateny.com/articles/opinion/commentary/increase-racial-justice-upzone-equity.html> (advocating for policy initiatives, in the era of Black Lives Matter, that would desegregate New York); see also John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 92 (2014) (detailing how exclusionary zoning regulations that were once typical for suburbs are now employed to restrict new developments in cities).

86. See *In Landmark Settlement, Nassau County Will Implement Affordable Housing Plan Aimed At Ending Residential Segregation*, YAHOO FIN. (Mar. 25, 2019), <https://finance.yahoo.com/news/landmark-settlement-nassau-county-implement-043509696.html> (detailing the settlement between Nassau County and affordable housing organizations, claiming that Nassau forced affordable housing developments exclusively into black communities).

87. U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty., N.Y., 712 F.3d 761 (2d Cir. 2013).

88. *Id.*; see *Appeals Court Rules Westchester County Violated Consent Decree*, NAT'L LOW INCOME HOUS. COALITION (Apr. 12, 2013), <https://nlihc.org/resource/appeals-court-rules-westchester-county-violated-consent-decree>.

Westchester can establish the steps it has taken to affirmatively further fair housing in conformity with the Civil Rights Act of 1964 and the Fair Housing Act.⁸⁹ Six years after the case, the Obama administration introduced the Affirmatively Furthering Fair Housing regulation, which required local governments to identify patterns of racial discrimination and to offer their plans to rectify them.⁹⁰ This case provides a clear guide for how counties can enforce provisions of the Fair Housing Act on their local municipalities, as well as how the state government can incentivize further development of affordable housing units. There have also been recent commitments by local legislators outside the city that indicate a willingness to combat the status quo.⁹¹ While these decisions and commitments by local governments have not been fully implemented, they indicate a potential push throughout New York State to make large-scale commitments to the development of affordable housing.

II. EXACERBATING EFFECTS OF COVID-19 ON NEW YORK CITY HOUSING

As the housing crisis worsened throughout the 21st Century,⁹² during and after the Great Recession,⁹³ city and State authorities continued their attempts to address the crisis.⁹⁴ While there are many critics of the various Mayoral administrations' housing initiatives,⁹⁵ these were all clear attempts to address

89. *Id.* (citing 42 U.S.C. § 5304(b)(2)).

90. See Julia Hirschfeld & Binyamin Appelbaum, *Obama Unveils Stricter Rules Against Segregation in Housing*, N.Y. TIMES (July 8, 2015), <https://www.nytimes.com/2015/07/09/us/hud-issuing-new-rules-to-fight-segregation.html>; see also Affirmatively Furthering Fair Housing, 80 Fed. Reg. 136 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, et al).

91. See Daniel Hampton, *Nassau Unveils New Anti-Housing Discrimination Plan*, PATCH (Nov. 22, 2019), <https://patch.com/new-york/mineola/nassau-unveils-new-anti-housing-discrimination-plan> (following a report that Long Island real estate agents intentionally promote segregation, Nassau County Executive Laura Curran implemented county-wide measures intended to combat segregation and Long Island's affordable housing crisis).

92. Becky Sullivan & Ari Shapiro, *10 Years After Housing Crisis: A Realtor, A Renter, Starting Over, Staying Put*, NPR (Apr. 28, 2018), <https://www.npr.org/2018/04/28/603678259/10-years-after-housing-crisis-a-realtor-a-renter-starting-over-staying-put>.

93. See Michelle Lerner, *10 years later: How the housing market has changed since the crash*, WASH. POST (Oct. 4, 2018) <https://www.washingtonpost.com/news/business/wp/2018/10/04/feature/10-years-later-how-the-housing-market-has-changed-since-the-crash/>; see also Gillian B. White, *The Recession's Racial Slant*, THE ATLANTIC (June 24, 2015), <https://www.theatlantic.com/business/archive/2015/06/black-recession-housing-race/396725/> (discussing the disparate effects the 2008 Recession had on African American homeownership).

94. See generally, *Your Home NYC*, NYC HOUSING, <https://www1.nyc.gov/site/housing/index.page> (last visited Mar. 7, 2021) (detailing the myriad efforts by New York City and State authorities to remedy the housing crisis); see also Caroline Spivack, *As NYC neighborhoods push back against rezonings, de Blasio's signature housing policy is threatened*, CURBED (Mar. 2, 2020), <https://ny.curbed.com/2020/2/6/21123983/nyc-affordable-housing-rezoning-bill-de-blasio>.

95. See Caroline Spivack, *As NYC neighborhoods push back against rezonings, de Blasio's signature housing policy is threatened*, CURBED (Mar. 2, 2020), <https://ny.curbed.com/2020/2/6/21123983/nyc-affordable-housing-rezoning-bill-de-blasio> (detailing De Blasio's failed rezoning attempts, and the neighborhoods that have prevented them).

the crisis that the City was facing.⁹⁶ Unfortunately, any progress the city has made in addressing its housing crisis has been stunted by the pandemic and its effects on low-income renters and the construction of new, affordable units.

A. RENTERS AND LOW-INCOME RESIDENTS BEAR THE BRUNT

COVID-19 has further brought to light the structural racism that underlies our housing market, and since the pandemic's onset, it has become clear that New York City's renters and landlords have been pushed to the precipice. Before the pandemic, the city had 312,000 renter households who worked, did not receive federal housing assistance, and had income levels two times lower than the poverty level.⁹⁷ Since the beginning of the pandemic, tens of millions of Americans have lost their jobs,⁹⁸ with millions more suffering loss of income due to either shortened hours or furlough.⁹⁹ These effects have not been equitably distributed across economic and racial classes, with the brunt of the pandemic's economic effects being felt by poor people and people of color.¹⁰⁰

These effects include higher infection and mortality rates amongst Black and Hispanic Americans,¹⁰¹ and more job losses than white households.¹⁰² The roots of these disparities stem from lower incomes, poor quality or

96. See Valeria Ricciulli, *City creates record number of affordable homes for vulnerable New Yorkers, but critics remain skeptical*, CURBED (Aug. 1, 2019), <https://ny.curbed.com/2019/8/1/20748687/bill-de-blasio-nyc-affordable-housing-data-2019/>.

97. The poverty line is considered an income of \$41,000 for a family of three. Low-income residents of New York were, in these instances referenced, earning 200% below this line. See Mironova & Waters, *supra* note 9.

98. See Eric Morath, *How Many U.S. Workers Have Lost Jobs During Coronavirus Pandemic? There Are Several Ways to Count*, WALL ST. J. (June 3, 2020), <https://www.wsj.com/articles/how-many-u-s-workers-have-lost-jobs-during-coronavirus-pandemic-there-are-several-ways-to-count-11591176601>.

99. See Patrick McGeehan, *A Million Jobs Lost: A 'Heart Attack' for the N.Y.C. Economy*, N.Y. TIMES (July 7, 2020), <https://www.nytimes.com/2020/07/07/nyregion/nyc-unemployment.html>.

100. See, e.g., Nichole Tucker, *COVID-19 Death Toll in NYC Calls Attention to Racial Disparities*, TARGETED ONCOLOGY (July 2, 2020), <https://www.targetedonc.com/view/covid-19-death-toll-in-nyc-calls-attention-to-racial-disparities>; (reflecting the pandemic's effects through the second and third weeks of March), <https://www.targetedonc.com/view/covid-19-death-toll-in-nyc-calls-attention-to-racial-disparities>; see also CUNY GRADUATE SCH. OF PUB. HEALTH AND HEALTH POL'Y, WORKING TO ADDRESS COVID-19 (2020), <https://sph.cuny.edu/research/covid-19-tracking-survey/september/>.

