

# WHITHER AFFIRMATIVELY FURTHERING FAIR HOUSING IN NEW YORK? THE AFFH MANDATE IN AN ERA OF LAND USE REFORM

*Timothy Gentles†*

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† Senior Articles Editor, *Cardozo Law Review*, Volume 45; J.D. Candidate (June 2024), Benjamin N. Cardozo School of Law. I would like to thank Professor Michael C. Pollack for his encouragement and enthusiasm, and some wonderful discussions about the politics of housing. I would also like to thank my colleagues at *Cardozo Law Review*, particularly John Hughes and Isabelle Faber, for their thoughtful edits. Finally, I would like to thank Bryce for her ongoing love and support, for putting up with late nights spent researching and writing, and for letting me spend the first day of our honeymoon finishing one of many rounds of drafts.

## INTRODUCTION

New York is experiencing a severe housing affordability crisis.<sup>1</sup> This crisis is driven by a housing supply shortfall decades in the making.<sup>2</sup> The state's housing shortage exacerbates economic, racial, and regional inequalities, and harms the economy by limiting growth.<sup>3</sup> New York's struggles with housing affordability reflect a national surge in housing costs since the pandemic that has disproportionately impacted communities of color.<sup>4</sup> Yet, in many respects, the crisis in New York is worse than that in other states with comparably robust housing demand.<sup>5</sup> The extent of New York's housing affordability crisis has led to growing

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<sup>1</sup> See Jolie Milstein, *New York's Housing Crisis Is Worse Than Ever; It's Time to Send in the Cavalry*, GOTHAM GAZETTE (July 20, 2022), <https://www.gothamgazette.com/130-opinion/11466-new-york-housing-crisis-cavalry-build-apartments> [<https://perma.cc/R6QN-UAF2>]; *Governor Hochul Announces Statewide Strategy to Address New York's Housing Crisis and Build 800,000 New Homes*, GOVERNOR KATHY HOCHUL (Jan. 10, 2023) [hereinafter *Housing Compact Announcement*], <https://www.governor.ny.gov/news/governor-hochul-announces-statewide-strategy-address-new-yorks-housing-crisis-and-build-800000> [<https://perma.cc/4WXY-QGGZ>].

<sup>2</sup> See NYC PLAN., *THE GEOGRAPHY OF JOBS: NYC METROPOLITAN REGION ECONOMIC SNAPSHOT 28* (2d ed. 2019), <https://www1.nyc.gov/assets/planning/download/pdf/planning-level/housing-economy/nyc-geography-jobs2-1019.pdf> [<https://perma.cc/Q5BQ-MTPM>] (noting that from 2001 to 2018 New York City produced 362,900 more jobs than housing units and Long Island produced 62,000 more jobs than housing units); Marcel Negret, Melissa Kaplan-Macey, Kate Slevin & Moses Gates, *Meeting Housing Need and the Pace of Growth in New York State*, RPA (Dec. 19, 2022), <https://rpa.org/latest/lab/meeting-housing-need-and-the-pace-of-growth-in-new-york-state> [<https://perma.cc/MD5H-PDSH>] (finding that 817,600 additional units of housing will be needed by 2032 to meet demand in New York State); Vicki Been, Ingrid Gould Ellen & Katherine O'Regan, *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL'Y DEBATE 25 (2019) (finding that inadequate housing supply leads to higher housing prices).

<sup>3</sup> See NOAH KAZIS, NYU FURMAN CTR., *ENDING EXCLUSIONARY ZONING IN NEW YORK CITY'S SUBURBS* 5–6 (2020), [https://furmancenter.org/files/Ending\\_Exclusionary\\_Zoning\\_in\\_New\\_York\\_Citys\\_Suburbs.pdf](https://furmancenter.org/files/Ending_Exclusionary_Zoning_in_New_York_Citys_Suburbs.pdf) [<https://perma.cc/ATT5-X9TN>].

<sup>4</sup> See Adewale A. Maye & Kyle K. Moore, *The Growing Housing Supply Shortage Has Created a Housing Affordability Crisis*, ECON. POL'Y INST.: WORKING ECON. BLOG (July 14, 2022, 9:31 AM), <https://www.epi.org/blog/the-growing-housing-supply-shortage-has-created-a-housing-affordability-crisis> [<https://perma.cc/59FX-Z8AH>]; Alexander Hermann & Thomas Shay Hill, *Home Prices Rose Fastest in Communities of Color During the Pandemic*, JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV. (May 18, 2021), <https://www.jchs.harvard.edu/blog/home-prices-rose-fastest-communities-color-during-pandemic> [<https://perma.cc/E6RW-QVM4>].

<sup>5</sup> See CITIZENS BUDGET COMM'N, *STRATEGIES TO BOOST HOUSING PRODUCTION IN THE NEW YORK CITY METROPOLITAN AREA* 17 (2020), [https://cbcny.org/sites/default/files/media/files/CBC\\_NYC-Housing-Production\\_08262020\\_0.pdf](https://cbcny.org/sites/default/files/media/files/CBC_NYC-Housing-Production_08262020_0.pdf) [<https://perma.cc/ay8J-7ERB>] (finding that between 2010 and 2018 New York City produced fewer units of housing per capita than peer cities).

momentum behind legislative action in recent years.<sup>6</sup> But so far, the New York legislature has failed to pass much needed reforms intended to stimulate housing growth.<sup>7</sup>

A large body of research shows that overly restrictive local land use regulations play a significant role in constraining housing supply and driving up prices.<sup>8</sup> The local adoption of exclusionary zoning practices, such as requiring large minimum lot sizes and prohibiting multifamily development, inhibits the production of enough housing to respond to demand.<sup>9</sup> This problem is particularly acute in high-demand, affluent suburbs.<sup>10</sup> Moreover, it tends to be intractable where control over land use decision-making is left to localities, which often have strong fiscal and

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<sup>6</sup> See Annemarie Gray, Opinion, *New York Finally Has Momentum on Housing and It's Time for a Breakthrough*, CITY & STATE N.Y. (Dec. 28, 2022), <https://www.cityandstateny.com/opinion/2022/12/opinion-new-york-finally-has-momentum-housing-its-time-breakthrough/381311> [<https://perma.cc/H478-3MTX>].

<sup>7</sup> See Luis Ferré-Sadurní & Mihir Zaveri, *A Plan to Force More Housing Development in New York Has Failed*, N.Y. TIMES (Apr. 21, 2023), <https://www.nytimes.com/article/nyc-housing-hochul-long-island-westchester.html> [<https://perma.cc/372Z-7WM4>] (describing the failure of Governor Kathy Hochul's housing plan in the face of "fierce resistance from state legislators"); see also Luis Ferré-Sadurní, *N.Y. Democrats, at Odds over Tenant Protections, Fail to Reach Housing Deal*, N.Y. TIMES (June 8, 2023), <https://www.nytimes.com/2023/06/08/nyregion/housing-good-cause-eviction.html> [<https://perma.cc/94NX-QHUL>]. Governor Hochul's New York Housing Compact aimed to address New York's housing affordability crisis by producing 800,000 new units of housing over the next ten years. See *Housing Compact Announcement*, *supra* note 1; KATHY HOCHUL, 2023 STATE OF THE STATE: ACHIEVING THE NEW YORK DREAM 21–49 (2023), <https://www.governor.ny.gov/sites/default/files/2023-01/2023SOTSBook.pdf> [<https://perma.cc/2268-8Y3W>].

<sup>8</sup> See, e.g., Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply*, in 5 HANDBOOK OF REGIONAL AND URBAN ECONOMICS 1289 (Gilles Duranton, J. Vernon Henderson & William C. Strange eds., 2015); Edward L. Glaeser, Joseph Gyourko & Raven Saks, *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331 (2005); see also THE WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT 2 (2016), [https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/images/Housing\\_Development\\_Toolkit%20f.2.pdf](https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf) [<https://perma.cc/N9XC-BTWQ>] ("Local policies acting as barriers to housing supply include land use restrictions that make developable land much more costly than it is inherently, zoning restrictions, off-street parking requirements, arbitrary or antiquated preservation regulations, residential conversion restrictions, and unnecessarily slow permitting processes. The accumulation of these barriers has reduced the ability of many housing markets to respond to growing demand.").

<sup>9</sup> See generally Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin*, 42 CARDOZO L. REV. 1611 (2021).

<sup>10</sup> See Brian R. Lerman, Note, *Mandatory Inclusionary Zoning—The Answer to the Affordable Housing Problem*, 33 B.C. ENV'T AFFS. L. REV. 383, 386 (2006); Ezra Rosser, *The Euclid Proviso*, 96 WASH. L. REV. 811, 834–35 (2021); David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1543 ("In the United States, there is heavier zoning in the most productive regions of the country . . . than in less productive regions.").

political incentives to restrict development.<sup>11</sup> This creates issues of collective action: while it may be rational for individual municipalities to restrict development, these restrictions in the aggregate lead to housing scarcity that substantially increases housing costs and harms the overall regional economy.<sup>12</sup> In response, a consensus is emerging that state-level intervention into zoning and land use policies is needed to address **exclusionary zoning's impact on housing costs.**<sup>13</sup>

Exclusionary zoning practices have also been shown to generate significant inequalities and to perpetuate residential segregation by race and income.<sup>14</sup> Additionally, modern-day zoning is rooted in the history of racial segregation and helped to facilitate “white flight”—the postwar movement of white people and capital from the urban core that has profoundly shaped the persistently unequal racial and economic

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<sup>11</sup> See Rosser, *supra* note 10, at 834 (noting that exclusionary zoning policies are motivated by a desire to “maximize tax revenue and minimize demands on city services”); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 400 (1977) (“Antigrowth measures have one premier class of beneficiaries: those who already own residential structures in the municipality doing the excluding.”); WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001) (arguing that local government behavior is driven by homeowners’ desire to maintain the value of their homes).

<sup>12</sup> See Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J.: MACROECONOMICS 1, 1 (2019) (finding that strict zoning laws in cities with strong productivity growth reduced aggregate U.S. growth by thirty-six percent from 1964 to 2009).

<sup>13</sup> See Rosser, *supra* note 10, at 849 (describing an emerging consensus among academics and policymakers that regulatory barriers are contributing to an affordable housing crisis); Kenneth A. Stahl, “Yes in My Backyard”: Can a New Pro-Housing Movement Overcome the Power of NIMBYS?, ZONING & PLAN. L. REP., Mar. 2018, at 1, 1; see also Sahalie Donaldson, *Zoning Fights May Become Political Liabilities in Upcoming 2023 NYC Council Primaries*, CITY & STATE N.Y. (Jan. 9, 2023), <https://www.cityandstateny.com/policy/2023/01/zoning-fights-may-become-political-liabilities-upcoming-2023-nyc-council-primaries/381555> [<https://perma.cc/CPO6-36SF>]. In addition to making housing less affordable and leading to allocative inefficiencies, exclusionary zoning may also have significant negative environmental impacts. See R. Pendall, *Do Land-Use Controls Cause Sprawl?*, 26 ENV’T & PLAN. B: PLAN. & DESIGN 555, 555–56 (1999) (arguing that low-density zoning increases sprawl); Gregory H. Shill, *Should Law Subsidize Driving?*, 95 N.Y.U. L. REV. 498, 539 (2020) (arguing that restrictive land use laws contribute to car dependency).

<sup>14</sup> See Michael C. Lens, *Zoning, Land Use, and the Reproduction of Urban Inequality*, 48 ANN. REV. SOCIO. 421, 434–35 (2022) (describing the role of exclusionary zoning in exacerbating social stratification and widening racial and economic inequality); 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) (finding that low-density zoning contributes to racial segregation); Jonathan T. Rothwell & Douglas S. Massey, *Density Zoning and Class Segregation in U.S. Metropolitan Areas*, 91 SOC. SCI. Q. 1123, 1123 (2010) (“Metropolitan areas with suburbs that restrict the density of residential construction are more segregated on the basis of income than those with more permissive density zoning regimes. This arrangement perpetuates and exacerbates racial and class inequality in the United States.”).

residential patterns of American metropolitan regions.<sup>15</sup> By some measures, the New York City metropolitan area is the most segregated in the nation,<sup>16</sup> and stark levels of segregation are evident in upstate cities as well.<sup>17</sup> New York also has a deep history, even in the recent past, of racially exclusionary suburbs and racial conflict over residential integration.<sup>18</sup>

But while a number of peer states have enacted state-level land use reforms to promote housing development, New York has lagged behind.<sup>19</sup> In fact, New York has some of the most exclusionary zoning in the country.<sup>20</sup> Although New York law ostensibly prohibits exclusionary zoning,<sup>21</sup> the so-called *Berenson* doctrine is widely regarded as

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<sup>15</sup> See Christopher Silver, *The Racial Origins of Zoning in American Cities*, in URBAN PLANNING AND THE AFRICAN-AMERICAN COMMUNITY: IN THE SHADOWS 23, 24 (June Manning Thomas & Marsha Ritzdorf eds., 1996); DAVID M.P. FREUND, COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA 61–66 (2007); see also Jan P. Mensz, Note, *Citizen Police: Using the Qui Tam Provision of the False Claims Act to Promote Racial and Economic Integration in Housing*, 43 U. MICH. J.L. REFORM 1137, 1141 (2010) (“Although restrictive covenants based on race are no longer enforceable, exclusionary zoning practices are in many ways the modern equivalent.”); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 242 (1985) (“[Z]oning provided a way for suburban areas to become secure enclaves for the well-to-do . . . .”); Rosser, *supra* note 10, at 821 (describing white flight as “[t]he outward movement of jobs and capital [that] transformed metropolitan areas” and created “rings of opportunity in the white suburbs” while leaving inner cities primarily populated by racial minorities and “marked by the negative consequences of concentrated poverty”); JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES 40 (2018) (describing “suburban flight” that allowed white residents to engage in exclusionary zoning practices as an “efficient mechanism of segregation” after racially restrictive covenants were no longer legally enforceable and federal fair housing laws prohibited explicit discrimination).

<sup>16</sup> *City Snapshot: New York City*, OTHERING & BELONGING INST., <https://belonging.berkeley.edu/city-snapshot-new-york-city> [<https://perma.cc/F4N4-8YHU>]; see also Catherine Hart, Comment, *Community Preference in New York City*, 47 SETON HALL L. REV. 881, 881 (2017).

<sup>17</sup> Alana Wise, *Buffalo Plagued by Economic Neglect, Segregation Long Before Shooting, Residents Say*, NPR (May 23, 2022, 12:48 PM), <https://www.npr.org/2022/05/23/1100574675/buffalo-plagued-by-economic-neglect-segregation-long-before-shooting-residents-say> [<https://perma.cc/6U6H-G7QN>].

<sup>18</sup> See, e.g., *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1369 (S.D.N.Y. 1985) (“[T]he segregative effect of the actions challenged by plaintiffs has been remarkably consistent and extreme. It is, to say the least, highly unlikely that a pattern of subsidized housing which so perfectly preserved the overwhelmingly white character of East and Northwest Yonkers came about for reasons unrelated to race.” (first citing *Gautreaux v. Chi. Hous. Auth.*, 296 F. Supp. 907, 910 (N.D. Ill. 1969); and then citing *United States v. City of Parma*, 494 F. Supp. 1049, 1097 (N.D. Ohio 1980))).

