Chipping Away at New York's Housing Crisis: Revisiting Legislative Discretion for Rezonings

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By David S. Steinmetz and Lee J. Lefkowitz

In the year preceding the 2006 housing crash, home prices in 40% of metro areas experienced a spike of more than 10%. That proved to be unsustainable, and what followed was a years-long recession and the collapse of the housing market.

Last year, 2021, was twice as extreme. Eighty percent of metro areas saw the same 10% spike; 25% saw home prices rise more than 20%.[1] Despite the trend today being twice as alarming as it was in 2006, little has been done to address what is increasingly looking like a crisis. Housing is scarce and unaffordable, and the dream of homeownership (and even finding affordable rentals) is slipping away for many. There are many reasons. One, especially in New York, is the aversion of many local municipalities to permitting development of more affordable, diverse (usually multi-family) housing stock. New York law, for decades, has afforded municipalities broad leeway to constrain developments to large-lot single-family homes. The result is low supply and high demand for fewer, more expensive homes. But that leeway could be changed. This article will analyze the New York housing crisis and the paucity of multi-family housing available in the state and offer a solution.

As land use attorneys who frequently represent developers striving to build multi-family, diverse and affordable housing in New York, we offer our perspective on the uphill battle. The most prevalent problem is the vast legislative discretion afforded to municipalities.

Many efforts to build these homes require a rezoning of a site to allow multi-family housing. And a municipality's discretion to deny a developer's rezoning application is, quite simply, too powerful. That discretion enables the municipality to reject multi-family housing without fear of a meaningful court challenge. It creates a chilling effect on development. A developer might be willing to undertake the many other risks of building diverse, affordable housing in New York, but the fact that a municipality can shut down the months- (or years-) long application process for any reason, at any time, is too great a risk to bear. New York should abandon this unchecked legislative discretion. Instead, New York should require local officials to examine and rely upon data, demographics and demand. New York should allow a rezoning applicant to invoke the court system. There should be judicial oversight to evaluate whether a municipality's decision to reject multi-family housing was based on substantial, empirical evidence.

Background

New York was trending for an affordable housing shortfall decades ago, but the pandemic fueled that crisis. At the beginning of the pandemic, rents plummeted while prices skyrocketed as residents fled apartments and rentals for more space in the suburbs.[2] Two years later, those home prices remain high, the market remains

competitive and single-family homes have become unaffordable to many.[3] From Q4 2019 to Q4 2021, median sale prices in every New York City borough experienced at least a 16.5% increase.[4] Meanwhile, rental prices have now returned and surpassed pre-pandemic levels and, in some cases, have seen their own meteoric rise.[5]

Again, this is nothing new; the pandemic only accelerated an already concerning trend. Both Westchester County and Long Island, in particular, had been dominated by unaffordability for years.[6] Meanwhile, in New York City, affordable units have been systematically replaced by unaffordable ones. From 2005 to 2017, 76,000 rental units were added, while 88,000 rent-stabilized units were lost. During that same period, the number of homes renting for more than $2,700 a month grew by 238,000, and apartments renting for $900 or less decreased by a million.[7]

The solution may seem simple: build more homes.[8] Increase supply. Respond to the demand. But it is harder than it looks, because New York needs not just any kind of supply. It needs more affordable, multi-family homes. That presents a challenge.

Multi-Family Housing as a Solution

New York State, especially areas outside New York City, is awash in large-lot and single-family zoning, which presents few opportunities to develop more affordable housing complexes.[9] Indeed, multi-family housing has been judicially recognized as more affordable and inclusive.[10] And municipalities' preference for single-family zoning to multi-family zoning is no secret, nor is it new. This sort of zoning has been used to exclude lower-income homebuyers for decades.[11] Indeed, it is codified in New York constitutional law that municipalities cannot zone away from multi-family zoning to single-family zoning in an effort to preclude diversity.[12] But rarely is zoning toward "affordable" housing incentivized, as opposed to extracted.

For this reason, building affordable homes remains an uphill battle. More affordable developments – even when good for the community – often face public opposition. Under New York law, developers can petition a municipality to rezone a site from single-family to multi-family, but whether to grant the petition is discretionary. Therein lies the problem: unbridled legislative discretion impedes progress, stunts diversification and blocks affordability.