101. See CUNY GRADUATE SCH. OF PUB. HEALTH AND HEALTH POL'Y, WORKING TO ADDRESS COVID-19 (2020), <https://sph.cuny.edu/research/covid-19-tracking-survey/september/>; see also Gina Kolata, *Social Inequities Explain Racial Gaps in Pandemic, Studies Find*, N.Y. TIMES (Dec. 9, 2020) <https://www.nytimes.com/2020/12/09/health/coronavirus-black-hispanic.html>.

102. Steven Brown, *The COVID-19 Crisis Continues to Have Uneven Economic Impact by Race and Ethnicity*, URB. INST. (July 1, 2020), <https://www.urban.org/urban-wire/covid-19-crisis-continues-have-uneven-economic-impact-race-and-ethnicity> (detailing the pandemic's disproportionate impact on African Americans).

overcrowded housing, and inadequate access to preventive medical care.¹⁰³ A study conducted by the CUNY Graduate School of Public Health and Health Policy shows that 34% of New Yorkers earning under \$50,000 reported that they, or someone in their household, had lost their job as a result of the pandemic.¹⁰⁴ Furthermore, New York City did not have certain race and ethnicity data early on in the pandemic,¹⁰⁵ meaning the racial disparities may be higher than known.¹⁰⁶ Despite the well-publicized drop in New York City rents,¹⁰⁷ the average rent is still nearly two times the national average.¹⁰⁸ Additionally, with unemployment in New York City nearly twice the national average,¹⁰⁹ and over two-thirds of city residents renting their homes,¹¹⁰ New York City's housing market remains in a precarious position.

A widespread inability of tenants to pay rent precipitates an inability for property owners to pay their mortgages.¹¹¹ According to a study by the Community Housing Improvement Program (CHIP), a quarter of New York City's renters have not paid rent since March.¹¹² Even starker, the delinquency rate on large commercial loans tied to real estate in the United

103. See David Cruz, *St. Barnabas Hospital's ER Is A "War Zone" As Bronx Coronavirus Hospitalization Rates Soar*, GOTHAMIST (Apr. 7, 2020), <https://gothamist.com/news/st-barnabas-hospitals-bronx-coronavirus> (quoting Dr. Neil Calman, CEO and President for the Institute for Family Health).

104. See Tucker, *supra* note 100; CUNY GRADUATE SCH. OF PUB. HEALTH AND HEALTH POL'Y, *JOB LOSS IN NYC DISPROPORTIONATELY IMPACTS HISPANICS AND LOWER INCOME CITY RESIDENTS* (2020), <https://sph.cuny.edu/research/covid-19-tracking-survey/week-2/>; see also See Mironova & Waters, *supra* note 9.

105. See Richard A. Opiel et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html> (detailing the economic and health discrepancies COVID-19 has based on race and socioeconomic class).

106. See Tucker, *supra* note 100.

107. See Stefanos Chen & Sydney Franklin, *New York Rents Continue to Slide, While Sales Rebound in Brooklyn*, N.Y. TIMES (Jan. 14, 2021) <https://www.nytimes.com/2021/01/14/realestate/new-york-city-real-estate-market.html>.

108. See *New York City Residential Rental Market Report: January 2021*, THE CORCORAN GROUP (Jan. 2021), https://www.eccorcoran.com/uploaded_doc/Corcoran_January_2021_Rental_Market_Report.pdf; see also *Rent Report, February 2021: The State of the Rental Market*, APARTMENTGUIDE (Feb. 24, 2021), <https://www.apartmentguide.com/blog/apartment-guide-annual-rent-report/#national-average>.

109. See Kaia Hubbard, *New York City's Falling Rents Reflect the Pain of COVID-19*, U.S. NEWS (Oct. 15, 2020) <https://www.usnews.com/news/cities/articles/2020-10-15/new-york-citys-falling-rents-reflect-the-trauma-of-covid-19>

110. Noah Manskar, *Fewer New Yorkers Own Homes as Number Renting Grows, Figures Show*, PATCH (Jan. 25, 2018), <https://patch.com/new-york/new-york-city/two-thirds-new-yorkers-now-rent-their-apartments-data-show>.

111. Prashant Gopal, *NYC Rental Market Pushed to Breaking Point by Tenant Debts*, BLOOMBERG BUS. (July 8, 2020), <https://www.bloomberg.com/news/articles/2020-07-08/coronavirus-moves-nyc-affordable-housing-crisis-to-breaking-point?sref=OH7mKQXK>.

112. *Id.*

States doubled in just one month, according to Moody's Investors Service.¹¹³ Once again, the pandemic's harm was not shared equally. While large real estate lenders have been more willing to give property owners time to work things out with their tenants,¹¹⁴ smaller lenders have been less patient, and have initiated foreclosure proceedings in some instances.¹¹⁵ This signals trouble for large swaths of affordable housing providers who are experiencing similar reductions in rental revenue¹¹⁶ but lack the cashflows to stay afloat.¹¹⁷ The city itself is bracing for hundreds of millions of dollars in delinquent property tax payments.¹¹⁸

In response to the eviction and foreclosure crises, the federal and New York State government have taken significant measures to intervene.¹¹⁹ The federal government enacted the CARES Act, which placed a nationwide moratorium on evictions.¹²⁰ Equally important were the stimulus payments from the federal government, and the continued temporary expansion of unemployment benefits.¹²¹ The State government enacted a 90-day eviction moratorium,¹²² as well as the Tenant Safe Harbors Act, which protects from eviction those renters who have suffered from the economic effects of the pandemic.¹²³ The New York City Department of Housing Preservation and

113. See JUN CHEN ET AL., CORONAVIRUS (COVID-19): AN EXAMINATION OF RECENT DELINQUENCY TREND OF COMMERCIAL REAL ESTATE LOAN PORTFOLIOS (Moody's Analytics, 2020).

114. See Matthew Goldstein, *Worried Lenders Pounce on Landlords Unable to Pay Their Loans*, N.Y. TIMES (Aug. 13, 2020), <https://www.nytimes.com/2020/08/13/business/commercial-landlord-loan-foreclosure.html>.

115. See, e.g., *D2 Mark LLC v. OREI VI Investments LLC*, 2020 WL 3432950, at *1–3 (N.Y. Sup. Ct. 2020).

116. See *Nam D. Pham et al., Affordable Rental Housing Providers' Expenses Increasing, Rent Revenues Declining during Pandemic*, NAT'L LOW INCOME HOUS. COALITION (Oct. 5, 2020), <https://hudnlha.com/wp-content/uploads/documents/NLHA%20Housing%20Provider%20Impacts%20of%20COVID%20Final%20Oct%202020.pdf>.

117. Sadeq Ali Kully, *What Will COVID-19 Mean for Housing Development in NYC*, CITY LIMITS (Apr. 23, 2020), <https://citylimits.org/2020/04/23/what-will-covid-19-mean-for-housing-development-in-nyc/>.

118. Robert Burnson & Chris Dolmetsch, *N.Y. Landlords to Governor: Spare Us Taxes If We Can't Evict*, BLOOMBERG (June 4, 2020), <https://www.bloomberg.com/news/articles/2020-06-05/n-y-landlords-to-governor-spare-us-taxes-if-we-can-t-evict>.

119. Jason DeParle, *Vast Federal Aid Has Capped Rise in Poverty, Studies Find*, N.Y. TIMES (June 21, 2020), <https://www.nytimes.com/2020/06/21/us/politics/coronavirus-poverty.html>.

120. See 15 U.S.C. § 9058 (The Cares Act's protections, however, only extend to homes backed by federal-secured mortgages and lacks any actual enforcement provision if a property owner were to violate the tenant protections).