<sup>19</sup> See KAZIS, *supra* note 3, at 3; Alex Armlovich, *Zoning Reform in Gotham*, NISKANEN CTR. (Jan. 9, 2023), <https://www.niskanencenter.org/zoning-reform-in-gotham> [<https://perma.cc/Q07T-XMEV>].

<sup>20</sup> KAZIS, *supra* note 3, at 4.

<sup>21</sup> See *Berenson v. Town of New Castle*, 341 N.E.2d 236 (N.Y. 1975) (requiring localities to consider regional housing needs when enacting zoning ordinances).

toothless.<sup>22</sup> By contrast, states with comprehensive schemes in place to limit exclusionary zoning see more affordable housing production and higher rates of new homes built than New York.<sup>23</sup>

Fair housing laws prohibit racial discrimination in housing but have largely failed to reduce residential segregation by race.<sup>24</sup> Although federal courts have held that zoning ordinances having a disproportionately exclusionary impact on racial minorities can in some cases violate the Fair Housing Act (FHA),<sup>25</sup> fair housing laws have had a limited impact on exclusionary zoning practices in the aggregate.<sup>26</sup>

A 2006 lawsuit against Westchester County challenging the lack of affordable housing in the County's **predominantly white communities** promised to change that by highlighting the potential of an underutilized provision of the FHA requiring the U.S. Department of Housing and Urban Development (HUD) to **"affirmatively further" fair housing (AFFH)**.<sup>27</sup> Yet despite a historic settlement agreement requiring

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<sup>22</sup> See Terry Rice, *Zoning and Land Use*, 42 SYRACUSE L. REV. 761, 785 (1991) (describing the *Berenson* doctrine as a "toothless tiger"); KAZIS, *supra* note 3, at 20 ("[The *Berenson*] doctrine is widely considered to be too weak to drive widespread change."); see also *infra* notes 106–11 and accompanying text.

<sup>23</sup> See, e.g., Nicholas J. Marantz & Huixin Zheng, *Exclusionary Zoning and the Limits of Judicial Impact*, 42 J. PLAN. EDUC. & RSCH. 280, 280–81 (2022) (finding that New Jersey's requirement that municipalities zone to accommodate their "fair share" of regional affordable housing needs has resulted in increased production of affordable housing compared to New York); HOCHUL, *supra* note 7, at 25–26 (noting that, in the previous decade, the northern New Jersey suburbs have permitted five times as many housing units per capita as Long Island and three times as many as the Lower Hudson Valley). However, despite the relative success of such affordable housing schemes in encouraging development and moderating housing prices, they have not necessarily reduced racial segregation. See, e.g., Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L.J. 877 (2006); Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1302 (1997).

<sup>24</sup> See, e.g., 42 U.S.C. § 3604(a) (making it unlawful to refuse to sell or rent housing on the basis of race, color, religion, sex, familial status, or national origin). See generally Michelle Adams, *The Unfulfilled Promise of the Fair Housing Act*, NEW YORKER (Apr. 11, 2018), <https://www.newyorker.com/news/news-desk/the-unfulfilled-promise-of-the-fair-housing-act> [<https://perma.cc/Y4EE-NFJR>] (arguing that the federal Fair Housing Act failed to achieve its aim of fostering racial integration); Alana Semuels, *The U.S. Is Increasingly Diverse, so Why Is Segregation Getting Worse?*, TIME (June 21, 2021, 5:35 AM), <https://time.com/6074243/segregation-america-increasing> [<https://perma.cc/M5XB-R9EY>] (noting that eighty percent of large metropolitan areas in the United States became more segregated between 1990 and 2019).

<sup>25</sup> See *infra* notes 92–97 and accompanying text.

<sup>26</sup> See Thomas Silverstein, *Overcoming Land Use Localism: How HUD's New Fair Housing Regulation Can Push States to Eradicate Exclusionary Zoning*, 5 U. BALT. J. LAND & DEV. 25, 39 (2015).

<sup>27</sup> United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, 495 F. Supp. 2d 375, 377 (S.D.N.Y. 2007); see also Matthew Shiers Sternman, Note, *Integrating the Suburbs: Harnessing the Benefits of Mixed-Income Housing in Westchester County and Other*

Westchester County to develop a significant number of affordable housing units in predominantly white communities,<sup>28</sup> the effect of the mandate to affirmatively further fair housing on the scope of federal oversight over local housing policy, including land use and zoning regulations, has remained relatively limited.<sup>29</sup> Although the *Westchester* litigation spurred the Obama administration to create a federal rule in 2015 clarifying the obligations of federal housing funding recipients to affirmatively further fair housing and creating a procedural framework to certify compliance,<sup>30</sup> this rule was repealed by the Trump administration in 2020 and, at the time of writing, remains in the process of being reinstated by the Biden administration.<sup>31</sup> Meanwhile, a handful of states passed their own AFFH legislation, including, in 2021, New York (New York AFFH law).<sup>32</sup> In light of the impending reinstatement of a federal AFFH rule, it remains to be seen to what extent requirements to affirmatively further fair housing will act as a meaningful constraint on exclusionary zoning moving forward.

This Note examines the potential impact of the New York AFFH law as a constraint on exclusionary zoning. It also assesses, in light of the momentum behind state-level interventions into local zoning laws, how New York can strengthen its requirement to affirmatively further fair housing in order to ensure that localities are not only building more

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*Low-Poverty Areas*, 44 COLUM. J.L. & SOC. PROBS. 1, 7 (2010); Peter Applebome, *Integration Faces a New Test in the Suburbs*, N.Y. TIMES (Aug. 22, 2009), <https://www.nytimes.com/2009/08/23/weekinreview/23applebome.html> [<https://perma.cc/M493-3334>] (quoting Ron Sims, then–Deputy Secretary of HUD, as saying the Westchester settlement “is consistent with the [P]resident’s desire to see a fully integrated society . . . . This is historic, because we are going to hold people’s feet to the fire.”).

<sup>28</sup> See Stipulation and Order of Settlement and Dismissal, United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (No. 06 Civ. 2860) [hereinafter Settlement Agreement].

<sup>29</sup> See generally Heather R. Abraham, *Fair Housing’s Third Act: American Tragedy or Triumph?*, 39 YALE L. & POL’Y REV. 1 (2020) (describing the history of the requirement to affirmatively further fair housing).

<sup>30</sup> Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903); see also Brian J. Connolly, *Promise Unfulfilled? Zoning, Disparate Impact, and Affirmatively Furthering Fair Housing*, 48 URB. LAW. 785, 815 (2016) (noting that the 2015 federal AFFH rule was issued in response to the ineffective incorporation of fair housing elements into housing and community planning exposed by the *Westchester* litigation).

<sup>31</sup> Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47899, 47904–05 (Aug. 7, 2020) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903); Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30779, 30783 (June 10, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903); Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516 (proposed Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5, 91, 92, 93, 570, 574, 576, 903, 983).

<sup>32</sup> N.Y. PUB. HOUS. LAW § 600 (McKinney 2023).

housing, but are also actively planning to increase racial and economic integration. Part I examines the federal duty to affirmatively further fair housing, its position within the FHA, and the history of its enforcement.<sup>33</sup> The Part then proceeds to describe exclusionary zoning and its relationship to fair housing, **and assesses New York's exclusionary zoning jurisprudence.**<sup>34</sup> Part II examines the New York AFFH law, comparing it to the federal AFFH rule and a similar California law, and finding the New York law lacking both procedurally and substantively.<sup>35</sup> Part III discusses the New York AFFH law as a constraint on exclusionary zoning and argues that in order to meaningfully further fair housing, the law must be strengthened by creating a private right of action, requiring recipients of state housing funding to report their fair housing progress, and more clearly defining what constitutes compliance.<sup>36</sup> Part III **concludes by assessing Governor Kathy Hochul's Housing Compact, a land use reform proposal that failed to pass the state legislature in 2023.** It argues that, while such proposed reforms would have represented an important step towards limiting the ability of municipalities to use their zoning powers to exclude, future state land use interventions should include a robust AFFH requirement in order to realize the New York law's goal of **creating more diverse and integrated communities.**<sup>37</sup>

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<sup>33</sup> See *infra* Section I.A.

<sup>34</sup> See *infra* Sections I.B–I.C.

<sup>35</sup> See *infra* Part II.

<sup>36</sup> See *infra* Sections III.A–III.B.1.

<sup>37</sup> See *infra* Section III.B.2.



## I. BACKGROUND

### A. *The Fair Housing Act and the Duty to Affirmatively Further Fair Housing*

#### 1. History of the AFFH Mandate

The Fair Housing Act was signed into law in 1968 in a tumultuous period of civil and racial unrest.<sup>38</sup> The FHA's chief legislative sponsor, Senator Walter Mondale, stated, in the vocabulary of the time, that the purpose of the Act was to replace "the ghetto[s]" with "truly integrated and balanced living patterns."<sup>39</sup> This goal was to be achieved through two primary mechanisms: (1) an antidiscrimination mandate prohibiting discrimination in the sale, rental, and financing of housing based on race, color, religion, sex, familial status, or national origin;<sup>40</sup> and (2) a requirement that HUD and other federal agencies administer their "programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [the FHA]."<sup>41</sup> This latter provision is known as the mandate to affirmatively further fair housing (AFFH mandate).<sup>42</sup>

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<sup>38</sup> 42 U.S.C. §§ 3601–3619; *see* U.S. DEP'T OF JUST., OPENING THE DOOR: HIGHLIGHTS IN FAIR HOUSING ACT ENFORCEMENT (2018), <https://www.justice.gov/crt/page/file/1496041/download> [<https://perma.cc/HM3A-6H59>]. The inclusion of a fair housing bill in the Civil Rights Act of 1968 was in part a response to a report by the Kerner Commission, formed in the wake of the "Long, Hot Summer of 1967," which found that inadequate housing for African Americans was contributing to social unrest and recommended "a comprehensive and enforceable Federal open-housing law." NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 13 (1968); *Affirmatively Furthering Fair Housing (AFFH)*, U.S. DEP'T OF HOUS. & URB. DEV., <https://www.hud.gov/AFFH> [<https://perma.cc/QZW4-E582>]; *see also* Michelle Ghaznavi Collins, Note, *Opening Doors to Fair Housing: Enforcing the Affirmatively Further Provision of the Fair Housing Act Through 42 U.S.C. § 1983*, 110 COLUM. L. REV. 2135, 2140 (2010).

<sup>39</sup> 114 CONG. REC. 3422 (1968) (statement of Sen. Walter Mondale); *see also* Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973) (noting that the goal of the FHA was to create "open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat").

<sup>40</sup> 42 U.S.C. § 3604. The Act was amended in 1988 to also protect against discrimination based on handicap or familial status. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601–3631).

<sup>41</sup> § 3608(e)(5); *see also id.* § 3608(d) (imposing the requirement to affirmatively further fair housing on all other federal departments and agencies).

<sup>42</sup> *See* Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L.J. 125, 126–28 (2012).

In light of the FHA's legislative history, courts have interpreted the AFFH mandate as requiring that HUD and its grantees, which include local municipalities and public housing agencies, do more than simply not discriminate.<sup>43</sup> Rather, it requires that the federal government take affirmative steps to achieve racial integration in housing.<sup>44</sup> However, **unlike the FHA's antidiscrimination provisions, the AFFH mandate lacks a private right of action.**<sup>45</sup> This has created significant barriers to the private enforcement of the AFFH mandate against both HUD and its grantees, resulting in widespread noncompliance.<sup>46</sup>

The scope of HUD-funding recipients' obligation to affirmatively further fair housing was clarified somewhat in 1995 when HUD issued regulations establishing the "analysis of impediments" (AI) process.<sup>47</sup> This required grantees of certain HUD-funded programs to "conduct an analysis to identify impediments to fair housing choice" and to submit to HUD an annual certification that it "will affirmatively further fair housing."<sup>48</sup> Although compliance with these requirements was decidedly mixed,<sup>49</sup> their existence laid the foundation for litigation against municipalities receiving HUD funds that had failed to comply with the AI process.<sup>50</sup>

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<sup>43</sup> See, e.g., *NAACP v. Sec'y of Hous. & Urb. Dev.*, 817 F.2d 149, 154–55 (1st Cir. 1987) (noting that the FHA's legislative history "suggests an intent that HUD do more than simply not discriminate itself" and that "it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases"); *Otero*, 484 F.2d at 1133–34; see also Collins, *supra* note 38, at 2142–45.

<sup>44</sup> See Schwemm, *supra* note 42, at 144.

<sup>45</sup> See Abraham, *supra* note 29, at 56.

<sup>46</sup> See Collins, *supra* note 38, at 2149–52 (noting that HUD's lack of monitoring for AFFH mandate compliance, the lack of a private right of action, and jurisprudential obstacles to private lawsuits to enforce the mandate have contributed to the persistence of discriminatory and segregatory housing programs).

<sup>47</sup> Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. 1878 (Jan. 5, 1995) (to be codified at 24 C.F.R. pts. 91, 92, 570, 574, 576, 968); see also Schwemm, *supra* note 42, at 150–52.

<sup>48</sup> Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. at 1905. The AI process applied to recipients of Community Development Block Grants, Emergency Shelter Grants, HOME Investment Partnerships, and Housing Opportunities for Persons With AIDS. *Id.* at 1878.

<sup>49</sup> See Craig Gurian & Michael Allen, *Making Real the Desegregating Promise of the Fair Housing Act: "Affirmatively Furthering Fair Housing" Comes of Age*, 43 CLEARINGHOUSE REV. 560, 561 (2010). A 2010 report by the U.S. Government Accountability Office estimated that twenty-nine percent of grantees had not updated their AIs in over five years. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS 9 (2010), <https://www.gao.gov/assets/gao-10-905.pdf> [<https://perma.cc/WX4Z-G6EM>]. Further, an internal HUD study in 2009 found that AIs were often completed in a cursory fashion and department oversight was limited. *Id.* at 2.

<sup>50</sup> See Abraham, *supra* note 29, at 26.

This possibility was realized in 2006 when a fair housing not-for-profit organization sued Westchester County, New York, under the False Claims Act for falsely certifying to HUD that it had complied with its obligation to affirmatively further fair housing as a condition of receiving federal funds.<sup>51</sup> Specifically, the lawsuit alleged that Westchester County “fail[ed] to analyze impediments to fair housing choice within the County in terms of race[,] . . . take appropriate actions to overcome those impediments,” and document its analysis and actions.<sup>52</sup> The district court agreed, finding that the County’s AIs “utterly failed to comply” with HUD’s regulatory requirements and that its certifications that it had affirmatively furthered fair housing were false.<sup>53</sup> The County settled in 2009, agreeing to spend \$51.6 million to develop at least 750 units of affordable housing, the majority of which were to be placed in municipalities with overwhelmingly white populations.<sup>54</sup> A government-selected monitor was also appointed to oversee the implementation of the affordable units and the County’s completion of an adequate AI.<sup>55</sup> The sufficiency of the County’s AI generated significant subsequent litigation that was only resolved when, under the Trump administration, HUD stopped contesting its adequacy.<sup>56</sup>

In an attempt to provide further clarity as to the precise scope of the AFFH mandate and to address shortcomings with the existing AI process, the Obama administration in 2015 enacted the Affirmatively Furthering Fair Housing Rule (2015 Rule).<sup>57</sup> The 2015 Rule defined, for the first time,

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<sup>51</sup> United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, 495 F. Supp. 2d 375, 376–78 (S.D.N.Y. 2007); 31 U.S.C. §§ 3729–3733.