Legislative Discretion

Municipal legislative bodies, when faced with an application from a developer seeking to rezone a site to multi-family, are vested broad discretion in assessing the application. Sadly, when reviewing such applications, local governments can disregard empirical data – even from their own experts. Indeed, the municipality need not entertain the application at all.

It is worth pausing here to note that this is different from other types of land use applications. Applications for variances, subdivisions, site plan approvals, SEQRA review, or special permits are all subject to a greater level of intellectual honesty and judicial scrutiny. In other words, they are not entirely discretionary – there are legal standards that govern the municipality's decision-making when faced with these applications. For example, when presented with a variance application, the municipality must apply a five-factor balancing test, and if a court later finds that the municipality "arbitrarily or capriciously" denied such an application, a judge will reverse the municipal decision.[13] In other words: on all land use applications besides rezonings, the municipality has a court looking over its shoulder. But an application for a rezoning is not exposed to the same kind of legal challenge. A local government presently retains broad powers to either approve or deny an application for a proposed rezoning without fear that a judge will subject it to scrutiny.

As a result, there is little downside for a municipality to deny an application, but municipal board members often perceive downsides to granting one. A few vocal constituents can easily sway public opinion. Even well-meaning municipalities that recognize the need for affordable housing, and at first view a multi-family project favorably, often face immense pressure from local residents who do not want to see affordable homes in their neighborhood. Thus, there is tremendous uncertainty in the process. From the perspective of a developer, that uncertainty yields risk that is hard to overcome. The application process is both lengthy and costly. And worse,

the municipality is able to deny the application for any reason, at any point in the process, even after much of those time and financial resources are sunk. The municipality can initially respond favorably and then about-face midway through when slammed with public opposition. This creates a widespread chilling effect on housing supply – let alone affordable and diversified units.

A developer stepping in and commencing a rezoning application should be viewed as a boon to the municipality. Zoning changes often involve multiple levels and years of protracted regulatory review (spanning successor administrations), as well as enormous upfront administrative review costs before a shovel ever gets in the ground. The developer can drive the process and bear many of those costs and much of the legwork for the municipality. Were a municipality to instead undertake a rezoning on its own (rather than developer driven), it would have to bear the costs, like retention of experts – engineers, architects, and planners – and undertake a complex environmental review. While many developers would be willing to spearhead this process, and attempt to aid New York's housing crisis by redeveloping blighted, vacant or underutilized properties into multi-family or affordable housing, it is a tall order to expect them to undertake massive upfront costs while not knowing if the current administration will ultimately adopt the rezoning needed for the project or even if that administration will still be there when it comes time to vote. Asking the developer to bear the costs presents a major gamble.[14] Yet another problem: in addition to its broad discretion, the municipality is legally precluded from making any promises to the developer, a prohibited act known as contract zoning.[15]

Thus, in sum, the law is set up to discourage developer-driven rezonings. Municipalities have few tools to draw developers into the process to steer (and pay for) redevelopment.

In recognition of this problem of legislative discretion and the oversaturation of single-family zoning throughout the state, New York (briefly) tried to resolve the problem, but the solution proposed was not well-considered. The New York Legislature contemplated mandating multi-family housing statewide in many areas.[16] This would have overridden local zoning. But, just as developers are challenged with persuading boards to adopt multi-family zoning over local opposition, public outcry against the state Legislature was swift. The moment word of this potential state-wide law reached the media, opposition quickly shut down the law. A similar measure – which would have permitted accessory dwellings to exist statewide on single- and multi-family homes – was recently scrapped.[17] Perhaps for good reason. The solutions were unpalatable, as they painted with too broad a brush and thrust multi-family zoning on localities without any location-by-location consideration. They lacked the nuance local municipalities and zoning codes are designed to foster.

Yet there may still be another path, more of a middle ground, to encourage (rather than require) more municipalities to adopt multi-family housing. Guardrails could be placed around a municipality's discretion to rezone. Municipalities could be required to evaluate rezoning petitions based on "substantial evidence": empirical data, facts and experts.