121. See 15 U.S.C. § 9021; 15 U.S.C. § 9023. See also, American Rescue Plan, H.R. 1319, 117th Cong. (1st Sess. 2021).

122. N.Y. Exec. Order No. 202.70 (2020), <https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-extending-moratorium-covid-related-commercial-evictions-0>.

123. See S.8192B (Hoylman)/A.10290B (Dinowitz); see also Jonah Engel Bromwich & Ezra Marcus, *The Talk of Montauk*, N.Y. TIMES (Oct. 23, 2020), <https://www.nytimes.com/2020/10/23/style/tenant-safe-harbor-act-hamptons.html> (detailing the story of a wealthy Manhattanite who refused to leave her Montauk rental home by invoking the Tenant Safe Harbor Act).

Development (HPD) issued a request to the owners of city-funded buildings with income-targeted housing to allocate 30% of their apartments for homeless people.¹²⁴ To do this, the city allocated additional rental voucher money for HPD to pay the rent of formerly homeless individuals living in these units.¹²⁵ While there was no legal mechanism to require the owners' compliance, the head of the New York State Association for Affordable Housing promoted the program to all its members anyway.¹²⁶ These measures have been effective in delaying widespread evictions,¹²⁷ but they fail to address the accruing debt low-income individuals face, and the generational poverty that will continue to develop as a consequence.¹²⁸ These actions were intended to act as relief measures until the virus subsided and the economy returned to health,¹²⁹ but the pandemic has continued, the economy has not returned back to life, and millions remain unemployed and underemployed.¹³⁰ As the shutdown continued through 2021, it becomes clearer that renters, and predominantly people of color, were hit hardest by the pandemic and will face significant challenges after the economy recovers.¹³¹

124. See Sam Raskin, *NYC asks affordable housing developers to house more homeless New Yorkers*, CURBED (Apr. 17, 2020).

125. *Id.*

126. *Id.*

127. See Conor Dougherty, *Millions of Evictions Are a Sharper Threat as Government Support Ends*, N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/2020/08/07/business/economy/housing-economy-eviction-renters.html> (detailing the impending economic fallout once the additional federal unemployment benefits run out, and the effects this will have on the housing market); see also SARAH STEIN & NISHA SUTARIA, HOUSING POLICY IMPACT: FEDERAL EVICTION PROTECTION COVERAGE AND THE NEED FOR BETTER DATA, FEDERAL RESERVE BANK OF ATLANTA (2020), <https://www.frbatlanta.org/community-development/publications/partners-update/2020/covid-19-publications/200616-housing-policy-impact-federal-eviction-protection-coverage-and-the-need-for-better-data.aspx>.

128. See Gopal, *supra* note 111.

129. See Goldstein, *supra* note 114.

130. See Emily Cochrane, *Jobless Benefits run out as Trump resists signing the relief bill*, N.Y. TIMES (Dec. 27, 2020), <https://www.nytimes.com/2020/12/26/us/politics/trump-unemployment-coronavirus-aid.html>.

131. See *Who are the renters in America?*, USA FACTS (Feb. 25, 2021), <https://usafacts.org/articles/who-is-renting-in-america-cares-act/>.

B. COVID-19 CURTAILS DEVELOPMENT

On top of long-standing issues like rising rents and a growing homeless population, over the past few years, New York City has seen a decrease in new housing construction and an increase in vacant housing units.¹³² This decrease in construction has been worsened by the pandemic. On March 20, 2020, in response to the city's initial outbreak, and to the large number of worksites that failed to report outbreaks,¹³³ Governor Cuomo issued the "New York State on PAUSE" executive order.¹³⁴ The order put a hold on any construction the city deemed "non-essential."¹³⁵ Essential construction included infrastructure projects, hospitals, homeless shelters, emergency repairs, and affordable housing units.¹³⁶ In response to these restrictions, some 900 appeals were filed with the Department of Buildings seeking exemption from the ruling that deemed them nonessential.¹³⁷ Then, on June 8, 2020, all of New York City's construction sites reopened,¹³⁸ and within days, work was underway on approximately 32,000 nonessential projects.¹³⁹ The combined effects of the recent downturn in construction and the government's shutdown produced an 8.5% decline in construction spending and a 14% decrease in construction jobs from the previous three years.¹⁴⁰ The New York Building Congress' Construction Outlook predicts that between 2020–2022 there will be 33% fewer new housing units constructed than compared to 2017–2019.¹⁴¹

Although affordable housing was deemed essential, there is widespread concern amongst developers about the economic viability of affordable

132. See generally NEW YORK CITY RENT GUIDELINES BOARD, 2019 HOUSING SUPPLY REPORT (2019) (detailing the rise in vacancies across New York City).

133. See Rosa Goldensohn, *Construction Workers Still on Job Amid Coronavirus Concerns*, THE CITY (Mar. 23, 2020), <https://www.thecity.nyc/2020/3/23/21210413/construction-workers-still-on-job-amid-coronavirus-concerns>.

134. N.Y. Exec. Order No. 202.6 (2020), <https://www.governor.ny.gov/news/no-2026-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

135. See Alex Benarroche, *What New York considers "essential construction" during COVID-19*, LEVELSET (Apr. 10, 2020), <https://www.levelset.com/news/construction-essential-business-new-york/>.

136. Amy Plitt & Caroline Spivack, *Which NYC construction projects are 'essential' right now?*, CURBED (Apr. 6, 2020), <https://ny.curbed.com/2020/4/3/21206956/new-york-construction-sites-map-coronavirus>.

137. See C.J. Hughes, *Construction in New York Limp Forward Despite Shutdown Order*, N.Y. TIMES (Apr. 5, 2020), <https://www.nytimes.com/2020/04/05/realestate/coronavirus-construction.html>.

138. See Kim Slowey, *New York City reopens nonessential construction work*, CONSTRUCTION DIVE (June 8, 2020), <https://www.constructiondive.com/news/new-york-city-reopens-nonessential-construction-work/579276/>.

139. *Id.*

140. See NEW YORK BUILDING CONGRESS, 2020-2022 NEW YORK CITY CONSTRUCTION OUTLOOK (2020).

141. *Id.*

housing development.¹⁴² One cause of concern for affordable housing developers was the value of the Low-Income Housing Tax Credit (LIHTC). The LIHTC program provides a reduction in federal income tax liability for investors in rental housing that serves low and very low-income households.¹⁴³ The IRS allocates tax credits to a developer based on the percentage of units that are affordable within a new development.¹⁴⁴ The developer is then able to sell these tax credits to corporate investors to raise the equity that is used towards constructing the project.¹⁴⁵ As a result of a tax credit investment, investors usually garner a significant percentage of equity in the project that helps finance the project while also obtaining a reduction in their federal income taxes.¹⁴⁶ Despite the value of these tax credits dropping precipitously in the 2008 recession, experts indicate that their value has stayed strong during the pandemic.¹⁴⁷ Developers hope this will keep the private sector's interest in affordable housing development at the same heights as seen in 2019.

C. SURROUNDING SUBURBS EXPERIENCE A HOUSING BOOM

There is concern about the pandemic's segregating effect on New York City's suburbs as well. Since the onset of the pandemic, there has been a housing boom in the suburbs surrounding New York City.¹⁴⁸ Despite 50% of Americans believing it is a bad time to purchase a house,¹⁴⁹ record-low interest rates have driven Americans with economic means to spread out into the suburbs and avoid urban congestion.¹⁵⁰ While signed sales contracts for condos and co-ops in New York City fell 60% in 2020 from a year earlier,¹⁵¹ deals for single-family homes doubled in Westchester County and Fairfield

142. See, e.g., Jennifer Castenson, *The Pandemic Threatens the Already Vulnerable Affordable Housing Crisis*, FORBES (Oct. 12, 2020), <https://www.forbes.com/sites/jennifercastenson/2020/10/12/the-pandemic-threatens-the-already-vulnerable-affordable-housing-crisis/?sh=dd2652c393d3>.