<sup>52</sup> United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, 668 F. Supp. 2d 548, 550 (S.D.N.Y. 2009).

<sup>53</sup> *Id.* at 563; *see also id.* at 569 (“The AFFH certification was not a mere boilerplate formality, but rather was a substantive requirement, rooted in the history and purpose of the fair housing laws and regulations, requiring the County to conduct an AI, take appropriate actions in response, and to document its analysis and actions.”).

<sup>54</sup> *See* Settlement Agreement, *supra* note 28, at 4–11; John R. Nolon & Tiffany Zezula, *Affirmatively Furthering Fair Housing: The Search for Solutions That Are Just Right*, ZONING & PLAN. L. REP., July 2012, at 1, 2–3.

<sup>55</sup> *See* Settlement Agreement, *supra* note 28, at 11–15.

<sup>56</sup> *See, e.g., County of Westchester v. U.S. Dep’t of Hous. & Urb. Dev.*, 802 F.3d 413 (2d Cir. 2015); *see also* Sarah Maslin Nir, *For Westchester, 11th Time Is Charm in Fight over Fair Housing*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/nyregion/westchester-fair-housing-hud-trump.html> [<https://perma.cc/ZA9K-YEY4>] (noting that HUD had rejected Westchester’s AI ten times before finding its eleventh submission acceptable).

<sup>57</sup> Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903); *see also* Abraham, *supra* note 29, at 29–32 (describing scrutiny of the effectiveness of the AI process by the National Commission on Fair Housing and Equal Opportunity, the U.S. Government Accountability Office, and HUD itself in the lead-up to the enactment of the 2015 Rule); Thomas Silverstein, *State Land Use Regulation in the Era of*

the duty to affirmatively further fair housing as “taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.”<sup>58</sup> It replaced the AI process with the more standardized Assessment of Fair Housing (AFH), which required “program participants” to analyze fair housing data, assess fair housing issues, and identify fair housing priorities and goals in accordance with templates and data provided by HUD.<sup>59</sup> The 2015 Rule required grantees to submit an AFH every three to five years,<sup>60</sup> a process that aimed to provide a transparent and iterative reporting framework and encourage grantees to reflect on and revise their AFH goals over time.<sup>61</sup>

In 2018, HUD suspended the AFH process and, in 2020, it repealed the 2015 Rule in its entirety, eliminating any mandatory AFFH planning process and redefining AFFH certification to require only that a grantee “take any action rationally related to promoting any attribute or attributes of fair housing.”<sup>62</sup> The Biden administration brought further changes to AFFH regulations, restoring the 2015 Rule’s definition of “affirmatively furthering fair housing” in 2021,<sup>63</sup> and in January 2023 issuing a proposed

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*Affirmatively Furthering Fair Housing*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 305, 316 (2015) (noting that the *Westchester* litigation played a significant role “in motivating HUD to develop its new regulation”).

<sup>58</sup> 24 C.F.R. § 5.151 (2023) (“Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant’s activities and programs relating to housing and urban development.”).

<sup>59</sup> *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. at 42353, 42355. Unlike the AI process, the 2015 Rule also provided standards for determining the adequacy of a submitted AFH and allowed HUD to impose a range of sanctions for noncompliance, including withholding federal funds. *See id.* at 42358.

<sup>60</sup> *See id.* at 42347, 42351, 42358.

<sup>61</sup> *See Abraham, supra* note 29, at 33–34, 36–37; Heather R. Abraham, Jason Knight, Russell Weaver & Christopher Holtkamp, *Just a “Planning Rule”: Enforcing the Duty to Affirmatively Further Fair Housing*, 31 J. AFFORDABLE HOUS. & CMTY. DEV. L. 203, 210–11 (2022) (describing the 2015 Rule as a “planning tool,” rather than an “enforcement rule,” designed to integrate fair housing principles into existing planning processes).

<sup>62</sup> *Preserving Community and Neighborhood Choice*, 85 Fed. Reg. 47899, 47899, 47901, 47905 (Aug. 7, 2020) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903) (contending that the 2015 Rule exceeded the mandate of the FHA by using AFFH certification as “a vehicle to force states and localities to change zoning and other land use laws”); *see also* *Restoring Affirmatively Furthering Fair Housing Definitions and Certifications*, 86 Fed. Reg. 30779, 30783 (June 10, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

<sup>63</sup> *Restoring Affirmatively Furthering Fair Housing Definitions and Certifications*, 86 Fed. Reg. 30779; *see also* Abraham, Knight, Weaver & Holtkamp, *supra* note 61, at 206.

revised AFFH rule (2023 Proposed Rule).<sup>64</sup> The proposed rule retains the basic framework of the 2015 Rule, but replaces the AFH process with a more streamlined Equity Plan process, designed to be less burdensome, be more transparent, and contain a greater range of enforcement options than the 2015 Rule.<sup>65</sup> During this period, in the absence of a stable AFFH regulatory framework, a number of states and localities—including New York State and City—decided to voluntarily undergo the AFH planning process;<sup>66</sup> many also codified a duty to affirmatively further fair housing for state agencies and localities receiving state housing funding.<sup>67</sup>

## 2. Litigation Under the AFFH Mandate

This ebb and flow of AFFH regulation post-*Westchester* has created some uncertainty about the future exposure to litigation of localities that fail to comply with their duty to affirmatively further fair housing.<sup>68</sup> The 2015 Rule did not expressly envision enforcement beyond HUD's ability to withhold funds from noncompliant grantees,<sup>69</sup> and indeed, in the less than three years that the 2015 Rule was in effect, no lawsuits were brought attempting to enforce compliance with its procedural requirements.<sup>70</sup> Although the 2023 Proposed Rule envisions a beefed-up administrative

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<sup>64</sup> Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516 (proposed Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5, 91, 92, 93, 570, 574, 576, 903, 983).

<sup>65</sup> *Id.* at 8517–18. Under the proposed new rule, Equity Plans, like AFHs, would need to be submitted by program participants every five years to HUD for review and acceptance. *Id.* at 8571. Unlike the AFH process, this five-year submission cycle is complemented by annual progress evaluations. *Id.* at 8519. The Equity Plan aims to reduce the burden on program participants by reducing the amount of data required to respond and providing a more flexible format than the AFH process. *Id.* at 8518, 8520. Finally, the new rule seeks to increase transparency and enforcement options by making proposed Equity Plans publicly available and establishing a public complaint and compliance review mechanism. *Id.* at 8520–21, 8529.

<sup>66</sup> See, e.g., *Governor Cuomo Launches Statewide Fair Housing Initiative in Opposition to Federal Government's Ongoing Efforts to Weaken the Fair Housing Act*, N.Y. STATE HOMES & CMTY. RENEWAL (July 13, 2020), <https://hcr.ny.gov/governor-cuomo-launches-statewide-fair-housing-initiative-opposition-federal-governments-ongoing> [<https://perma.cc/4V83-DLLS>]; Amy Plitt, *NYC Launches Fair Housing Planning Process, Despite HUD Delays*, CURBED (Mar. 9, 2018, 11:50 AM), <https://ny.curbed.com/2018/3/9/17097132/new-york-fair-housing-hud-ben-carson> [<https://perma.cc/DLV8-DFSK>].

<sup>67</sup> See, e.g., N.Y. PUB. HOUS. LAW § 600 (McKinney 2023); CAL. GOV'T CODE § 8899.50 (West 2023); N.Y.C., N.Y., Local Law No. 133 (July 29, 2018).

<sup>68</sup> See generally Abraham, Knight, Weaver & Holtkamp, *supra* note 61.

<sup>69</sup> See Affirmatively Furthering Fair Housing, 88 Fed. Reg. at 8529–30.

<sup>70</sup> This is hardly surprising, given that the 2015 Rule established a cyclical three-to-five-year timeframe for AFH submission and attempted to channel compliance through a nonadversarial, collaborative process. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272, 42358 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903); see also Abraham, *supra* note 29, at 37.

complaint process channeled through HUD, the agency has made it clear that this process is intended to supplant the “unpredictable” enforcement of the AFFH mandate through litigation.<sup>71</sup>

Under the regulatory framework that existed prior to the 2015 Rule, three primary litigation vehicles existed for alleged violations of the AFFH mandate. Perhaps the most promising was the False Claims Act (FCA) claim utilized by the plaintiffs in *Westchester*.<sup>72</sup> The FCA allows private parties to bring civil actions in the name of the government against persons or entities alleged to have submitted a false claim for payment using federal revenue.<sup>73</sup> After *Westchester*, a handful of housing advocacy organizations filed suit against municipalities, with varying degrees of success, on a similar theory that an allegedly false certification that the municipality was affirmatively furthering fair housing violated the FCA.<sup>74</sup> The mixed track record of these lawsuits highlights the potentially limited utility of this theory, namely that plaintiffs were only likely to prevail in cases, like *Westchester*, where a municipality completely failed to analyze race-based fair housing impediments.<sup>75</sup>

Another litigation vehicle available to plaintiffs is to sue HUD under the Administrative Procedure Act (APA) for failing to fulfill its statutory obligation to administer its programs in a manner that affirmatively

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<sup>71</sup> Affirmatively Furthering Fair Housing, 88 Fed. Reg. at 8530.

<sup>72</sup> See *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County*, 495 F. Supp. 2d 375, 376–77 (S.D.N.Y. 2007).

<sup>73</sup> See Stephen F. Hayes, *Enforcing Civil Rights Obligations Through the False Claims Act*, 1 COLUM. J. RACE & L. 29, 32 (2011). To establish liability under the FCA, a relator must establish that (1) a false claim or false statement (2) was submitted to the United States for payment (3) with the knowledge that the claim or statement in support of the claim was false or fraudulent. 31 U.S.C. § 3729(a)(1).

<sup>74</sup> See, e.g., *United States ex rel. Mei Ling v. City of Los Angeles*, 389 F. Supp. 3d 744, 748–49, 751 (C.D. Cal. 2019) (denying the city’s motion to dismiss); *United States ex rel. Hanna v. City of Chicago*, 834 F.3d 775, 776 (7th Cir. 2016) (affirming dismissal of FCA claim because of a failure to allege circumstances of fraudulent claim with requisite particularity); *United States ex rel. Lockey v. City of Dallas*, 576 Fed. App’x 431, 432, 436 (5th Cir. 2014) (affirming dismissal of FCA claim because allegations and transactions on which claim was based had already been publicly disclosed); *United States ex rel. Freedom Unlimited, Inc. v. City of Pittsburgh*, 728 F. App’x 101, 104 (3d Cir. 2018) (reversing dismissal of FCA complaint).

<sup>75</sup> See *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County*, 668 F. Supp. 2d 548, 565 (S.D.N.Y. 2009) (finding that Westchester was required to analyze race-based impediments in conducting its AI and that, by failing to do so, its certification to HUD that it was affirmatively furthering fair housing was false); Abraham, *supra* note 29, at 28 n.105 (“Presumably, after *Westchester*, most jurisdictions easily avoid FCA liability by conducting at least a nominal analysis of fair housing by race.”). FCA liability is further limited by the public disclosure bar, which precludes suit where there has been a public disclosure of the transaction or allegations at issue. § 3730(e)(4); see also Hayes, *supra* note 73, at 34; *Lockey*, 576 Fed. App’x at 432, 435 (dismissing FCA claim that city submitted false claims for federal housing funds because allegations were “the product and outgrowth of publicly disclosed information” (quoting *United States ex rel. Fried v. W. Indep. Sch. Dist.*, 527 F.3d 439, 443 (5th Cir. 2008))).

furthering fair housing.<sup>76</sup> Under the APA, courts are authorized to “set aside agency action . . . not in accordance with law” and “compel agency action unlawfully withheld.”<sup>77</sup> In *NAACP v. Secretary of Housing & Urban Development*, the First Circuit recognized that HUD’s failure to use its grant programs to more aggressively desegregate housing in Boston may have constituted a failure “to ‘administer’ its programs ‘in a manner affirmatively to further the policies’ of ‘fair housing’” that was reviewable under the APA.<sup>78</sup> The APA does not allow for enforcement of federal duties against nonfederal entities, such as local governments.<sup>79</sup>

Another approach has been to enforce the AFFH mandate through 42 U.S.C. § 1983.<sup>80</sup> However, while there have been some notable instances in which plaintiffs have successfully sued public housing authorities under this theory for violating the AFFH mandate, courts are increasingly divided as to whether the mandate confers individual rights enforceable under § 1983.<sup>81</sup>

In the absence of a private right of action to enforce the AFFH mandate, the mixed track record of these three litigation vehicles suggests that litigation by itself may be ill-suited to achieve widespread compliance with the mandate.<sup>82</sup>

## B. *Exclusionary Zoning and Fair Housing*

By contributing to economic and racial segregation, exclusionary zoning practices would appear to be inconsistent with the AFFH

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<sup>76</sup> See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 21:7 (2023).

<sup>77</sup> 5 U.S.C. § 706.

<sup>78</sup> 817 F.2d 149, 158 (1st Cir. 1987) (quoting 42 U.S.C. §§ 3608(e)(5), 3601); see also SCHWEMM, *supra* note 76, § 21:7 (noting that courts may only set aside agency actions under the APA where they are “arbitrary and capricious” and that APA-based claims cannot result in money damages against the government).

<sup>79</sup> See *MHANY Mgmt. Inc. v. County of Nassau*, 843 F. Supp. 2d 287, 333 (E.D.N.Y. 2012) (noting that the APA provides no recourse for plaintiffs seeking relief from alleged violations of the AFFH mandate by a local government entity implementing federal law duties imposed on HUD).

<sup>80</sup> See 42 U.S.C. § 1983 (allowing plaintiffs to enforce federal constitutional and statutory rights in court).

<sup>81</sup> For examples of cases finding the AFFH mandate enforceable under § 1983, see *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33, 37–38 (D. Mass. 2002); *Thompson v. United States Dept. of Housing and Urban Development*, 348 F. Supp. 2d 398, 420–21 (D. Md. 2005); and *Wallace v. Chicago Housing Authority*, 298 F. Supp. 2d 710, 717–19 (N.D. Ill. 2003). For examples of cases finding it unenforceable, see *MHANY Management*, 843 F. Supp. 2d at 334–37; *Asylum Hill Problem Solving Revitalization Ass’n v. King*, 890 A.2d 522, 535–39 (Conn. 2006); and *Baker v. City of San Diego*, 463 F. Supp. 3d 1091, 1099 (S.D. Cal. 2020). For more on the enforceability of the AFFH mandate through § 1983 generally, see Collins, *supra* note 38, at 2162–70; and Abraham, *supra* note 29, at 28 n.105.