143. FURMAN CENTER FOR REAL ESTATE & URBAN POLICY, *THE EFFECTS OF THE LOW-INCOME HOUSING TAX CREDIT* (2017).

144. *Id.*

145. *Id.*

146. See *id.*

147. See Beth Mattson-Teig, *The LIHTC Market Weathers COVID-19 Pressures*, NAT'L REAL EST. INV. (June 1, 2020), <https://www.nreionline.com/investment/lihtc-market-weather-covid-19-pressures>.

148. See, e.g., Prashant Gopal & John Gittelsohn, *Urban Exiles are Fueling a Suburban Housing Boom Across the U.S.*, BLOOMBERG BUS. (Aug. 20, 2020), <https://www.bloomberg.com/news/articles/2020-08-20/covid-pandemic-fuels-u-s-housing-boom-as-urbanites-swarm-suburbs?sref=OH7mKQXK>.

149. Jeffrey M. Jones, *New Low in U.S. Say It Is a Good Time to Buy a House*, GALLUP (Apr. 24, 2020), <https://news.gallup.com/poll/309215/new-low-say-good-time-buy-house.aspx>.

150. See Gopal & Gittelsohn, *supra* note 148.

151. Oshrat Carmiel, *Manhattan Lags With Suburban Shift Fueling Region's Home Sales*, BLOOMBERG (Aug. 6, 2020), <https://www.bloomberg.com/news/articles/2020-08-06/manhattan-lags-with-suburban-shift-fueling-region-s-home-sales?sref=OH7mKQXK>.

County, Connecticut.¹⁵² The increased demand is causing significant supply shortages for builders and has resulted in price increases in new developments.¹⁵³ This increased demand drives home prices up and further prevents low-income families from being able to purchase these single-family homes.¹⁵⁴ In fact, the majority of New Yorkers who fled were from the city's wealthiest neighborhoods, with more than half of the residents from these neighborhoods being white and earning over \$100,000 annually.¹⁵⁵ The mass exodus and resultant loss of high-income taxpayers, which could exacerbate ballooning state and city budget holes, caused New York lawmakers to panic.¹⁵⁶

In an increasingly diversifying city,¹⁵⁷ this widespread migration out of the city further isolates poverty and entrenches New York's already-segregated suburban landscape.¹⁵⁸ As wealthy residents leave New York City, they take significant portions of their tax revenue with them. The resulting reduction in the city's revenue will have dramatic effects on New York's public housing stock.¹⁵⁹ Combined with the disproportionate toll of COVID-19 on the Black community,¹⁶⁰ there is concern that New York's

152. See Gopal & Gittelsohn, *supra* note 148.

153. See Prashant Gopal, *U.S. Housing Boom Threatened by Short Supply of Homes to Buy*, BLOOMBERG (Sept. 25, 2020), <https://www.bloomberg.com/news/articles/2020-09-25/housing-boom-in-u-s-threatened-by-shortage-of-available-homes?sref=OH7mKQXX>.

154. *Id.*

155. See Kevin Quealy, *The Richest Neighborhoods Emptied Out Most as Coronavirus Hit New York City*, N.Y. TIMES, May 15, 2020, <https://www.nytimes.com/interactive/2020/05/15/upshot/who-left-new-york-coronavirus.html>; MICHAEL HENDRIX, A SURVEY OF NEW YORK CITY'S HIGH-INCOME EARNERS: THE FUTURE OF WORK AND THE QUALITY OF LIFE, MANHATTAN-INSTITUTE (Sept. 16, 2020), <https://www.manhattan-institute.org/survey-nyc-high-income-earners-future-work-and-quality-life> (surveying New York City residents to find out who fled, and combining these analytics with racial and economic breakdowns of neighborhoods based on previous censuses).

156. See Luis Ferré-Sadurní & Jesse McKinley, *Tax the Ultrarich? Cuomo Resists, Even With a \$14 Billion Budget Gap*, N.Y. TIMES (Sept. 7, 2020), <https://www.nytimes.com/2020/09/07/nyregion/wealth-tax-budget-billionaires.html>.

157. WILLIAM H. FREY, THE NATION IS DIVERSIFYING EVEN FASTER THAN PREDICTED, BROOKINGS INST. (July 1, 2020), <https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted/> (detailing the diversification of America, particularly in cities like New York City and Los Angeles).

158. See BEEN, *supra* note 1; see also Talmon Joseph Smith, *New York is Dead ... to Whom? We've Seen New York's White Flight Before*, THE ATLANTIC (Aug. 26, 2020), <https://www.theatlantic.com/culture/archive/2020/08/new-york-dead-to-whom/615673/>.

159. See Dana Rubinstein, *'We're at War': New York City Faces a Financial Abyss*, N.Y. TIMES (Sept. 28, 2020), <https://www.nytimes.com/2020/09/28/nyregion/nyc-budget-coronavirus.html> (detailing the economic windfall of the pandemic, and the resulting loss in personal tax revenue from the evacuation of wealthy residents).

160. See Tucker, *supra* note 105; CUNY GRADUATE SCH. OF PUB. HEALTH AND HEALTH POL'Y, WORKING TO ADDRESS COVID-19 (2020), <https://sph.cuny.edu/research/covid-19-tracking-survey/september/>.

housing will become further segregated.¹⁶¹ Homeownership amongst the Black community was already on the decline.¹⁶² Thus, the widespread housing inequities and segregation that existed in New York and New York City have been both highlighted and worsened by the pandemic.

III. APPROACHES OF OTHER JURISDICTIONS

Due to the disparate impact of COVID-19 on people of color, and the exacerbating effects it has had on inequality and racial segregation, New York State is being forced to confront its history of segregation. In response to the inequitable impact, the State must implement wide-ranging, ameliorative legislation that responds to the housing crisis before it becomes unsustainable. In considering what measures to take, the State should look to other jurisdictions across the United States that have been successful in combatting the housing crisis.

A. ACCESSORY DWELLING UNIT DEVELOPMENT

Some municipalities have attempted to increase their housing supply through the creation of accessory dwelling units (ADUs), with some states loosening regulatory restrictions on their construction, and others offering financial assistance to encourage their development.¹⁶³ An ADU is a separate, self-contained housing unit that is located on the property of a single-family home but cannot be sold separately from the main structure.¹⁶⁴ These additional units make housing more affordable by providing property owners with the income needed to maintain their residence, pay their mortgage,¹⁶⁵ and, in some instances, enable them to live in neighborhoods with better schools and better access to quality healthcare.¹⁶⁶ In Portland,

161. Connor Maxwell, *The Coronavirus Crisis is Worsening Racial Inequality*, CTR. FOR AM. PROGRESS (June 10, 2020), <https://www.americanprogress.org/issues/race/news/2020/06/10/486095/coronavirus-crisis-worsening-racial-inequality/>.

162. Laurie Goodman, Jun Zhu & Rolf Pendall, *Are gains in black homeownership history?*, URB. INST. (Feb. 14, 2017), <https://www.urban.org/urban-wire/are-gains-black-homeownership-history>.

163. See Infranca, *supra* note 20 (citing Margaret Brinig & Nicole Stelle Garnett, *A Room of One's Own? Accessory Dwelling Unit Reforms and Local Parochialism*, 45 *The Urb. Law.* 519, 535 (2013) (discussing local and state efforts around ADU development)).

164. See generally John Infranca, *Housing Changing Households: Regulatory Changes for Micro-Units and Accessory Dwelling Units*, 25 *STAN. L. & POL'Y REV.* 53 (2014) (detailing the growth in popularity of ADUs, and the legislative changes making this growth possible).

165. Kathleen Pender, *New California Housing Laws Make Granny Units Easier to Build*, S.F. CHRON. (Dec. 3, 2016), <https://www.sfchronicle.com/news/article/New-California-housing-laws-make-granny-units-10688483.php> (detailing the broad-scale, economic benefits low- and moderate-income households experience when allowed to maintain an additional dwelling unit on their single-family parcel).

166. See Infranca, *supra* note 20 (comparing the educational benefits derived from an increase in affordable housing development that is experienced both by the low-income students in these developments, and the region as a whole); see also Keith Ihlanfeldt & Tom Mayock, *Affordable Housing and the Socioeconomic Integration of Elementary Schools*, 58 *J. OF REAL ESTATE FIN. &*

Oregon, the city previously had ownership and setback requirements for ADUs to be developed.¹⁶⁷ Portland also required “dedicated off-street parking.”¹⁶⁸ These requirements hindered any widespread ADU development and restricted ADUs to properties with the space to construct new parking spots.¹⁶⁹ After Portland eliminated these requirements,¹⁷⁰ and waived various filing and development fees,¹⁷¹ it saw a significant increase in ADU development.¹⁷² In 2016, 615 new ADUs were issued permits which is an increase from eighty-six in 2010.¹⁷³ By implementing these policies and removing some of these procedural hurdles, Portland has succeeded in encouraging ADU development as one method for combatting its housing crisis.

Other municipalities witnessed the success of Portland’s ADU program and implemented their own ADU initiatives.¹⁷⁴ Many state governments limit the ability of local governments to prevent ADU development.¹⁷⁵ For example, the California State Legislature passed two new laws in 2016 that

ECON. 567 (July 9, 2017) (focusing on the effects on a school from an influx of low-income students).

167. See Bob Young, *Big Interest in Little Backyard Houses: Will Seattle Ease the Rules?*, SEATTLE TIMES (Dec. 19, 2015), <https://www.seattletimes.com/seattle-news/politics/city-rules-among-big-obstacles-for-little-houses/>.

168. See Infranca, *supra* note 25, at 859. The requirement of “dedicated off-street parking” means that to construct an ADU, a property owner must construct additional parking space in their driveway. This requirement is in response to opposition from existing residents of a neighborhood, who often fear competition for on-street parking.

169. See Infranca, *Housing Changing Households*, *supra* note 164. This creates both a special and financial burden for individuals looking to develop an ADU and further restricts these beneficial developments to a specific class of homeowner.

170. Steve Law, *Fee Waiver for New Accessory Dwelling Units Fixed into Law, but There’s a Fee to Get It*, PORTLAND TRIB. (June 27, 2018), <https://pamplinmedia.com/sl/399497-294774-fee-waiver-for-new-accessory-dwellingunits-fixed-into-law-but-theres-a-fee-to-get-it>.

171. Portland City Council, Resolution No. Substitute 37353 (adopted May 2, 2018), <https://www.portlandoregon.gov/auditor/article/682997>.

172. See Kim Moore, *By the Numbers: Portland’s Residential Housing Boom*, OR. BUS. (Nov. 14, 2017), <https://www.oregonbusiness.com/article/real-estate/item/18092-by-the-numbers-portlands-residential-housing-boom>

173. *The Ascent of ADUs in Portland*, ACCESSORYDWELLINGS.ORG (Feb. 27, 2017), <https://accessorydwellings.org/2017/02/27/the-ascension-of-adus-in-portland/>; See Infranca, *supra* note 20, at 859 (highlighting the increase of ADU permit applications in Portland since the restrictions were eased).

174. See Infranca, *supra* note 20, at 860–869 (discussing California, Vermont, Washington and Oregon’s efforts to mirror Portland’s ADU program); see also Jeff Ostrowski, *Coronavirus sparks renewed interest in granny flats, in-law suites*, THE OKLAHOMAN (Aug. 8, 2020), <https://oklahoman.com/article/5668406/coronavirus-sparks-renewed-interest-in-granny-flats-in-law-suites>.

175. See Pender, *supra* note 165 (explaining that any California cities or counties that have not adopted or amended a local ordinance that complies with the new, more permissive state ADU law will have to follow the state law until they approve a compliant one); see also Margaret Brinig & Nicole Stelle Garnett, *A Room of One’s Own? Accessory Dwelling Unit Reforms and Local Parochialism*, 45 THE URB. LAW. 519-524 (2013).

limit the extent to which localities can regulate ADUs.¹⁷⁶ One of the laws requires local governments to approve one ADU “per single-family lot if the unit is contained within the existing space of a single-family residence or accessory structure, has independent exterior access from the existing residence, and the side and rear setbacks are sufficient for fire safety.”¹⁷⁷ The law also forbids municipalities from requiring parking if the ADU is located within one half-mile of public transit, one block from a car share vehicle, part of the existing primary residence or an existing accessory structure, located in a historic district, or if on-street parking permits are required but not offered to the ADU occupant.¹⁷⁸ Absent a broad scale rezoning, and subsequent demolition of single-family parcels, ADU development provides a plausible mechanism for increasing density in the suburbs of New York.

B. JUDICIAL INTERVENTION IN THE HOUSING MARKET: THE *MOUNT LAUREL DOCTRINE*

Another avenue to combat the housing crisis comes from New Jersey’s *Mount Laurel* doctrine which developed over the course of two judicial decisions between 1975 and 1983, intended to promote affordable housing development across the state.¹⁷⁹ Specifically, the doctrine gives developers the ability to appeal a local government’s rejection of their proposed development.¹⁸⁰ In the first of these judicial decisions, *Mount Laurel Township*, the New Jersey Supreme Court held that, because zoning powers are delegated by the state to local authorities, courts must examine the effects of a municipalities’ zoning ordinance on all the state’s citizens, rather than those within “the borders of the particular municipality.”¹⁸¹ This ruling required local municipalities to develop, through their land-use regulations, low and moderate-income housing to meet the “*present and prospective regional need*.”¹⁸² In the past, local governments used this language to reject proposed developments based on the potential impositions on traffic congestion and available street parking.¹⁸³ Following this decision, local municipalities were required to look to the whole region’s housing needs.¹⁸⁴ Additionally, the decision encouraged the local legislature to strike down

176. See Cal. S.B. 1069, 2015–2016 Leg., Reg. Sess. (Cal. 2016); see also A.B. 2299, 2015–2016 Leg., Reg. Sess. (Cal. 2016).

177. See Cal. S.B. 1069 (codified at CAL. GOV’T CODE § 65852.2(f)).

178. See Infranca, *supra* note 20, at 862 (quoting Cal. S.B. 1069 (codified at CAL. GOV’T CODE §65852.2(e))).

179. John M. Payne, *Fairly Sharing Affordable Housing Obligations: The Mount Laurel Matrix*, 22 W. NEW ENG. L. REV. 365 (2001).

180. See Robert C. Holmes, *The Clash of Home Rule and Affordable Housing: The Mount Laurel Story Continues*, 12 UNIV. CONN. L. REV. 325 (2018).

181. *S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp.*, 336 A.2d 713, 726 (N.J. 1975).

182. *Id.* at 713.