<sup>82</sup> See Abraham, *supra* note 29, at 59.

mandate.<sup>83</sup> Indeed, under certain circumstances, such practices have been found to run afoul of the federal FHA and state fair housing requirements.<sup>84</sup> “Exclusionary zoning” describes land use regulations that are designed to, and have the effect of, excluding persons from a community or entire zoning municipality on the basis of income or wealth.<sup>85</sup> Although economic segregation is not unconstitutional nor illegal under the FHA, it is often deeply intertwined with and, in practice, inseparable from racial segregation.<sup>86</sup> Indeed, traditional zoning has its historical roots as a tool to maintain residential segregation after explicitly racially discriminatory zoning was outlawed by the Supreme Court.<sup>87</sup> Combatting exclusionary zoning is therefore an important tool for furthering the purpose of the FHA to increase residential racial integration.<sup>88</sup>

Federal guidance emphasizes that the FHA applies to and limits local land use and zoning powers.<sup>89</sup> HUD’s *Affirmatively Furthering Fair*

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<sup>83</sup> See Jonathan Zasloff, *The Price of Equality: Fair Housing, Land Use, and Disparate Impact*, 48 COLUM. HUM. RTS. L. REV. 98, 110–12 (2017) (describing the disparate racial impact of restrictive land use regulations).

<sup>84</sup> See Stewart E. Sterk, *Incentivizing Fair Housing*, 101 B.U. L. REV. 1607, 1613 (2021).

<sup>85</sup> See J.R. Kemper, Comment Note, *Exclusionary Zoning*, 48 A.L.R.3d 1210 (1973) (“[Exclusionary zoning] has as its real purpose, or its actual result or effect, not the promotion of the health, safety, morals, or the general welfare of a community, but rather the achievement of a form of economic segregation by restricting land usage to low population density, high-cost, residential development which is in turn calculated to block, or at least limit, the influx into a community or municipality, of persons having low or moderate incomes . . .”).

<sup>86</sup> See Silverstein, *supra* note 57, at 307, 313 (describing the “deep historical connection[s]” between exclusionary zoning and “residential racial and ethnic segregation” and concluding that “economic exclusion and by extension racial exclusion were at the heart of zoning from its inception”); Audrey G. McFarlane, *The Properties of Integration: Mixed-Income Housing as Discrimination Management*, 66 UCLA L. REV. 1140, 1166 (2019) (describing the municipal zoning power as an instrument of economic segregation and exclusion that is “ultimately a pillar of residential racial segregation”).

<sup>87</sup> *Buchanan v. Warley*, 245 U.S. 60 (1917) (invalidating a Louisville zoning ordinance prohibiting non-white persons from residing on majority white blocks); see also FREUND, *supra* note 15, at 61–66; Silverstein, *supra* note 57, at 311. A few years after striking down racially discriminatory zoning, the Supreme Court endorsed race-neutral zoning schemes that separated land uses on the basis of permitted density, even though the effect, and often the intent, of such schemes was to separate poorer residents of color from white, wealthier homeowners. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); see also Silverstein, *supra* note 57, at 313.

<sup>88</sup> See Cecilia Rouse, Jared Bernstein, Helen Knudsen & Jeffery Zhang, *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, THE WHITE HOUSE (June 17, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market> [<https://perma.cc/C9AX-6M49>] (advocating for the Biden administration’s proposed Unlocking Possibilities Program to incentivize reform of exclusionary zoning on the basis that it will address racial discrimination in housing).

<sup>89</sup> See, e.g., U.S. DEP’T OF HOUS. & URB. DEV. & U.S. DEP’T OF JUST., STATE AND LOCAL LAND USE LAWS AND PRACTICES AND THE APPLICATION OF THE FAIR HOUSING ACT (2016),



*Housing Rule Guidebook*, published to provide program participants with guidelines for implementing the 2015 Rule, identified the removal of exclusionary zoning barriers and the implementation of inclusionary zoning schemes as “best practice[.]” policy strategies to affirmatively further fair housing.<sup>90</sup> Indeed, one of the central issues in subsequent litigation over the implementation of the *Westchester* consent decree was whether the decree required Westchester County to develop a strategy to address exclusionary zoning.<sup>91</sup>

There is also a significant body of federal case law holding that exclusionary zoning laws are subject to challenge under the FHA when they have a disparate impact on particular racial groups or perpetuate segregation.<sup>92</sup> For example, in *United States v. City of Black Jack*, the Eighth Circuit held that the virtually all-white city’s zoning ordinance, which completely prohibited the construction of multifamily dwellings within its municipal borders, had a racially discriminatory effect that violated the FHA by foreclosing eighty-five percent of the Black metropolitan population from living in the municipality.<sup>93</sup> Similarly, the Seventh Circuit in *Metropolitan Housing Development Corp. v. Village of Arlington Heights* concluded that the FHA obligated the municipality to refrain from implementing zoning policies that effectively foreclosed the construction of low-cost housing within its boundaries after the overwhelmingly white village refused to rezone land to allow for the development of low-income housing that would have significantly contributed to racial integration.<sup>94</sup> More recently, the Supreme Court has endorsed the cognizability of these exclusionary zoning claims, noting that “[s]uits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods

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<https://www.justice.gov/crt/page/file/909956/download> [<https://perma.cc/Y8EW-JWQT>] (noting that minimum lot size requirements and prohibitions on multifamily housing may violate the FHA insofar as they exclude persons from the municipality because of their membership in a protected class).

<sup>90</sup> U.S. DEP’T OF HOUS. & URB. DEV., AFFIRMATIVELY FURTHERING FAIR HOUSING RULE GUIDEBOOK 124–25 (2015) [hereinafter AFFH RULE GUIDEBOOK], <https://www.hud.gov/sites/dfiles/FHEO/documents/AFFH-Rule-Guidebook.pdf> [<https://perma.cc/X3W5-DGF7>].

<sup>91</sup> See *County of Westchester v. U.S. Dep’t of Hous. & Urb. Dev.*, 778 F.3d 412, 416 (2d Cir. 2015) (describing HUD’s repeated rejections of Westchester’s AI for failing to include “a satisfactory zoning analysis and plan to overcome exclusionary zoning”).

<sup>92</sup> See Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 365 (2013).

<sup>93</sup> 508 F.2d 1179, 1186–88 (8th Cir. 1974).

<sup>94</sup> 558 F.2d 1283, 1285, 1291 (7th Cir. 1977); see also *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir.) (holding that an ordinance restricting multifamily housing in an overwhelmingly white town to a largely minority “urban renewal area” disproportionately harmed racial minorities), *aff’d in part*, 488 U.S. 15 (1988).

without sufficient justification are at the heartland of disparate-impact liability.”<sup>95</sup> Although disparate impact claims under the FHA have had some success at countering exclusionary zoning policies, such litigation has had limited systemic effect.<sup>96</sup> Further, standing requirements are often burdensome and evidentiary requirements high, limiting the number of exclusionary zoning cases that can feasibly be brought and their potential deterrent effects on municipalities.<sup>97</sup>

Beginning in the 1970s, a handful of states addressed the problem of exclusionary zoning by developing comprehensive affordable housing schemes requiring municipalities to plan for their “fair share” of regional low- and moderate-income housing needs.<sup>98</sup> In New Jersey, the *Mount Laurel* doctrine emerged from a series of state supreme court decisions requiring that local land use regulations “make realistically possible” the development of each municipality’s “fair share” of the regional need for low- and moderate-income housing.<sup>99</sup> The *Mount Laurel* doctrine was later codified in New Jersey’s Fair Housing Act, which established the Council on Affordable Housing (COAH), a state agency tasked with allocating each municipality’s fair share housing obligations.<sup>100</sup> Under the Act, municipalities may voluntarily develop fair share housing plans for certification by the COAH that, upon approval, would exempt them from “builder’s remedy” lawsuits, which allow developers to bypass local zoning regulations.<sup>101</sup> Similarly, California law ensures localities consider regional affordable housing needs by requiring every municipality in the state to adopt a comprehensive plan that includes a “housing element,” a specific plan for meeting housing needs that must be updated every five

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<sup>95</sup> Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc., 576 U.S. 519, 521 (2015).

<sup>96</sup> Silverstein, *supra* note 57, at 316.

<sup>97</sup> *Id.* at 315 n.47 (“[I]dentifying plaintiffs with standing to challenge exclusionary zoning has been difficult. Affordable housing developers are often best positioned to prove that they have suffered injury as a result of land use barriers, but they may be unwilling to file lawsuits because they tend to be repeat players dependent upon municipal goodwill in order to function.”); Seicshnaydre, *supra* note 92, at 392 (“Few litigants have the resources to hire an expert to develop the kind of statistical analysis often important to establish a prima facie case of disparate impact.”).

<sup>98</sup> See John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 836–46 (2019).

<sup>99</sup> S. Burlington Cnty. NAACP v. Township of Mount Laurel, 336 A.2d 713, 724 (N.J. 1975); see also S. Burlington Cnty. NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983).

<sup>100</sup> N.J. STAT. ANN. §§ 52:27D-305, -307 (West 2023).

<sup>101</sup> *Id.* § 52:27D-309; S. Burlington Cnty. NAACP, 456 A.2d at 452–53; see also Daniel Meyler, *Is Growth Share Working for New Jersey?*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 219, 227 (2010) (“A builder who successfully demonstrated that a noncompliant municipality’s zoning was exclusionary would be granted permission to build at a higher density than would otherwise be provided so long as the builder also provided a portion of affordable housing in its construction.”).

or eight years.<sup>102</sup> Like in New Jersey, fair share requirements are allocated by a state agency, the California Department of Housing and Community Development (CAHCD), and noncompliant municipalities are subject to a builder's remedy.<sup>103</sup>

### C. *Exclusionary Zoning in New York*

Unlike New Jersey, California, and a small handful of other states, New York has not yet developed a statutory framework to curb localities' ability to adopt exclusionary zoning rules.<sup>104</sup> Instead, New York's Court of Appeals has developed a judicial doctrine requiring local bodies enacting zoning laws to consider regional housing needs,<sup>105</sup> but the doctrine has been largely ineffective as a prohibition on exclusionary zoning practices.<sup>106</sup>

This doctrine was announced in *Berenson v. Town of New Castle*, which established a two-part test to determine the validity of zoning ordinances: (1) "whether the board has provided a properly balanced and well ordered plan for the community" and (2) whether consideration has been given to regional housing needs.<sup>107</sup> However, the subsequent procedural history of the case makes the limitations of New York's approach more evident. On remand, the New York Supreme Court invalidated the town's ordinance, which completely excluded multifamily development, and ordered that the ordinance be amended to allow for the construction of 3,500 housing units over the next ten years and plaintiff's land be rezoned at a density of eight units per acre.<sup>108</sup> However, both this judicially imposed "fair share" scheme and the minimum density requirement were later reversed by the Appellate Division, resulting in the construction of luxury condominiums on the plaintiff's land.<sup>109</sup> Subsequent Court of Appeals cases clarified the standards governing the

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<sup>102</sup> CAL. GOV'T CODE §§ 65300, 65302, 65583 (West 2023); see also *id.* § 65588(e)(3) (providing a schedule for the revision of housing elements that depends on the type of municipality).

<sup>103</sup> *Id.* §§ 65584.01, 65583(g).

<sup>104</sup> Strategies adopted by other states include directly preempting certain municipalities adopting particular land use restrictions (e.g., Oregon), creating state-level permitting processes for affordable housing developments (e.g., Massachusetts and Connecticut), and variations on the "fair share" requirements of California and New Jersey (e.g., Pennsylvania). For an overview of various state-level approaches see KAZIS, *supra* note 3, at 21–40.

<sup>105</sup> See *Berenson v. Town of New Castle*, 341 N.E.2d 236, 242 (N.Y. 1975).

<sup>106</sup> See *Nolon & Zezula*, *supra* note 54, at 2–4; KAZIS, *supra* note 3, at 20–21.

<sup>107</sup> 341 N.E.2d at 242.

<sup>108</sup> See *Berenson v. Town of New Castle*, 415 N.Y.S.2d 669, 673 (App. Div. 1979).

<sup>109</sup> *Id.* at 678 (holding that the New York Supreme Court's imposition of "fair share" and density requirements was "unsupported by case law and contrary to the public considerations embodied therein"); *Nolon & Zezula*, *supra* note 54, at 4.

validity of zoning ordinances under the *Berenson* doctrine, and cemented the judiciary's reluctance to interfere with the legislative judgment of localities except in the most egregious cases.<sup>110</sup> In the absence of any robust statutory or judicial prohibition on exclusionary zoning in New York, challenges to overly restrictive zoning have been essentially limited to those available under the FHA.<sup>111</sup>

## II. ANALYSIS OF THE NEW YORK AFFH LAW

There is widespread recognition that housing discrimination and residential segregation remain deeply pervasive in New York.<sup>112</sup> On December 21, 2021, Governor Hochul signed a package of nine bills combatting housing discrimination into law.<sup>113</sup> The package was designed to address disheartening findings of widespread discrimination by the real estate industry in Long Island that had been identified in an

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<sup>110</sup> See, e.g., *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville*, 414 N.E.2d 680 (N.Y. 1980) (sustaining the validity of five-acre minimum lot zoning). This judicial reticence was first expressed in *Berenson* itself, in which the court, noting that zoning “is essentially a legislative act,” expressed its unwillingness to take on the role of regional planner. 341 N.E.2d at 243. Given the lack of any legislative guidance as to how to measure a municipality’s “fair share” of regional housing needs, how to define the region in question, or who comprises the class of those in need of housing, New York courts have thus far proven unwilling to provide an affirmative requirement that municipalities zone to allow for the construction of affordable housing. See *Suffolk Hous. Servs. v. Town of Brookhaven*, 491 N.Y.S.2d 396, 402 (App. Div. 1985) (noting that an obligation for municipalities to zone for low-to-moderate-income housing “would require us to work a change of historic proportions in the development of New York zoning law, a step which we respectfully decline to take”); see also *Nolon & Zezula, supra* note 54, at 6; *John R. Nolon, A Comparative Analysis of New Jersey’s Mount Laurel Cases with the Berenson Cases in New York*, 4 PACE ENV’T L. REV. 3, 4–5 (1986).

<sup>111</sup> See *supra* Section I.B. New York has also enacted state fair housing laws prohibiting discrimination in the sale, rental, or other provision of housing. N.Y. EXEC. LAW § 296(5)(a)(1) (McKinney 2023). New York’s Human Rights Law (HRL) largely mirrors the federal FHA, although it does expand its coverage to a number of protected categories not covered by the federal FHA: creed, sexual orientation, gender identity or expression, military status, age, and marital status. *Id.* Likely because it is largely duplicative of federal law, the HRL had played a negligible role in exclusionary zoning litigation in New York. *But see* *Broadway Triangle Cmty. Coal. v. Bloomberg*, 941 N.Y.S.2d 831, 834 n.5 (N.Y. Sup. Ct. 2011) (involving parallel claims under the FHA, the Equal Protection Clause, the Civil Rights Act, the HRL, and the New York City Human Rights Law challenging the alleged disparate racial impact of a rezoning action).

<sup>112</sup> See, e.g., *Elaine Gross, Even in N.Y., a Shameful Legacy of Housing Discrimination to Unravel*, N.Y. DAILY NEWS (Apr. 6, 2021, 3:00 PM), <https://www.nydailynews.com/opinion/nyoped-even-in-ny-a-shameful-legacy-of-housing-discrimination-20210406-3kpue6lqpzdvnvgfhdyyiqeti-story.html> [<https://perma.cc/826K-6FZH>].