183. See Infranca, *supra* note 20 at 839, 849.

184. See *S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp.*, 336 A.2d 713, 724 (N.J. 1975).

local zoning regulations that were excluding new, denser developments by citing this “regional need” for housing.¹⁸⁵

These doctrines had immense benefits both for the individuals in the affordable developments, and the communities as a whole. Studies have found that the residents of Mount Laurel’s affordable housing developments have “higher rates of employment and family income and significantly lower rates of welfare dependency.”¹⁸⁶ Studies also found that the developments did not have a deleterious effect on property values and that taxes in the area did not go up.¹⁸⁷ Despite the evident benefits that integrated housing has provided its residents, New Jersey’s elected branches found numerous creative ways to assist local governments in avoiding, or at least minimizing, their housing obligations under the law.¹⁸⁸ Furthermore, following *Mount Laurel II* in 1983, there was a prolonged period of inaction by the judiciary during which the courts failed to enforce the housing requirements on local municipalities.¹⁸⁹ This period of inaction similarly allowed New Jersey’s Council on Affordable Housing (COAH) to avoid its *Mount Laurel* obligations.¹⁹⁰

Recently, New Jersey courts have again become proactive in promoting municipalities’ fair housing obligations. In 2011, the Appellate Division dismissed the COAH’s willingness to allow municipalities to determine their own fair housing obligations.¹⁹¹ In rejecting the COAH’s practice, the court again asserted that land-use regulations that conflict with the general, regional welfare are unconstitutional.¹⁹² Frustrated by local municipalities’ failure to assist with the region’s housing needs, as well as the legislature’s failure to enforce their fair housing obligations, the New York courts should follow the lead of the New Jersey courts and enforce the obligations themselves.¹⁹³

185. *S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp.*, 456 A.2d 390, 413–15 (N.J. 1983).

186. See Editorial, *The Mount Laurel Doctrine*, N.Y. TIMES (Jan. 28, 2013), <https://www.nytimes.com/2013/01/29/opinion/the-mount-laurel-doctrine.html> (quoting Douglas S. Massey, et. al., CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB (Princeton Review, 2013)).

187. See Editorial, *The Mount Laurel Doctrine*, N.Y. TIMES (Jan. 28, 2013), <https://www.nytimes.com/2013/01/29/opinion/the-mount-laurel-doctrine.html>.

188. See Holmes, *supra* note 180, at 349–56.

189. *Id.* at 348, 358.

190. *Id.* at 358.

191. *Id.* at 356–58 (discussing *In re Adoption of N.J.A.C. 5:96 & 5:97*, 15 A.3d 325, 456 (N.J. Super. Ct. App. Div. 2011)).

192. *Id.* at 360.

193. See Infranca, *supra* note 20, at 840–41 (citing to *In re Adoption of N.J.A.C. 5:96 & 5:97*, 110 A.3d at 42).

C. CALIFORNIA'S RECENT STATEWIDE EFFORTS

In California, numerous municipalities have implemented measures to prevent developers from building new units within their jurisdictions.¹⁹⁴ This has forced city governments and Governor Gavin Newsom to implement measures to ameliorate what has become one of the most precarious housing situations in the country in ways that voters are not directly authorizing.¹⁹⁵ In Los Angeles, Mayor Eric Garcetti began the Transit Oriented Communities Program.¹⁹⁶ The program allows developers to upzone neighborhoods near major bus and train lines and incentivizes the inclusion of affordable units in the developments through tax breaks.¹⁹⁷ The goal is to reduce carbon emissions by encouraging public transit use while simultaneously tackling Los Angeles' housing shortage.¹⁹⁸ In July 2018, Los Angeles' City Council approved the Exposition Corridor Transit Neighborhood Plan, which would have built between 4,000–6,000 new housing units along five separate E Line transit stations.¹⁹⁹ However, over a year later, following a lawsuit by a community-based, anti-development non-profit,²⁰⁰ not a single one of these units has been built.²⁰¹

California has also taken steps at the state level. In early 2020, the California State Legislature proposed SB-50 which would: (1) increase allowable building heights statewide to five stories near major public transit stops, and (2) allow multifamily apartments on most properties.²⁰² While the bill ultimately failed,²⁰³ it is indicative of the type of large-scale projects needed to address the affordability crisis. One year prior, Governor Newsom threatened to deny transportation funding to cities that failed to satisfy longer-term housing quotas.²⁰⁴ In its own right, New York could take similar drastic action but has instead taken a hands-off approach to the local municipalities and smaller cities surrounding New York City.

194. *Id.* at 860–866 (detailing the efforts of local municipalities to restrict new development, and the statewide efforts to bypass these restrictions).

195. See Alissa Walker, *The real reason California's upzoning bill failed*, CURBED (Feb. 7, 2020), <https://archive.curbed.com/2020/2/7/21125100/sb-50-california-bill-fail>.

196. See Jarrett Hill, *'Fix the City' sues LA over program to build housing near transit hubs*, KCRW: GREATER L.A. (Sept. 5, 2019), <https://www.kcrw.com/news/shows/greater-la/will-las-furban-spread-statewide/fix-the-city-sues-la-over-program-to-build-housing-near-transit-hubs>.

197. See Bianca Barragan, *LA sued over plan to add density along Expo Line*, CURBED (Oct. 30, 2018), <https://la.curbed.com/2018/10/30/18043732/expo-line-lawsuit-transit-density>.

198. See Jenna Chandler, *California's transit density bill is back. What would it do to Los Angeles?*, CURBED (Jan. 7, 2020), <https://la.curbed.com/2020/1/7/21054886/california-transit-density-bill-50>.

199. See Barragan, *supra* note 197.

200. See Hill, *supra* note 196; see also Barragan, *supra* note 197.

201. See Walker, *supra* note 195.

202. *Id.*

203. *Id.*

204. Matt Levin, *It's a Big Deal: Newsom's Housing Budget Explained*, MERCURY NEWS (Jan. 14, 2019), <https://www.mercurynews.com/2019/01/13/its-a-big-deal-newsoms-housing-budget-explained/>.

D. ZONING AUTHORITY: STATE VS. LOCAL

Thirteen states have statutes or regulations that either expressly authorize inclusionary zoning or imply such authority by granting states broad powers to promote affordable housing.²⁰⁵ The ability to implement inclusionary zoning policies in these states largely depends on state legislatures' willingness to enact zoning laws that conflict with local municipalities' policies and depends on the "home rule" powers that the municipalities possess.²⁰⁶ "Home rule" describes the relationship between state and local government and the extent to which a state government delegates its powers to local governments.²⁰⁷ In Connecticut, for example, municipalities derive their powers from the state legislature and are thus able to have these powers removed.²⁰⁸

New York State, conversely, has an "incentive zoning" statute that enables local planning and zoning commissions to provide incentives to developers but fails to require municipalities to provide these incentives.²⁰⁹ By failing to require these developments, New York has allowed local municipalities to reject affordable housing proposals and zoning changes.²¹⁰ Furthermore, New York is a limited "home rule" state, with local municipalities holding structural and functional powers under the New York State Constitution which explicitly limits the legislature's ability to interfere with local affairs.²¹¹ To effectively combat its housing crisis, New York State must look to the authority other states' constitutions grant to their legislatures, and New York's state courts must continue to examine restrictive zoning regulations in relation to the regional housing needs, as they have in the past.²¹²

205. Timothy S. Hollister et al., *National Survey of Statutory Authority and Practical Considerations for the Implementation of Inclusionary Zoning Ordinances*, NATIONAL ASSOCIATION OF HOME BUILDERS, June 2007, at 2.

206. See Holmes, *supra* note 180, at 325 (2018).

207. *Id.* at 325–29 (2018).

208. Timothy S. Hollister et al., *National Survey of Statutory Authority and Practical Considerations for the Implementation of Inclusionary Zoning Ordinances*, NAT'L ASS'N HOME BUILDERS (June 2007), <https://inclusionaryhousing.org/wp-content/uploads/2016/08/Hollister-et-al.-2007-National-Survey-of-Statutory-Authority-and-Practic.pdf> (Two municipalities in Connecticut have adopted inclusionary zoning ordinances, with Stamford's ordinance recently being amended to allow several new multi-family developments in its downtown area).

209. *Id.*

210. See, e.g., Lizabeth Cohen, *The Doomed 1970's Plan to Desegregate New York's Suburbs*, BLOOMBERG CITYLAB (Oct. 21, 2019), <https://www.bloomberg.com/news/articles/2019-10-21/why-fair-share-housing-failed-in-1970s-suburbia>.

211. N.Y. CONST. art. IX, § 1, 2.

212. See, e.g., *Berenson v. Town of New Castle*, 341 N.E.2d 236, 242–243 (N.Y. 1975) (finding that any party may challenge a local zoning ordinance because it fails to account for the regional housing needs for multi-family housing development); see also, *Matter of City of Rochester*, 530 N.E.2d 202 (N.Y. 1988) (finding that a county's interest in development outweighs a local municipality's interest in restricting such development).

IV. THE IDEAL TIME TO REMEDY LONG-STANDING INEQUITIES IN HOUSING

In the wake of the pandemic's economic devastation and the modern-day, pandemic-driven white flight to the suburbs, New York State must intervene in its housing market in a radical way. The pandemic's disproportionate impact on the black community shows that the need is not just to override challenges from neighborhood coalitions and historic preservation, but to address the racial segregation that serves as the foundation of New York State's housing infrastructure. The State must expand its housing authority to allow New York City developers to build beyond the confines of New York City and into the nearby suburbs. Similar to how the federal government took drastic action in the provision and financing of housing during the Great Depression, New York must respond to the pandemic's effects on the housing market by expanding its authority over local municipalities, eliminating procedural hurdles to new developments, and subsidizing localities willing to cooperate. Crucially, the State must do this while keeping in mind the segregating policies that permeated the federal government's approach during the Great Depression. New York must seize the unique moment that the pandemic has created to remedy the long-standing segregation and housing inequality in New York State.

A. AMEND THE NEW YORK STATE CONSTITUTION

The first step the State must take is to amend the New York State Constitution and expand its authority by limiting local municipalities' "home rule" authority. The New York State Constitution can be amended either by proposing an amendment in the legislature or through a convention, both of which require voter approval.²¹³ A State Constitutional Convention has not occurred since 1967,²¹⁴ and therefore a single amendment would likely be the appropriate route. New York State must amend Article IX of the New York State Constitution to further establish itself as a "Dillon's Rule" state,²¹⁵ and to limit municipalities' "home rule" powers. The "Dillon Rule" is derived from an 1868 decision issued by Judge John Dillon, which asserts that a municipal government may engage in activities only if it is specifically sanctioned by the State government.²¹⁶ While New York is considered a "Dillon's Rule" state, it has failed to exercise this authority over the housing decisions of local municipalities' governments. Currently, a large percentage

213. See Gerald Benjamin, *The New York State Constitution: A Briefing Book*, TEMPORARY STATE COMMISSION ON CONSTITUTIONAL REVISION 57, 64–66, 73 (1994).

214. See Richard I. Nunez, *New York State Constitutional Reform – Past Political Battles in Constitutional Language*, 10 WILLIAM & MARY L. REV. 366, 373 (1968).

215. N.Y. CONST. art. IX.

216. See Holmes, *supra* note 180, at 329–330.

of New York State's counties are exclusively zoned for single-family use and effectively use this zoning to restrict new developments.²¹⁷ For example, in 2018 Nassau, Suffolk, and Westchester County permitted the development of just 3,658 new units for a combined population of 3.8 million people.²¹⁸ This lack of development restricts much-needed housing to the confines of New York City, and is indicative of the authority municipalities in these counties possess over the region's housing needs.

If New York succeeds in amending its constitution, it will be able to use cases like *Anti-Discrimination Center* and *Mhany Management* in Nassau and Westchester counties similar to how New Jersey used the *Mount Laurel* decisions.²¹⁹ While the practical effect of these decisions by the state judiciary remains questionable,²²⁰ New York must continue to require municipalities' compliance with their fair housing obligations. Additionally, the court should use these decisions similar to how New Jersey courts used the *Mount Laurel* doctrine and must overturn any local zoning regulations having a deleterious effect on the general welfare of the state. Like the Second Circuit in *Anti-Discrimination Center*, New York State could overturn any local municipality's rejection of a proposed affordable housing development through an injunction, by citing to the regional housing needs and the greater welfare of the state. By establishing the precedent that these obligations will be enforced by the state courts, local governments will be forced to become proactive in meeting their fair housing obligations.

B. NEW YORK STATE'S ADU DEVELOPMENT

Amending the New York State Constitution will also allow the legislature to alter any overly burdensome ADU requirements imposed by many municipalities. There have been recent steps towards reducing the procedural hurdles that impede ADU development in places like Nassau and Westchester County.²²¹ For instance, in 2019, the Nassau County Board of

217. See Alanna Browdy & Arvind Sindhvani, *Our Region Needs More Housing: End Single Family Zoning*, REGIONAL PLAN ASS'N (2019), <https://rpa.org/latest/lab/our-region-needs-more-housing-end-single-family-zoning>.

218. See Eric Kober, *And You, New York?*, CITY-JOURNAL (Sept. 27, 2019), <https://www.city-journal.org/housing-accessory-dwelling-units>.

219. See *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581 (2d Cir. 2016) (finding that a restrictive zoning ordinance is in violation of the Federal Housing Authority, and using this to enforce the development of affordable housing); see also *U.S. ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cty., N.Y.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009).

220. Editorial, *Towns That Defy Fair-Housing Law*, N.Y. TIMES, (July 27, 2016), <https://www.nytimes.com/2016/07/27/opinion/towns-that-defy-fair-housing-law.html> (quoting the Anti-Discrimination Center's executive director as saying that, despite the 750 homes being built, exclusionary zoning remains a problem in Westchester, and that many of the communities failed to enforce the consent decree's requirements).

221. See Suanne Thamm, *Nassau County adopts accessory dwelling regulations*, FERNANDINA OBSERVER (Mar. 14, 2019), <https://fernandinaobserver.com/county-news/nassau-county-adopts-accessory-dwelling-regulations/>.

County Commissioners voted to approve changes to the County Land Development Code (LDC) that would allow ADUs as a by-right use in any residentially-zoned district in Nassau County.²²² These measures, however, have not sparked the ADU boom seen in Portland, Oregon, and California. While they indicate a step towards easing restrictions, there are procedural and substantive requirements that still hinder the efficacy of these changes. Under the current LDC requirements, ADUs may only be used by family members, friends or caretakers, unless the main home on the parcel carries an active homestead exemption through the County Property Appraiser.²²³ Furthermore, many municipalities in Nassau and Westchester County still impose off-street parking requirements.²²⁴ Lastly, to construct an ADU, there is a complex array of paperwork to be submitted to the relevant county building department.²²⁵

New York must follow the leads of Portland and California in eliminating a number of these hurdles that hinder ADU development throughout the State. For instance, similar to both Portland and California, New York State should limit municipalities' ability to impose parking requirements which add to the prospective construction costs for ADUs. The State could do this by allowing any ADU development so long as the newly constructed ADU is located within one half-mile of public transit, one block from a car share vehicle, is part of an already-existing structure, or is located in a historic district. While the State should expect to receive pushback from local municipalities and their constituents, they could combat this pushback by explicitly limiting the extent to which localities can regulate ADUs, similar to Portland's ADU laws.