<sup>113</sup> *Governor Hochul Signs Legislative Package to Combat Housing Discrimination*, GOVERNOR KATHY HOCHUL (Dec. 21, 2021), <https://www.governor.ny.gov/news/governor-hochul-signs-legislative-package-combat-housing-discrimination> [<https://perma.cc/79WZ-SADW>].

investigative report by *Newsday*.<sup>114</sup> *Newsday* found that real estate agents routinely directed minority buyers to predominantly minority communities and white buyers to white communities, further solidifying Long Island’s already deeply entrenched residential segregation.<sup>115</sup> The stubborn persistence of discriminatory housing practices led to calls from public officials and housing advocates for further legislative action to **strengthen the state’s fair housing laws and enforcement**.<sup>116</sup> The resulting legislative package included additional antidiscrimination training requirements for brokers, increasing fines against those found violating antidiscrimination laws, and creating an obligation that all state and local agencies administering housing programs must affirmatively further fair housing.<sup>117</sup>

### A. *Text and Legislative History*

New York’s AFFH law imposes an obligation on all state and local agencies administering housing programs or enforcing state housing laws and any localities that receive state housing funds to affirmatively further fair housing.<sup>118</sup> The law requires “covered housing agencies,” which includes any state department, agency, or office administering housing or community development programs, or any locality receiving funds from the state for such programs, to administer housing and community development programs and activities “in a manner that affirmatively furthers fair housing.”<sup>119</sup> The law defines affirmatively furthering fair housing as taking “meaningful actions” to:

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<sup>114</sup> *Id.*; see also Ann Choi, Keith Herbert & Olivia Winslow, *Long Island Divided*, NEWSDAY (Nov. 17, 2019), <https://projects.newsday.com/long-island/real-estate-agents-investigation> [<https://perma.cc/M5FB-4UEZ>].

<sup>115</sup> See Olivia Winslow, *Dividing Lines, Visible and Invisible*, NEWSDAY (Nov. 17, 2019), <https://projects.newsday.com/long-island/segregation-real-estate-history> [<https://perma.cc/TYE7-29V5>] (noting that Long Island is “one of the most segregated suburbs in America”).

<sup>116</sup> See Craig Waletzko, *An Open Letter to Governor Cuomo*, FAIR HOUS. JUST. CTR. (Jan. 30, 2020), <https://www.fairhousingjustice.org/newsletters/january-30-2020> [<https://perma.cc/W4NC-7DSY>] (calling on then-Governor Andrew Cuomo to strengthen the state HRL by expressly allowing for vicarious liability in housing discrimination actions, including persons with conviction records among those protected by antidiscrimination laws, creating a state obligation to affirmatively further fair housing, and explicitly prohibiting discriminatory actions by local public agencies, including through land use and zoning decisions).

<sup>117</sup> Craig Waletzko, *New York Fair Housing Network Responds to Enactment of New Laws*, FAIR HOUS. JUST. CTR. (Jan. 7, 2022), <https://www.fairhousingjustice.org/newsletters/opening-acts-january-7-2022> [<https://perma.cc/V6NH-ZA99>].

<sup>118</sup> N.Y. PUB. HOUS. LAW § 600 (McKinney 2023); *Governor Hochul Signs Legislative Package to Combat Housing Discrimination*, *supra* note 113.

<sup>119</sup> PUB. HOUS. § 600.

- (a) identify and overcome patterns of residential segregation and housing discrimination;
- (b) eradicate racially or ethnically concentrated areas of poverty;
- (c) reduce disparities in access to opportunity;
- (d) eliminate disproportionate housing needs;
- (e) provide the public reasonable and regular opportunities to comment on fair housing issues and participate in the development and advancement of affirmative fair housing policy; and
- (f) encourage and maintain compliance with article fifteen of the executive law and any other applicable anti-discrimination or fair housing law.<sup>120</sup>

It further provides that covered agencies “shall take no action that is materially inconsistent with the obligation [to affirmatively further fair housing]”<sup>121</sup> and requires New York State Homes and Community Renewal (NYSHCR)<sup>122</sup> to issue a report every five years detailing “any significant initiatives, policies, or programs undertaken in furtherance of fair housing and any recommendations for improving the state of fair housing in New York.”<sup>123</sup>

The law’s legislative history indicates that it seeks to address the harmful effects of decades of pervasive patterns of housing discrimination in the state by ensuring not just that the state and its localities no longer participate in discriminatory practices, but that they “actively seek to create more diverse, inclusive communities.”<sup>124</sup> In a statement to the press, Senator Brian P. Kavanagh similarly pointed to the

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<sup>120</sup> *Id.* § 600(3).

<sup>121</sup> *Id.* § 600(4).

<sup>122</sup> NYSHCR is the state’s affordable housing agency, defining its mission as “build[ing], preserv[ing], and protect[ing] affordable housing and increas[ing] homeownership throughout New York State.” *About HCR*, N.Y. STATE HOMES & CMTY. RENEWAL, <https://hcr.ny.gov/about-hcr> [<https://perma.cc/CFN6-YJFX>].

<sup>123</sup> PUB. HOUS. § 600(5)(a). The law also creates an interim reporting requirement in years two and four, in which NYSHCR must explain “any progress or significant changes” since the full report and detail “any new significant initiatives, policies, or programs that have been undertaken in furtherance of fair housing.” *Id.* § 600(5)(b). NYSHCR issued a draft of its inaugural report in April 2023. N.Y. STATE HOMES & CMTY. RENEWAL, FAIR HOUSING MATTERS NY: AN ASSESSMENT OF FAIR HOUSING IN NEW YORK STATE (2023), <https://hcr.ny.gov/system/files/documents/2023/05/2023-fair-housing-matters-ny-public-cmt-draft-june-16-deadline.pdf> [<https://perma.cc/A2CB-VFGW>].

<sup>124</sup> SPONSOR MEMO, S. 1353-244, Reg. Sess. (2021), <https://www.nysenate.gov/legislation/bills/2021/s1353/amendment/a> [<https://perma.cc/8GEY-42GP>]. The Senate Sponsor Memo further states that the law imposes an obligation on the state and localities “to overcome historic patterns of segregation, achieve truly balanced and integrated living patterns, promote fair housing choice, and foster neighborhoods that are free from discrimination.” *Id.*

legacy of “decades of systemic inequality and racism in housing, through redlining, disinvestment, and overt discrimination,” stating that the law seeks to overcome this by “affirmatively promot[ing] equality, fairness, and integration in housing.”<sup>125</sup>

### B. *Comparison with Other AFFH Mandates*

In many respects, New York’s AFFH law parallels the language and substantive content of the AFFH definition from the federal rule.<sup>126</sup> Like the federal AFFH rule, New York’s law provides a definition of “affirmatively further[ing] fair housing” as taking “meaningful actions” that go beyond simply combatting housing discrimination by instead seeking to address residential segregation, concentrated poverty, and disparities in access to housing and opportunity, and ensuring that funding recipients comply with the antidiscrimination mandates of fair housing and civil rights laws.<sup>127</sup> Further, the New York law requires opportunities for public comment and participation in the development and advancement of fair housing policy, a provision that parallels the 2023 Proposed Rule’s requirement that community engagement play a key role in the development of Equity Plans.<sup>128</sup> Additionally, like the federal AFFH mandate, the New York AFFH law does not provide for a private right of action. Enforcement presumably lies only with the state’s ability to withhold funding from covered agencies.

However, unlike the 2023 Proposed Rule, in which each grantee’s Equity Plan is subject to review and acceptance by HUD, the New York AFFH law contains no such reporting framework for covered agencies.<sup>129</sup> Further, while HUD, following the promulgation of the 2015 Rule,

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<sup>125</sup> Brian Kavanagh, *Governor Hochul Signs Legislative Package to Combat Housing Discrimination*, N.Y. STATE SENATE (Dec. 22, 2021), <https://web.archive.org/web/20230510190441/https://www.nysenate.gov/newsroom/press-releases/brian-kavanagh/governor-hochul-signs-legislative-package-combat-housing>.

<sup>126</sup> See 24 C.F.R. § 5.151 (2023).

<sup>127</sup> See PUB. HOUS. § 600(3).

<sup>128</sup> Compare *id.* § 600(3)(e) (requiring “covered housing agencies” to “provide the public reasonable and regular opportunities to comment on fair housing issues and participate in the development and advancement of affirmative fair housing policy”), with *Affirmatively Furthering Fair Housing*, 88 Fed. Reg. 8516, 8537 (proposed Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5, 91, 92, 93, 570, 574, 576, 903, 983) (“The community engagement process is intended to be a robust discussion across all sectors of the community so that program participants can make informed choices about how to overcome existing fair housing issues, such as barriers to fair housing choice, and make equitable funding decisions.”).

<sup>129</sup> Compare *Affirmatively Furthering Fair Housing*, 88 Fed. Reg. at 8537–38, with PUB. HOUS. § 600.

provided extensive guidance, including within the rule itself,<sup>130</sup> through Assessment Tools for local governments,<sup>131</sup> public housing agencies,<sup>132</sup> and states,<sup>133</sup> and in an AFFH Rule Guidebook,<sup>134</sup> New York State has produced no comparable guidance.

Compare this to California, which, like New York, enacted its own AFFH law in light of the federal government's rollback of the 2015 Rule.<sup>135</sup> California's law also closely mirrors the language of the federal AFFH rule.<sup>136</sup> Unlike the federal and New York AFFH mandates, which apply only to those entities receiving funding for housing programs, California's mandate expressly applies to all localities in the state.<sup>137</sup> Further, California has incorporated its AFFH mandate into the state's existing housing element planning process, which every five or eight years requires local governments to submit housing plans to the state that "make adequate provision for the existing and projected needs of all economic segments of the community."<sup>138</sup> From January 1, 2021, any such plans submitted to the state must include a program to affirmatively further fair housing.<sup>139</sup> Moreover, unlike the federal AFFH mandate and New York's AFFH law, California's housing element law contains a private right of action, allowing for mandamus relief to enforce localities' compliance with the law's requirements.<sup>140</sup> By coupling its AFFH

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<sup>130</sup> Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42271, 42355–57 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

<sup>131</sup> U.S. DEP'T OF HOUS. & URB. DEV., ASSESSMENT OF FAIR HOUSING TOOL FOR LOCAL GOVERNMENTS (2017), <https://www.hud.gov/sites/dfiles/FHEO/documents/Assessment-of-Fair-Housing-Tool-For-Local-Governments-2017-01.pdf> [<https://perma.cc/XGV6-93L2>].

<sup>132</sup> U.S. DEP'T OF HOUS. & URB. DEV., ASSESSMENT OF FAIR HOUSING TOOL FOR PUBLIC HOUSING AGENCIES (2017), <https://www.hud.gov/sites/dfiles/FHEO/documents/Assessment-of-Fair-Housing-Tool-For-Public-Housing-Agencies-2017-01.pdf> [<https://perma.cc/JLV8-RM3A>].

<sup>133</sup> U.S. DEP'T OF HOUS. & URB. DEV., ASSESSMENT OF FAIR HOUSING TOOL FOR STATES AND INSULAR AREAS (2016), <https://www.hud.gov/sites/dfiles/FHEO/documents/AFH-Assessment-Tool-for-States-and-Insular-Areas-2016-09.pdf> [<https://perma.cc/7TS4-VER6>].

<sup>134</sup> AFFH RULE GUIDEBOOK, *supra* note 90.

<sup>135</sup> Renee M. Williams, *Affirmatively Further Fair Housing: California's Response to a Changing Federal Landscape*, 28 J. AFFORDABLE HOUS. & CMTY. DEV. L. 387, 392 (2019).

<sup>136</sup> The law requires "public agenc[ies]" to take "meaningful actions" to "address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws." CAL. GOV'T CODE § 8899.50(a)(1) (West 2023).

<sup>137</sup> *Id.* § 8899.50(a)(2)(B); *see also* Williams, *supra* note 135, at 394–95.

<sup>138</sup> § 65583; *see also id.* § 65588(e)(3).

<sup>139</sup> *Id.* § 65583(c)(10)(A), (C).

<sup>140</sup> *See id.* §§ 65583(g)(3), (h), 65751. The failure of a municipality to adopt a housing element in compliance with the state housing element law can result in a court order requiring the municipality to approve proposed developments containing affordable housing. PUB. INT. L.



mandate with the state-level requirement that localities plan for regional housing needs, California, unlike New York, provides a preexisting framework through which to measure compliance and an enforcement mechanism tied to a broader planning process.<sup>141</sup>

### C. *Application and Scope of the New York AFFH Law*

The question remains as to whether the New York AFFH law meaningfully expands the scope of its obligation to entities beyond those covered by the federal mandate. The New York statutory obligation applies to “any state department, agency or office administering housing and community development laws or . . . programs.”<sup>142</sup> This includes NYSHCR and the various housing agencies within HCR, such as the Division of Housing and Community Renewal, the Housing Finance Agency, the Affordable Housing Corporation, the Housing Trust Fund Corporation, the Municipal Bond Bank Agency, and the State of New York Mortgage Agency.<sup>143</sup> The statute further notes that the obligation covers “any public housing agency” and “any localities receiving funds from [the state] to administer programs or activities related to housing and community development.”<sup>144</sup>

Perhaps the most obvious impact of the new AFFH law will be on NYSHCR itself.<sup>145</sup> In the current absence of a federally mandated fair housing planning process, the statute codifies NYSHCR’s obligation to, at the very least, produce a report evaluating the state’s compliance with the AFFH law.<sup>146</sup> Moreover, it imposes a direct obligation on NYSHCR and its various subsidiary agencies to set policies that ensure its actions will affirmatively further fair housing.<sup>147</sup> However, this obligation likely does not extend far beyond that already imposed by the federal AFFH mandate because, as a statewide public housing agency and a recipient of

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PROJECT, CALIFORNIA HOUSING ELEMENT MANUAL: LAW, ADVOCACY, AND LITIGATION 24–25 (4th ed. 2019), <http://www.pilpca.org/wp-content/uploads/2019/04/PILP-California-Housing-Element-Manual-Law-Advocacy-and-Litigation-4th-Edition-January-2019.pdf> [<https://perma.cc/2HV6-AT3V>]; see also § 65755.

<sup>141</sup> See Williams, *supra* note 135, at 394–96.

<sup>142</sup> N.Y. PUB. HOUS. LAW § 600(1) (McKinney 2023).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> As New York State’s affordable housing agency, NYSHCR administers programs such as multifamily rental housing financing, low-interest mortgages to first-time homebuyers, grants for housing rehabilitation and community development, rent regulation enforcement, and housing vouchers. *About HCR*, *supra* note 122.

<sup>146</sup> PUB. HOUS. § 600(5)(a).

<sup>147</sup> See *id.* § 600(1).

Community Development Block Grant (CDBG) funding, NYSHCR is a “[p]rogram participant[]” required to certify that it is complying with its obligation to affirmatively further fair housing under federal AFFH regulations.<sup>148</sup> However, NYSHCR does provide funding directly to municipalities through at least two programs: the Affordable Home Ownership Development Program (AHOD Program)<sup>149</sup> and New York Main Street Grants.<sup>150</sup> These programs capture a small number of municipalities that do not receive funding from HUD and so are not subject to the federal AFFH mandate, but would be subject to the state AFFH law.<sup>151</sup>

Despite the fact that the New York AFFH law slightly expands the number of localities covered by an obligation to affirmatively further fair housing, its failure to provide (1) a reporting framework for covered agencies, (2) a private right of action, and (3) substantive guidelines through which to measure compliance makes it decidedly unclear how the law will be enforced.