If unable to pass an amendment of this import, New York State may also encourage ADU development by limiting the funding and subsidization of its public transit systems like the Long Island Railroad (LIRR). By some accounts, the LIRR is the most heavily subsidized of New York City's three major transit systems.²²⁶ While taxes from both Nassau and Suffolk county contribute to covering the LIRR's operating costs, the majority of the subsidies come from taxes collected by the remainder of the New York City area.²²⁷ Similar to California's proposal to withhold transportation funding, New York can restrict the distribution of State funds until local governments can establish how they are addressing the region's housing needs.

222. *Id.*

223. *Id.*

224. See Sabrina Sucato, *Granny Pods Spark Controversy as Demand for Affordable Housing Continues*, HUDSON VALLEY MAGAZINE (Dec. 27, 2018), <https://hvmag.com/life-style/granny-pods-spark-controversy-as-demand-for-affordable-housing-continues/>.

225. See Thamm, *supra* note 221.

226. See Jim Brennan, *LIRR's Heavy Subsidies and the Coming Debate over MTA Funding*, GOTHAM GAZETTE (Jan. 10, 2019), <https://www.gothamgazette.com/letters/130-opinion/8182-lirr-s-heavy-subsidies-and-the-coming-debate-over-mta-funding>.

227. *Id.*

Specifically, until Nassau and Suffolk counties can establish how they are affirmatively furthering fair housing in accordance with its Fair Housing Act obligations, New York State should restrict the financial assistance it offers to these suburbs.

These ADU proposals are not limited to the suburbs either; about 15% of New York City's residential land is zoned for single-family homes, particularly in Queens and Staten Island.²²⁸ By offering a myriad of routes for homeowners to avoid the requirement of new, off-street parking to build an ADU, New York State could see growth in accessory dwelling structures similar to Portland.

C. THE RESPONSE IN NEW YORK CITY

In August 2020, the city's six-month Uniform Land Use Review Procedure (ULURP) relaunched virtually, after being shut down in March because of the pandemic.²²⁹ ULURP is the process by which a developer proposes to build something that is outside an area's particular zoning designation.²³⁰ The ULURP process is lengthy and complex and requires approval from the Department of City Planning (DCP), the City Planning Commission, and the City Council, and involves the advisory opinions of local community boards and the borough president.²³¹ In relaunching ULURP, the DCP announced it will focus its new proposals on city-backed affordable housing, climate-resilient infrastructure, and economic recovery projects.²³²

By prioritizing affordable housing and infrastructure, the city is attempting to lay the groundwork for its recovery over the long run.²³³ In doing so, the city must avoid continuing to upzone communities of color. In the past, ULURP developed a reputation for excluding residents, particularly those in low-income communities of color, who often do not have the time or resources to attend the public hearings.²³⁴ Since it is these same

228. See Kober, *supra* note 218.

229. See Caroline Spivack, *As Rezoning Process Relaunches, New York Seeks to "Dismantle" Inequity*, CURBED (July 30, 2020), <https://ny.curbed.com/2020/7/30/21346424/new-york-city-land-use-review-ulurp-equity> [hereinafter *Rezoning Process Relaunches*].

230. See Caroline Spivack, *What is ULURP, and why should I care? NYC's land-use review process, explained*, CURBED (Jan. 22, 2020), <https://ny.curbed.com/2020/1/22/21073049/nyc-zoning-ulurp-land-use-review-city-council> [hereinafter *What is ULURP*] (detailing the processes and procedural requirements to garner ULURP approval).

231. See *id.*

232. See *Rezoning Process Relaunches*, *supra* note 229; see also, DEP'T OF CITY PLANNING, *WHAT IS NYC ENGAGE?*, <https://www1.nyc.gov/site/nycengage/index.page> (attempting to foster public participation in the ULURP process).

233. See *Rezoning Process Relaunches*, *supra* note 229; see also Alexandra Lange, *Is America's densest city ready to make room?*, CURBED (Sept. 12, 2018), <https://ny.curbed.com/2018/9/12/17841844/downtown-brooklyn-80-flatbush-building-yimby> (discussing the difficulties affordable housing developers face when confronted by borough officials and community boards).

234. See *Rezoning Process Relaunches*, *supra* note 229.

communities that were hit hardest by the pandemic,²³⁵ the DCP must prioritize racial equity in any new developments, and take steps to ensure that a diverse set of voices are heard throughout the planning process. In what will likely be the last major rezoning of the De Blasio Administration, New York is in the process of upzoning the Gowanus waterfront to develop a mixture of new housing and green infrastructure.²³⁶ The eighty-block development plan in Gowanus is expected to create 8,200 new apartments by 2035, roughly a third of which will be set aside as affordable units.²³⁷ Despite New York announcing its investments would be focused on areas hardest hit by COVID-19, Gowanus was not disproportionately affected by the pandemic.²³⁸ Despite this, the decision to rezone Gowanus has been championed by those who felt New York City's rezonings were too often occurring in low-income communities of color.²³⁹ Historically, the land-use review process has been accused of excluding these communities, who lack the time and resources to attend the ULURP public hearings.²⁴⁰ By rezoning a middle-income, majority-white neighborhood, ULURP is attempting to bring affordable housing to neighborhoods that already have the infrastructure needed to develop a broad array of economic opportunities.²⁴¹ In the future, the city must continue to look to this project as a model for sustainable rezonings.

New York City is at a unique political moment, having put its land-use review process on hold for months, during which the city seemed to acknowledge the structural racism and land-use decisions that have segregated New York City.²⁴⁹ By working to incorporate this understanding into the ULURP process, the city has the chance to implement changes to the inequitable, unsustainable housing situation we currently have.

CONCLUSION

COVID-19 and the government-imposed shutdown have caused significant disruption and economic uncertainty for the real estate industry.

235. See Kolata, *supra* note 101.

236. See *Rezoning Process Relaunches*, *supra* note 229 (detailing the various benefits the Gowanus neighborhood will receive from new development).

237. Caroline Spivack, *City says Gowanus rezoning will create 8,200 new apartments*, CURBED (Mar. 28, 2019), <https://ny.curbed.com/2019/3/28/18285233/dcp-gowanus-brooklyn-rezoning-create-8200-apartments>.

238. See *Rezoning Process Relaunches*, *supra* note 229.

239. See *Rezoning Process Relaunches*, *supra* note 229; see also Caroline Spivack, *How NYC rezonings spur 'racialized displacement' throughout the city*, CURBED (Dec. 5, 2019), <https://ny.curbed.com/2019/12/5/20995175/nyc-rezonings-racial-displacement-jumaane-williams> [hereinafter *How NYC rezonings spur*] (detailing the pernicious effects of zoning, and the frequency with which low-income communities of color are the ones targeted for rezoning).

240. See *How NYC rezonings spur*, *supra* note 239; see also *Rezoning Process Relaunches*, *supra* note 229.

241. See *Rezoning Process Relaunches*, *supra* note 229.

²⁴⁹ See *How NYC rezonings spur*, *supra* note 239.

The most effective way to combat these disruptions will be a broad-scale, multi-faceted plan at the federal, state, and local levels. While there have been attempts to protect the interests of the real estate industry, the government can and must do better. The government must provide financial and regulatory help to combat the current housing crisis and work to remedy broad-scale inequities in housing.

*Daniel Finnegan**

* B.A. Fordham University, 2015; J.D. Candidate, Brooklyn Law School, 2022. I would like to thank the entire staff of the Brooklyn Journal of Corporate, Financial & Commercial Law, especially Michael Blackmon, Katherine Teng, and Ryan Bolger, for their valued feedback and assistance. Thank you to my parents and my family for their ceaseless, unending encouragement; Chloe DeAngelis for always loving, motivating and supporting me; and Conor Semple for his wonderful, lifelong friendship.