### III. PROPOSAL

#### A. *Using New York’s AFFH Law to Address Exclusionary Zoning*

The New York AFFH law is likely of limited utility as a litigation vehicle. Although the history of federal AFFH enforcement suggests that **the law’s lack of a private right of action** may not be a complete bar to litigation under the statute,<sup>152</sup> a lack of viable alternative state law causes of action seriously hampers this prospect. Indeed, to date there has been

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<sup>148</sup> 24 C.F.R. § 5.152(d)(2) (2023); *see also* N.Y. STATE HOMES & CMTY. RENEWAL, STATEWIDE SECTION 8 VOUCHER PROGRAM, intro., at 1 (2021), <https://hcr.ny.gov/system/files/documents/2021/12/admin-plan-version-2021.1.pdf> [<https://perma.cc/W59Y-3KF5>] (noting that by implementing HUD’s Section 8 Housing Choice Voucher Program, NYSHCR acts as a public housing agency).

<sup>149</sup> *Affordable Home Ownership Development*, N.Y. STATE HOMES & CMTY. RENEWAL, <https://hcr.ny.gov/affordable-home-ownership-development> [<https://perma.cc/TJE5-GTDJ>].

<sup>150</sup> *New York Main Street*, N.Y. STATE HOMES & CMTY. RENEWAL, <https://hcr.ny.gov/new-york-main-street> [<https://perma.cc/U5RN-3SZZ>].

<sup>151</sup> As of 2021, fifty-one municipalities in New York State receive CDBG, ESG, HOME, or HOPWA grants, and so are subject to the federal AFFH mandate. *See Find a Grantee*, HUD EXCH., <https://www.hudexchange.info/grantees/find-a-grantee> [<https://perma.cc/P5RP-Q2QX>] (filter by New York, CDBG, ESG, HOME, and HOPWA). NYSHCR’s current list of New York State Affordable Housing Corporation (the agency that administers the AHOD Program) grantees includes fifteen municipalities that are not currently subject to the federal AFFH mandate. *See Affordable Housing Corporation*, N.Y. STATE HOMES & CMTY. RENEWAL, <https://hcr.ny.gov/affordable-housing-corporation-0> [<https://perma.cc/UF3T-MMHX>].

<sup>152</sup> *See supra* Section I.A.2.

no litigation brought under the New York AFFH law. Further, despite the clear relevance of local zoning laws to compliance with state and federal AFFH mandates,<sup>153</sup> New York's AFFH law provides little that would strengthen a prospective litigant's ability to target exclusionary zoning ordinances beyond the relatively weak protections already available under the *Berenson* doctrine.<sup>154</sup> Though three state law remedies might seem like potential candidates for state AFFH law enforcement—the New York False Claims Act,<sup>155</sup> declaratory judgment actions,<sup>156</sup> and Article 78 proceedings<sup>157</sup>—each possess significant limitations to their potential use as AFFH enforcement vehicles.

First, although New York is one of a number of states that has enacted its own False Claims Act (NYFCA), it is not suitable for bringing claims against municipalities like those that have been brought under the federal FCA.<sup>158</sup> The NYFCA allows any person to bring qui tam actions on behalf of the state or a local government.<sup>159</sup> It imposes liability for making “a false or fraudulent claim”<sup>160</sup> against “an officer, employee or agent of the state or a local government.”<sup>161</sup> Although modeled on the federal FCA, the NYFCA differs in one crucial respect: it does not permit civil actions against federal, state, or local governments, or against government officers and employees.<sup>162</sup> This significantly limits the scope of state FCA liability as compared to the federal FCA and forecloses the use of the NYFCA against local governments for failing to comply with their state obligation to affirmatively further fair housing.<sup>163</sup>

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<sup>153</sup> See *supra* Section I.B.

<sup>154</sup> See *supra* Section I.C.

<sup>155</sup> N.Y. STATE FIN. LAW §§ 187–194 (McKinney 2023).

<sup>156</sup> N.Y. C.P.L.R. 3001 (McKinney 2023).

<sup>157</sup> *Id.* 7801.

<sup>158</sup> See *supra* notes 72–75 and accompanying text.

<sup>159</sup> STATE FIN. § 190(2)(a) (“Any person may bring a qui tam civil action . . . on behalf of the person and the people of the state of New York or a local government.”). “Qui tam” actions are suits brought by private litigants on behalf of the government under which the qui tam plaintiff is entitled to recover a portion of the penalty. See Comment, *Qui Tam Suits Under the Federal False Claims Act: Tool of the Private Litigant in Public Actions*, 67 NW. U. L. REV. 446, 449–50 (1972).

<sup>160</sup> STATE FIN. § 189(1)(a).

<sup>161</sup> *Id.* § 188(1)(a)(i).

<sup>162</sup> *Id.* § 190(1), (2)(a) (“No action may be filed pursuant to this subdivision against the federal government, the state or a local government, or any officer or employee thereof acting in his or her official capacity.”).

<sup>163</sup> See Michael A. Morse, Bryan S. Neft & Peter S. Wolff, *Protecting the Empire: A Practitioner's Primer on the New York False Claims Act*, N.Y. ST. BAR J., Feb. 2010, at 22, 24 (noting that the NYFCA's local government immunity provision “eliminates this potentially significant source of false claims act recovery”).

Second, declaratory judgment actions enable litigants to obtain a judicial declaration of their rights.<sup>164</sup> Such actions are frequently employed to challenge the validity of zoning ordinances, either on state constitutional grounds,<sup>165</sup> or on the ground that they conflict with state law.<sup>166</sup> Although no New York State court has explicitly spoken on the question of whether a declaratory judgment action to enforce the obligation to affirmatively further fair housing against a municipality is cognizable, the Eastern District of New York in *MHANY Management Inc. v. County of Nassau* found that, while plaintiffs had standing to bring a declaratory judgment action against a locality, the plaintiffs' AFFH claim had to be dismissed due to lack of an express or implied right of action.<sup>167</sup>

Third, CPLR Article 78 proceedings are a mechanism for judicial review of actions of administrative agencies or officers.<sup>168</sup> Such proceedings are the principal method of securing judicial review of administrative conduct related to land use and zoning.<sup>169</sup> New York law provides for Article 78 review of municipal administrative actions by parties “aggrieved by any decision of the board of appeals or any officer, department, board or bureau of the [municipality].”<sup>170</sup>

The only case that has been brought in New York state court alleging that a municipality had failed to fulfill its federal duty to affirmatively further fair housing provides limited guidance as to how a court might respond to either a declaratory judgment action or Article 78 proceeding against a municipality alleging that a zoning ordinance or action violated the state AFFH law.<sup>171</sup> *Churches United for Fair Housing, Inc. v. de Blasio*

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<sup>164</sup> N.Y. C.P.L.R. 3001 (McKinney 2023).

<sup>165</sup> See, e.g., *Berenson v. Town of New Castle*, 341 N.E.2d 236, 239 (N.Y. 1975) (declaratory judgment action to invalidate zoning ordinance that totally prohibits multifamily development on the basis that it amounted to a deprivation of the constitutional rights of current and potential town residents). Indeed, in New York, a declaratory judgment action is the primary affirmative litigation vehicle to challenge the facial validity of a zoning ordinance. 3 PATRICIA E. SALKIN, *NEW YORK ZONING LAW & PRACTICE* § 35:01 (4th ed. 2023)

<sup>166</sup> See, e.g., *Abbott House v. Village of Tarrytown*, 312 N.Y.S.2d 841, 843 (App. Div. 1970) (declaratory judgment action to invalidate zoning ordinance prohibiting use of a particular parcel as a home for neglected children on the basis that it thwarted the state's policy of providing for neglected children and conflicts with and hinders state law).

<sup>167</sup> 843 F. Supp. 2d 287, 312, 336 (E.D.N.Y. 2012); see also C.P.L.R. 3001 (“The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.”).

<sup>168</sup> C.P.L.R. 7801–7806.

<sup>169</sup> 3 SALKIN, *supra* note 165, § 33:02.

<sup>170</sup> N.Y. GEN. CITY LAW § 81-c(1) (McKinney 2023).

<sup>171</sup> See *Churches United for Fair Hous., Inc. v. De Blasio*, 119 N.Y.S.3d 467, 468–69 (App. Div. 2020).

was brought as a hybrid declaratory judgment and Article 78 proceeding challenging New York City's failure to evaluate the possible effects on racial segregation before rezoning a parcel of land.<sup>172</sup> The case was dismissed at the trial court stage on the grounds that the federal AFFH mandate lacked an underlying private right of action and was "too 'vague and amorphous' to be enforceable."<sup>173</sup> Given New York state courts' reluctance in cases following *Berenson* to take on the role of "regional planner" and the trial court's concerns in *Churches United* about the lack of parameters around the federal AFFH mandate, it seems likely that in the absence of clear standards about how the state duty to affirmatively further fair housing applies to local zoning regulations, courts will be similarly hesitant to declare that a municipal zoning ordinance violates the New York AFFH law.<sup>174</sup>

The trial court in *Churches United* also noted that an Article 78 proceeding is not an appropriate vehicle to challenge violations of the federal AFFH mandate due to the lack of a private right of action.<sup>175</sup> Yet, as the plaintiffs argued, under New York law, Article 78 relief should only be denied "where there is clear legislative intent negating review."<sup>176</sup> Further, a number of federal courts have found the AFFH mandate enforceable under § 1983.<sup>177</sup> On appeal, the Appellate Division, perhaps in recognition of this ambiguity, affirmed the trial court's dismissal of the AFFH mandate claim on substantive grounds only, noting that, "Assuming, arguendo, that petitioners may bring a CPLR article 78 proceeding to challenge the City's action," the city had met its obligation to affirmatively further fair housing.<sup>178</sup> The Appellate Division did not comment on the viability of plaintiffs' declaratory judgment action.

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<sup>172</sup> *Churches United for Fair Hous., Inc. v. De Blasio*, No. 151786/2018, 2018 WL 3646976, at \*4–5 (N.Y. Sup. Ct. Aug. 1, 2018).

<sup>173</sup> *Id.* at \*11, \*15 (quoting *Blessing v. Freestone*, 520 U.S. 329, 338 (1997)). The court further notes that the statutory provision containing the AFFH mandate "does not define HUD's duty to further fair housing or place any parameters on it" as an additional reason that it does not "confer enforceable rights on individuals like plaintiffs." *Id.* at \*11.

<sup>174</sup> *Berenson v. Town of New Castle*, 341 N.E.2d 236, 243 (N.Y. 1975); *Churches United*, 2018 WL 3646976, at \*11–12 (noting that courts do not have the "authority, resources or expertise" to oversee every "policy, practice, or act" of every grantee subject to the federal AFFH mandate (quoting *Thomas v. Butzen*, No. 04 C 5555, 2005 WL 2387676, at \*11 (N.D. Ill. Sept. 26, 2005))).

<sup>175</sup> *Churches United*, 2018 WL 3646976, at \*13.

<sup>176</sup> Memorandum of Law in Further Support of Petition and in Further Support of Motion for Preliminary Injunction and in Opposition to Defendants' Motions to Dismiss at 6, *Churches United*, 2018 WL 3646976 (No. 151786/2018) (quoting *Dairylea Coop., Inc. v. Walkley*, 339 N.E.2d 865, 868 (N.Y. 1975)) ("Article 78 is a broad catch-all proceeding allowing petitioners to ensure that governmental decisions that affect them directly are both legal and rational.").

<sup>177</sup> See sources cited *supra* note 81.

<sup>178</sup> *Churches United for Fair Hous., Inc. v. De Blasio*, 119 N.Y.S.3d 467, 469 (App. Div. 2020).

Although the Appellate Division's ambivalence suggests that using Article 78 relief to enforce a municipality's federal or state obligation to affirmatively further fair housing may not be *entirely* foreclosed, there are nonetheless significant limits on its potential to challenge exclusionary zoning ordinances. For one, Article 78 proceedings may not be used to challenge legislative actions, such as amendments to zoning ordinances.<sup>179</sup> As such, Article 78 proceedings are only available to challenge piecemeal land use changes that do not require local legislative action, such as use variances or the administrative proceedings leading up to zoning amendments, rather than exclusionary zoning ordinances themselves.<sup>180</sup> Article 78 proceedings challenging zoning decisions also have strict standing requirements and a thirty-day statute of limitations from the date of the decision being challenged.<sup>181</sup>

Rather than a vehicle to be used against municipalities, Article 78 may be better suited to challenge NYSHCR itself for failing to comply with its obligation to affirmatively further fair housing.<sup>182</sup> For instance, a litigant may plausibly allege that NYSHCR failed to administer its programs in a manner that affirmatively furthered fair housing if it provided CDBG funds to a municipality that engaged in exclusionary zoning practices.

### B. *The Need for Further State Action*

With no private right of action and a lack of substantive standards by which to measure compliance, it is difficult to see the courts playing a meaningful role in enforcing the New York AFFH law.<sup>183</sup> Further, the law's failure to include a reporting requirement creates a lack of

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<sup>179</sup> See, e.g., *Inland W. Coram Plaza, LLC v. Town of Brookhaven*, 836 N.Y.S.2d 493 (Sup. Ct. 2007) (holding that a rezoning by a town board is a legislative function, not subject to challenge by an Article 78 proceeding).

<sup>180</sup> See, e.g., *Emmett v. Town of Edmeston*, 771 N.Y.S.2d 568 (App. Div. 2004) (Article 78 proceeding challenging town's Zoning Board of Appeals' granting of a variance).

<sup>181</sup> See 3 SALKIN, *supra* note 165, § 33:06; *Blumberg v. Hill*, 119 N.Y.S.2d 855, 857 (Sup. Ct. 1953) (“[T]o be aggrieved by a decision of a zoning board of appeals so as to be entitled to have it reviewed, one must have a specific, personal and legal interest in the subject matter thereof as distinguished from a general interest such as is theoretically shared by all members of a community.”); N.Y. GEN. CITY LAW § 38 (McKinney 2023) (providing for a thirty-day statute of limitations for Article 78 proceedings against municipal administrative bodies). *But see* N.Y. C.P.L.R. 217(1) (McKinney 2023) (explaining that Article 78 proceedings have a four-month statute of limitations “[u]nless a shorter time is provided in the law authorizing the proceeding”).

<sup>182</sup> See *Adler ex rel. Adler v. Educ. Dep't of the State of N.Y.*, 760 F.2d 454, 458 (2d Cir. 1985) (“Article 78 review closely resembles review under the federal Administrative Procedure Act . . . .”); *cf. supra* notes 76–79 and accompanying text.

<sup>183</sup> See *supra* notes 173–74 and accompanying text.

transparency and accountability that obfuscates compliance with the law.<sup>184</sup> In order to effectively address the exclusionary zoning policies that continue to contribute to residential segregation and constitute a significant barrier to fair housing in New York State, the legislature must step in to (1) bolster the New York AFFH law and (2) implement statewide zoning reforms.

### 1. Bolstering the New York AFFH Law

The New York AFFH law should be amended to create a private right of action and reporting framework for all covered agencies, and to more clearly define what constitutes compliance with the law. This would allow for more effective enforcement of the law, ensure that state and local policymakers are properly considering the effects of a wide range of housing and land use policies, create public accountability and transparency, and further the stated goal of the New York AFFH law “to create more diverse, inclusive communities.”<sup>185</sup>

First, the law should be amended to create a private right of action allowing private enforcement of the New York AFFH law against local jurisdictions receiving housing funds from the state. Without a private right of action, enforcement of the law lies solely in the hands of the state, limiting accountability and compliance.<sup>186</sup> Given that the state AFFH law has a weaker reporting requirement than the federal AFFH mandate did even prior to the enactment of the 2015 Rule, a private right of action would be essential to ensure that the state and entities receiving state housing funds do not shirk their obligation to affirmatively further fair housing.<sup>187</sup>

Second, a robust reporting framework for covered entities, similar to that provided by the federal AFFH rule, should be created. The 2023 Proposed Rule’s regular and structured reporting framework, the Equity

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<sup>184</sup> See NAT’L COMM’N ON FAIR HOUS. & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING, Executive Summary (2008), [https://www.nationalfairhousing.org/wp-content/uploads/2017/04/Future\\_of\\_Fair\\_Housing.pdf](https://www.nationalfairhousing.org/wp-content/uploads/2017/04/Future_of_Fair_Housing.pdf) [<https://perma.cc/UU58-2GD6>] (finding a pervasive lack of compliance with the federal AFFH mandate in the absence of a robust reporting requirement).

<sup>185</sup> See *Governor Hochul Signs Legislative Package to Combat Housing Discrimination*, *supra* note 113.

<sup>186</sup> See Abraham, *supra* note 29, at 57–62; Collins, *supra* note 38, at 2183.

<sup>187</sup> In California, the state AFFH law’s provision of a private right of action has already resulted in some significant litigation and settlements against municipalities. See, e.g., *Advocates Win Judgement Against the City of Huntington Park for More Inclusive and Accessible Housing*, DISABILITY RTS. CAL. (Aug. 16, 2022), <https://www.disabilityrightsca.org/press-release/advocates-win-judgement-against-the-city-of-huntington-park-for-more-inclusive-and> [<https://perma.cc/SM78-GU4A>] (describing judgment against the City of Huntington Park for violating state fair housing laws, including a failure to affirmatively further fair housing).

Plan, requires grantees to evaluate fair housing issues, establish priorities and goals, and regularly review progress towards those goals.<sup>188</sup> In contrast to the New York AFFH law's current requirement that only NYSHCR is obligated to assess fair housing compliance, a regular reporting requirement applying to all covered entities and requiring state approval would increase transparency and ensure that localities consider the broad range of policy tools at their disposal to improve the state of fair housing in their communities.<sup>189</sup>

Finally, the State must articulate substantive standards by which compliance with the New York AFFH law can be measured. The State should consider, as both HUD and CAHCD have done, issuing guidance **expanding on and providing examples of the kinds of “meaningful actions” that will affirmatively further fair housing.**<sup>190</sup> This would help both to ensure that efforts to affirmatively further fair housing are effective and to create accountability between the state and funding recipients, as well as between the state and the public. Further, this added measurability would provide actionable standards for advocates and potential litigants who wish to challenge failures to follow the requirement to affirmatively further fair housing.

## 2. The Need for State Intervention into Land Use and Zoning

AFFH laws, by themselves, may not be enough to address New York's deeply entrenched patterns of residential segregation and its interrelated housing affordability crisis.<sup>191</sup> For one, the AFFH framework—due to its convoluted history, repeated overhauls at the federal level, and recent and limited adoption by states—is relatively untested in its capacity to systemically address and overcome residential segregation.<sup>192</sup> Moreover, its open-ended, process-based framework is at

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<sup>188</sup> See Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8516–17 (proposed Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5, 91, 92, 93, 570, 574, 576, 903, 983).

<sup>189</sup> Cf. Abraham, *supra* note 29, at 33–38.

<sup>190</sup> See, e.g., CAL. DEP'T OF HOUS. & CMTY. DEV., AFFIRMATIVELY FURTHERING FAIR HOUSING: GUIDANCE FOR ALL PUBLIC ENTITIES AND FOR HOUSING ELEMENTS 13, 15 (2021), [https://www.hcd.ca.gov/community-development/affh/docs/affh\\_document\\_final\\_4-27-2021.pdf](https://www.hcd.ca.gov/community-development/affh/docs/affh_document_final_4-27-2021.pdf) [<https://perma.cc/ZRX2-9QZF>] (noting, for example, that “replacing segregated living patterns with truly integrated and balanced living patterns” can be achieved through community benefits agreements, inclusionary zoning requirements, and zoning for a variety of housing types, as well as providing numerous examples of common barriers to affirmatively furthering fair housing); AFFH RULE GUIDEBOOK, *supra* note 90.

<sup>191</sup> KAZIS, *supra* note 3, at 7.

<sup>192</sup> See *supra* Sections I.A, II.B. One issue is that, where AFFH mandates are predicated on receiving state or federal housing funds, wealthy municipalities, which are often highly racially *and*



times at odds with the need for prescriptive, enforceable mandates.<sup>193</sup> Given these limitations, the State should pair its AFFH mandate with state-level reforms to land use and zoning in order to promote economic and racial integration and to help relieve the supply pressures that are fueling the housing affordability crisis.<sup>194</sup>

Despite the **legislature’s failure to pass Governor’s Kathy Hochul’s Housing Compact**, the plan—which aimed to boost housing production in the State—**represented a significant shift away from New York’s historic reluctance to intervene in local land use decision-making.**<sup>195</sup> At the center of the Housing Compact were two proposals to allow the state to preempt local zoning regulations in certain circumstances. First, it would have subjected all municipalities in the state to home creation targets: downstate municipalities would have been required to increase their housing stock by three percent every three years, while all other municipalities would have had to increase theirs by one percent.<sup>196</sup> And if localities had failed to meet those targets, a fast-track approval process would be available to allow multifamily housing projects that meet certain size and affordability criteria to be approved by a state-level administrative body or the court system, even where existing zoning would not allow the project to be built.<sup>197</sup> The proposal would have **allowed localities to obtain a “safe harbor” from this fast-track process by implementing “preferred actions” that create substantial additional zoning capacity.**<sup>198</sup> Second, the Housing Compact proposed requiring

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economically exclusionary, can simply wall themselves off from such requirements by not accepting funding for housing programs. *See* Sterk, *supra* note 84, at 1646 (noting that one result of the 2015 Rule was that smaller municipalities opted out of HUD programs that would have required them to participate in the AFH process).

<sup>193</sup> *See* Noah M. Kazis, *Fair Housing, Unfair Housing*, 99 WASH. U. L. REV. ONLINE 1, 12–13 (2021), <https://wustllawreview.org/2021/11/23/fair-housing-unfair-housing> [<https://perma.cc/5N6B-FULX>].

<sup>194</sup> *See generally* Infranca, *supra* note 98.

<sup>195</sup> *See* Luis Ferré-Sadurní & Mihir Zaveri, *New York Officials Failed to Address the Housing Crisis. Now What?*, N.Y. TIMES (Apr. 27, 2023), <https://www.nytimes.com/2023/04/27/nyregion/nyc-housing-crisis.html> [<https://perma.cc/J2FX-R8RW>] (noting that, despite the failure of Hochul’s plan, some housing advocates have “said that the moment marked major progress”); *see also* *Housing Compact Announcement*, *supra* note 1; HOCHUL, *supra* note 7, at 21–49.

<sup>196</sup> HOCHUL, *supra* note 7, at 32–33; S. 4006, 2023–2024 Leg. Sess. pt. F (N.Y. 2023), <https://legislation.nysenate.gov/pdf/bills/2023/s4006> [<https://perma.cc/Y6GT-F3JH>]. The proposed legislation defined downstate municipalities as New York City and municipalities in Westchester, Orange, Putnam, Dutchess, Rockland, Nassau, and Suffolk Counties. *Id.* pt. F, sec. 2, § 1001(11).

<sup>197</sup> HOCHUL, *supra* note 7, at 32–36; S. 4006 pt. F, sec. 2, §§ 1001(14), 1004–1006.

<sup>198</sup> *Housing Compact Announcement*, *supra* note 1; HOCHUL, *supra* note 7, at 35–36. These “preferred actions” include **permitting accessory dwelling units, facilitating lot splits, removing certain restrictive zoning, allowing certain density levels over a portion of previously developed**

municipalities to rezone areas within a half mile of all train stations run by the Metropolitan Transit Authority to allow for a density of at least fifteen to fifty homes per acre, depending on the distance of the station from New York City.<sup>199</sup> Although Governor Hochul has dropped both proposals from her 2024 agenda,<sup>200</sup> largely due to the political backlash that the Housing Compact engendered in 2023,<sup>201</sup> such supply-driven land use reforms remain essential to addressing New York's ongoing housing affordability crisis.

Before assessing the potential impact of the Housing Compact's two major land use reform proposals on housing affordability and furthering fair housing goals, it should first be noted that, despite claims by opponents of land use reform,<sup>202</sup> as a matter of New York law there are no legal barriers to enacting state-level land use regulations.<sup>203</sup> Although New York is a constitutional home rule state that gives localities the power to make laws "relating to [their] property, affairs or government,"<sup>204</sup> localities have extremely limited immunity from state

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areas, and rezoning a specific amount of commercial areas to allow for housing. S. 4006 pt. F, sec. 2, § 1003(4).

<sup>199</sup> HOCHUL, *supra* note 7, at 37; S. 4006 pt. G. Additional proposals by Hochul to encourage housing production included infrastructure and planning funds to support additional housing production, an expedited environmental review process for rezonings to facilitate meeting home targets or increasing density near transit stations, repealing a state law limiting the maximum housing density in New York City, legislation to facilitate converting commercial to residential uses, legalizing basement apartments in New York City, and creating a statewide database of housing permit and zoning data. HOCHUL, *supra* note 7, at 38–42.

<sup>200</sup> KATHY HOCHUL, 2024 STATE OF THE STATE: OUR NEW YORK, OUR FUTURE 49–56 (2024), <https://www.governor.ny.gov/sites/default/files/2024-01/2024-SOTS-Book-Online.pdf> [<https://perma.cc/HKA5-YJY7>]; see also Rebecca C. Lewis, Austin C. Jefferson & Holly Pretsky, *Takeaways from Hochul's 2024 State of the State Agenda*, CITY & STATE N.Y. (Jan. 9, 2024), <https://www.cityandstateny.com/policy/2024/01/takeaways-hochuls-2024-state-state-agenda/393208> [<https://perma.cc/CTL4-APP7>].

<sup>201</sup> Greg David, *How Hochul's Housing Dream Died: Backlash Surged Beyond the 'Burbs*, THE CITY (Apr. 21, 2023, 6:17 PM), <https://www.thecity.nyc/2023/04/21/how-hochul-housing-dream-died-suburb-backlash> [<https://perma.cc/E2PW-J3T6>].

<sup>202</sup> See, e.g., Zach Williams & Carl Campanile, *'You Will Create Chaos'—GOP Reps Blast Kathy Hochul Plan for Suburban Housing*, N.Y. POST (Jan. 25, 2023, 6:49 PM), <https://nypost.com/2023/01/25/gop-reps-say-kathy-hochul-housing-plan-will-hurt-suburbs-by-overriding-local-control> [<https://perma.cc/2J29-RZLQ>] (quoting Republican members of Congress as saying that the provisions in Hochul's Housing Compact that would override local zoning controls were "unconstitutional," would "eliminate centuries of legal precedent," and would "eliminate home rule altogether").

<sup>203</sup> See Noah Kazis, Testimony Before the New York State Senate Finance Committee and Assembly Ways and Means Committee, at 4 (Feb. 9, 2022), [https://helming.nysenate.gov/sites/default/files/nyu\\_furman\\_center.22\\_0.pdf](https://helming.nysenate.gov/sites/default/files/nyu_furman_center.22_0.pdf) [<https://perma.cc/C9M4-YGGB>] ("New York law does not give local governments an absolute power over land use."); Silverstein, *supra* note 57, at 311 ("There is nothing in New York law that would prevent the state from statutorily imposing a regime with the power to override local land use decisions.").

<sup>204</sup> N.Y. CONST. art. IX, § 2(c).

preemption.<sup>205</sup> Further, a judicial “state concern” doctrine holds that the legislature may pass special legislation applying to only some localities when the legislation is a matter of substantial state concern.<sup>206</sup> New York’s Court of Appeals has previously held that housing is a matter of statewide concern<sup>207</sup> and, given the depth of New York’s current housing crisis, the court would most likely uphold the state’s preemption of local zoning powers to address it.<sup>208</sup>

The Housing Compact’s proposal to set local new homes targets, and to create a state-level process to bypass local zoning where municipalities fail to meet those targets, resembles “fair share” housing schemes enacted by other states.<sup>209</sup> However, unlike many of these schemes, which typically allocate housing targets for each individual municipality based on regional population growth or existing affordable housing stock,<sup>210</sup> Hochul’s proposal would have imposed an obligation to build new housing uniformly on all municipalities. This has the benefit of simplicity, as commentary in favor of the Housing Compact noted.<sup>211</sup> The proposal also differed from other comparable schemes in that compliance was to be measured by housing units *actually built*, rather than housing capacity zoned for. This would seem to help avoid a common problem with such schemes, which inadequately guard against recalcitrant

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<sup>205</sup> The only limitation on the ability of the state legislature to pass laws affecting the property, affairs, or government of localities is that they cannot enact special laws targeted at the property, affairs, or government of some, but not all, localities without a supermajority or a special request from the locality. *Id.* art. IX, § 2(b)(2). Otherwise, the state is free to legislate on any such local matters so long as the law applies to all localities. *Id.*

<sup>206</sup> *See* *Adler v. Deegan*, 167 N.E. 705, 708 (N.Y. 1929) (holding that a law applying only to New York City setting minimum safety standards for housing did not need to comply with special legislation procedures because it addressed a matter of “state concern”).

<sup>207</sup> *Floyd v. N.Y. State Urb. Dev. Corp.*, 300 N.E.2d 704, 706 (N.Y. 1973).

<sup>208</sup> *See* Milstein, *supra* note 1; Kazis, *supra* note 203, at 4.

<sup>209</sup> *See supra* notes 98–103 and accompanying text.

<sup>210</sup> For example, New Jersey’s *Mount Laurel* scheme allocates each municipality’s fair share housing obligations based on its “present and prospective fair share for low and moderate income housing and its capacity to accommodate its present and prospective housing needs.” N.J. STAT. ANN. § 52:27D-310(e) (West 2023). Massachusetts, on the other hand, has created a state-level housing appeals process allowing developers to bypass local zoning boards to build affordable housing projects that only applies to municipalities where less than ten percent of the existing housing stock is affordable to low- or moderate-income families. MASS. GEN. LAWS ch. 40B, § 20 (2023).

<sup>211</sup> *See, e.g.*, Christian Britschgi, *New York Gov. Kathy Hochul’s Housing Plan Avoids Common Mistake of Other YIMBY Reforms*, REASON (Jan. 11, 2023, 11:20 AM), <https://reason.com/2023/01/11/new-york-gov-kathy-hochuls-housing-plan-avoids-common-mistake-of-other-yimby-reforms> [<https://perma.cc/RZH2-HRLF>] (contrasting Hochul’s proposal with the complexity of California’s approach, in which the state calculates local housing needs by income level and then allocates obligations to build certain numbers of new housing units affordable to those at various income levels).

municipalities that seek to achieve compliance through bad faith proposals for housing that is unlikely to be built.<sup>212</sup> Finally, the proposal differed from other fair share schemes in that it did not expressly require municipalities to build *affordable* housing to meet their goals.<sup>213</sup> This led to criticisms that the Housing Compact was inadequate to address the immediate needs of those most affected by the housing affordability crisis, criticism that likely contributed to the demise of the proposal.<sup>214</sup>

**The Housing Compact’s second major land use proposal would have required municipalities to zone areas within a half mile of train stations to accommodate a certain level of residential density, and is an example of what is commonly referred to as “transit-oriented development” (TOD).<sup>215</sup> The proposal appears to be modeled on Massachusetts’s MBTA Communities zoning law, which was passed in 2021 and requires all localities served by the transit authority of Greater Boston to create zoning districts within a half mile of transit stations that have by right multifamily zoning capacity of up to twenty-five percent of the entire municipality’s existing housing stock.<sup>216</sup> Although it is too early to judge**

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<sup>212</sup> See, e.g., Paula A. Franzese, *An Inflection Point for Affordable Housing: The Promise of Inclusionary Mixed-Use Redevelopment*, 52 UIC J. MARSHALL L. REV. 581, 593–94 (2019) (noting that lack of enforcement and municipal resistance often led to the siting under *Mount Laurel* of affordable units in “less desirable” areas); John M. Payne, *Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665, 672 (1996) (describing widespread failures of New Jersey’s COAH to enforce compliance with the state’s *Mount Laurel* process and describing the agency’s fair share allocations as “paper numbers only”).

<sup>213</sup> However, the development of affordable units will be encouraged by each new unit of affordable housing counting as two units toward each municipality’s home creation targets. S. 4006, 2023–2024 Leg. Sess. pt. F, sec. 2, § 1003(3)(c)(i) (N.Y. 2023), <https://legislation.nysenate.gov/pdf/bills/2023/s4006> [<https://perma.cc/Y6GT-F3JH>]. Similarly, the fast-track approval process will only be available for developments that include some affordable housing. See *id.* pt. F, sec. 2, § 1001(14).

<sup>214</sup> See, e.g., Austin Celestin, *New York State Failed to Deliver on Housing—New York City Must Step Up*, GOTHAM GAZETTE (May 24, 2023), <https://www.gothamgazette.com/130-opinion/12018-new-york-state-city-housing-growth> [<https://perma.cc/4X65-CBDC>] (“For progressive legislators, one of the sticking points of the governor’s Housing Compact was its lack of tenant protections.”).

<sup>215</sup> See Robert H. Freilich, *The Land-Use Implications of Transit-Oriented Development: Controlling the Demand Side of Transportation Congestion and Urban Sprawl*, 30 URB. LAW. 547, 549–50 (1998) (describing TOD as a planning concept characterized by high-density, mixed-use development near transit stations that is designed to encourage public transit use, reduce congestion and emissions, and create higher density communities).

<sup>216</sup> See MASS. GEN. LAWS. ch. 40A, § 3A (2023); Eric Shupin, Abhidnya Kurve & Dana LeWinter, *New MBTA Communities Zoning Law Makes It Easier to Create the Homes the Commonwealth’s Residents Need*, BOS. BAR J., Winter 2022, at 28, 28, 30. In certain respects, Hochul’s TOD proposal was more robust. While the Massachusetts MBTA law requires municipalities to zone for fifteen housing units per acre, New York’s proposed law would have required fifty units per acre for railway stations within fifteen miles of New York City. Compare § 3A(a)(1), with S. 4006, 2023–2024 Leg. Sess. pt. G, sec. 3, § 20-h(1)(a)(i), (q) (N.Y. 2023), <https://legislation.nysenate.gov/pdf/bills/2023/>

the effect of Massachusetts's law on housing production, commentators have long suggested that TOD can further fair housing goals by creating more affordable housing options in areas with greater connectivity to jobs and opportunities.<sup>217</sup> Rezoning for TOD promises to address a problem particularly acute to the New York metropolitan area: municipalities with excellent transit infrastructure but extremely restrictive zoning, a combination that effectively shuts the door of economic opportunity to all but the wealthiest.<sup>218</sup>

However, state-level land use reforms of the kind proposed by Hochul arguably do not go far enough in addressing other onerous zoning requirements that when imposed by municipalities can constrain residential development.<sup>219</sup> Three potential areas that the New York legislature should address in addition to housing production goals and TOD are: (1) single-family zoning; (2) accessory dwelling units; and (3) parking minimums.

*Eliminating single-family zoning.* In light of voluminous research showing that single-family zoning exacerbates racial and economic segregation, a small number of states and municipalities have recently made efforts towards eliminating single-family zoning.<sup>220</sup> For example, in 2019, Oregon passed a measure requiring cities of over ten thousand people to allow duplexes in areas previously zoned for single-family homes.<sup>221</sup> New York should consider following the lead of these pioneers

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s4006 [<https://perma.cc/Y6GT-F3JH>]. Further, while municipalities in Massachusetts only need rezone an area sufficient to create the mandated zoning capacity, Hochul's proposal would have required municipalities to zone to allow for the average minimum density throughout the *entire* half-mile vicinity of transit stations. See Shupin, Kurve & LeWinter, *supra* note 216, at 29; HOCHUL, *supra* note 7, at 37; S. 4006 pt. G, sec. 3, § 20-h(1).

<sup>217</sup> See Orfield, *supra* note 23, at 905.

<sup>218</sup> See KAZIS, *supra* note 3, at 14–17 (describing how two suburban New York municipalities with excellent transit access to New York City—Bellerose in Nassau County and Bronxville in Westchester County—have used zoning controls to effectively forbid new development).

<sup>219</sup> See generally Sara C. Bronin, *Zoning by a Thousand Cuts*, 50 PEPP. L. REV. 719, 724–25 (2023) (describing “the many hidden constraints on housing embedded in zoning codes,” such as lot configuration, building size, and occupancy requirements, as well as procedural requirements like mandatory public hearings).

<sup>220</sup> John Infranca, *Singling Out Single-Family Zoning*, 111 GEO. L.J. 659, 667 (2023); see also Jessica Trounstein, *The Geography of Inequality: How Land Use Regulation Produces Segregation*, 114 AM. POL. SCI. REV. 443 (2020); Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS'N 6, 12 (2016); Rothwell, *supra* note 14, at 291.

<sup>221</sup> Laurel Wamsley, *Oregon Legislature Votes to Essentially Ban Single-Family Zoning*, NPR (July 1, 2019, 7:03 PM), <https://www.npr.org/2019/07/01/737798440/oregon-legislature-votes-to-essentially-ban-single-family-zoning> [<https://perma.cc/QE5T-7D6Q>]. Similarly, in 2019, Minneapolis, in an effort to address its history of residential segregation, adopted a housing plan that allowed duplexes and triplexes to be built anywhere in the city. See Erick Trickey, *How*

and setting minimum allowable density restrictions for residential zones in cities above a certain size,<sup>222</sup> or banning single-family residential zoning entirely.

*Accessory dwelling units.* Another zoning reform tool is to permit accessory dwelling units (ADUs) by right.<sup>223</sup> Like eliminating single-family zoning, legalizing ADUs increases housing supply and provides more affordable housing options, while having a minimal effect on neighborhood character, a major source of opposition to much zoning reform.<sup>224</sup> Researchers have found that ADUs typically rent for lower prices than comparably sized units, suggesting that legalizing ADUs is a useful mechanism for providing affordable housing in desirable, high opportunity areas, thereby reducing disparities in access to opportunity.<sup>225</sup> The Housing Compact identified permitting ADUs as a “preferred action” entitling a municipality to a safe harbor from the plan’s fast-track approval process.<sup>226</sup> The legislature should take this one step further by considering standalone legislation allowing ADUs to be constructed throughout the state, or alternatively should consider requiring ADUs be permitted by right within a half mile of railway stations.<sup>227</sup>

*Parking minimums.* There is a growing consensus that minimum parking requirements for new housing development constrict supply and make housing more expensive.<sup>228</sup> In particular, such requirements have the effect of discouraging the building of smaller, more affordable

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*Minneapolis Freed Itself from the Stranglehold of Single-Family Homes*, POLITICO (July 11, 2019), <https://www.politico.com/magazine/story/2019/07/11/housing-crisis-single-family-homes-policy-227265> [https://perma.cc/YZ7W-V9QE]; Henry Grabar, *Minneapolis Confronts Its History of Housing Segregation*, SLATE (Dec. 7, 2018, 4:48 PM), <https://slate.com/business/2018/12/minneapolis-single-family-zoning-housing-racism.html> [https://perma.cc/DK5T-S3KN]. There are some questions about how effective Minneapolis’s elimination of single-family zoning has been in stimulating housing production, with one study noting that in over two years since the change, only ninety-seven additional residential units had been permitted. Justin Fox, *What Happened When Minneapolis Ended Single-Family Zoning*, BLOOMBERG (Aug. 20, 2022, 8:00 AM), <https://www.bloomberg.com/opinion/articles/2022-08-20/what-happened-when-minneapolis-ended-single-family-zoning> [https://perma.cc/3Y68-KXA2].

<sup>222</sup> For example, requiring that the lowest density residential zones allow for the construction of duplexes, triplexes, or quadplexes.

<sup>223</sup> Infranca, *supra* note 98, at 857–60.

<sup>224</sup> *See id.* at 857–58.

<sup>225</sup> *See id.* at 873; N.Y. PUB. HOUS. LAW § 600(3)(c) (McKinney 2023).

<sup>226</sup> S. 4006, 2023–2024 Leg. Sess. pt. F, sec. 2, § 1003(4)(a) (N.Y. 2023), <https://legislation.nysenate.gov/pdf/bills/2023/s4006> [https://perma.cc/Y6GT-F3JH].

<sup>227</sup> *See id.* pt. G.

<sup>228</sup> *See* Lewis Lehe, *Minimum Parking Requirements and Housing Affordability*, 11 J. TRANSPORT & LAND USE 1309 (2018); Shill, *supra* note 13, at 549 (“Parking quotas have been found to add between 12.5% and 38% to the costs of constructing multifamily housing units.”).

housing units, disproportionately affecting people of color.<sup>229</sup> The Housing Compact proposed prohibiting parking minimums in the context of certain “preferred action[s].”<sup>230</sup> The legislature should consider more broad-based limitations on New York municipalities’ ability to impose minimum parking requirements in order to encourage the development of smaller, lower-cost units.

While state-level zoning reforms of the kind proposed in the Housing Compact have the potential to meaningfully address the underlying conditions that have led to the housing affordability crisis, there is little evidence that they alone are capable of reversing deeply entrenched patterns of residential segregation.<sup>231</sup> For instance, while there is significant evidence from other states that land use reforms similar to those proposed by Hochul have been fairly effective at increasing housing supply and affordability,<sup>232</sup> there is little evidence that such schemes have meaningfully increased residential racial integration.<sup>233</sup> In order to achieve the goals of the New York AFFH law, legislators should consider ways in which they can embed a robust requirement that municipalities affirmatively further fair housing into any future land use reforms. Specifically, future land use reforms should—like the Housing Compact proposed—require localities to report housing production and zoning data to the state for the purpose of

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<sup>229</sup> See Lehe, *supra* note 228, at 1310–11; Zasloff, *supra* note 83, at 110. Further, parking minimums encourage urban sprawl, which in turn exacerbates air pollution, the health effects from which fall disproportionately on racial minorities. See Diane Alexander & Janet Currie, *Is It Who You Are or Where You Live? Residential Segregation and Racial Gaps in Childhood Asthma*, 55 J. HEALTH ECON. 186, 199 (2017).

<sup>230</sup> See, e.g., S. 4006 pt. F, sec. 2, § 1003(4)(a)(iv) (to qualify for “preferred action” status, parking requirements may not be imposed on ADUs unless there is no adjacent street parking or there is no public transit stop within a half mile).

<sup>231</sup> See *supra* notes 23–26 and accompanying text.

<sup>232</sup> See, e.g., Maddie Hanna, *40 Years Later, N.J. Courts, Towns Still Wrestling with ‘Affordable’ Housing*, PHILA. INQUIRER (Oct. 13, 2017, 5:34 PM), <https://www.inquirer.com/philly/news/40-years-later-n-j-courts-towns-still-wrestling-with-affordable-housing-20171013.html> [<https://perma.cc/ER7Q-GVQX>] (noting that since its inception New Jersey’s *Mount Laurel* scheme is responsible for 80,000 units of housing affordable to lower- and middle-income families); Carolina K. Reid, Carol Galante & Ashley F. Weinstein-Carnes, *Addressing California’s Housing Shortage: Lessons from Massachusetts Chapter 40B*, 25 J. AFFORDABLE HOUS. & CMTY. DEV. L. 241, 251 (2017) (noting that Massachusetts’s 40B affordable housing scheme has “had a significant impact on the total supply of housing in Massachusetts”).

<sup>233</sup> See Orfield, *supra* note 23 (noting the limited effects of fair share schemes in other states in ameliorating racial residential segregation); Wish & Eisdorfer, *supra* note 23, at 1294–95, 1302 (same); Edward G. Goetz & Yi Wang, *Overriding Exclusion: Compliance with Subsidized Housing Incentives in the Massachusetts 40B Program*, 30 HOUS. POL’Y DEBATE 457, 458 (2020) (indicating that, under Massachusetts’s 40B scheme, municipalities with large white populations have produced less affordable housing than more diverse municipalities).

assessing compliance.<sup>234</sup> Embedding an AFFH reporting requirement into such a reporting framework would help to overcome two major weaknesses in the existing New York AFFH law: the limited application of the law only to those municipalities that receive state housing funds and the lack of any local reporting requirements.<sup>235</sup> By integrating the state AFFH law with substantive prohibitions on exclusionary local zoning, measurable affirmative goals, and a reporting and enforcement framework, New York has the opportunity to not just make the state more affordable, but also to create the diverse, integrated communities that the New York AFFH law envisions.

### CONCLUSION

**New York's AFFH law is a step in the right direction but does not go far enough. It is significantly weaker than the soon-to-be reinstated federal AFFH rule and California's version of the law. Moreover, it does not directly address, nor provide a viable path towards combatting, the state's notoriously exclusionary zoning. Although a recent proposal by Governor Hochul for statewide zoning reforms failed to pass amidst the legislature's opposition, lawmakers and advocates must continue to push for measures that will reduce exclusionary zoning, bolster housing production, and increase affordability. The prospect of such reforms should also be taken as a significant opportunity to wed the goals of the state AFFH law to a framework that provides substantive standards for compliance, robust local reporting requirements, and an enforcement mechanism. To ensure that New York closes its housing supply gap, tackles its severe affordability crisis, and overcomes persistent racial and economic segregation, the State must strengthen its AFFH law and integrate its mandate into future state-level land use reforms.**

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<sup>234</sup> See S. 4006 pt. H.

<sup>235</sup> See *supra* Section III.B.