The Solution: Circumscribe Legislative Discretion

Today, there are few options and almost no recourse available to a developer who undertakes this onerous rezoning process and comes away with nothing to show for it. The developer might accept the burden of the rezoning application, having consultants with experience in zoning, planning, engineering and community design perform extensive studies. Those studies might reveal empirical data indicating that multi-family is appropriate, and indeed encouraged, in the particular location. The municipality's own experts might agree and reach that same conclusion. Yet, the developer can still be left empty-handed if the municipality decides, in its discretion, to decline to rezone.

A simple solution is to give the developer recourse in that situation. Notably, if the municipality grants the developer's application, and adopts the rezoning to multi-family, the opponents already have recourse and can challenge the rezoning on a number of grounds. The playing field should be leveled. Allow the developer to challenge the municipality's decision in court and permit the courts to make a judicial determination as to whether the municipal decision-making was sound, based on "substantial evidence" and "empirical data." Permit the court to reverse or vacate the municipality's outcome if it finds that outcome to be an improvident abuse of discretion. Local governments should not be allowed to ignore even their own experts. Again, it is worth noting

that courts already do this for other land use applications. And some states already extend this standard to rezonings.

Connecticut, for example, has already taken this step.[18] Massachusetts has a similar rule.[19] Florida, too.[20] New York could adopt such a rule, whereby courts are enabled to examine a municipality's motives and reasons and require that a decision on whether to rezone, or not rezone, is in fact based on the substantial evidence.

Imposing a similar standard for rezonings that already occur for other land use entitlements need not lead to significantly more litigation than already occurs. It would merely extend an already existing legal mechanism to the only land use application currently excluded from it. The mere prospect of there being judicial scrutiny of a municipal decision on a rezoning application might just be the encouragement local legislative boards need to give multi-family housing its fair shake.

A municipality should not be permitted to make zoning and planning decisions that wholly ignore economic reality, demographics, changed circumstances and market conditions, without an ounce of judicial oversight or scrutiny. Injecting some degree of judicial review could give municipalities the nudge they need to make the changes all New Yorkers need: more affordable and/or diverse housing options. Giving the court a role would make the municipality accountable to someone other than the few vocal local opponents who don't want to see change – let alone affordable housing. And it would give developers the confidence they need to undertake the process in the first place, knowing that they would have some recourse if the facts were on their side but ignored by the municipality. Most important, developers could be assured that the ultimate decision will be predicated on facts, not politics.

David S. Steinmetz is the managing partner and a cofounder of Zarin & Steinmetz. He maintains a full caseload representing developers and other clients on a wide variety of projects throughout the New York Metro area. His zoning and environmental work also involves conducting complex due diligence, drafting zoning, ensuring SEQRA compliance and securing a multitude of entitlements and municipal permits.

Lee J. Lefkowitz litigates municipal and zoning matters, environmental cleanup lawsuits, religious and civil rights actions, as well as contract, commercial, property and business disputes. He has made submissions and argued cases before federal and state courts of all levels, including the Supreme Court of the United States.

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[2] Matthew Haag, *New Yorkers Are Fleeing to the Suburbs: 'The Demand Is Insane*,' N.Y. Times, Aug. 30, 2020, https://www.nytimes.com/2020/08/30/nyregion/nyc-suburbs-housing-demand.html.

[3] Lisa Prevost, *5 Ways the Coronavirus Has Changed Suburban Real Estate*, N.Y. Times, July 17, 2020, https://www.nytimes.com/2020/07/17/realestate/coronavirus-suburbs-real-estate.html.

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[6] *Westchester 2025 – Context for County and Municipal Planning and Policies to Guide County Planning* (last revised Jan. 5, 2010), https://planning.westchestergov.com/images/stories/pdfs/2025ContextPolicies.pdf; Binyamin Applebaum, *Long Island, We Need To Talk (About Housing)*, N.Y. Times, Feb. 24, 2022, https://www.nytimes.com/2022/02/24/opinion/long-island-housing.html; *Patterns for Westchester, The Land and the People* (1996), https://planning.westchestergov.com/images/stories/reports/patternsforwestchester.pdf.

[7] Katie Honan, *New York City's Affordable Housing Units Dwindled Since 2005*, Wall St. J., Sept. 25, 2018, https://www.wsj.com/articles/citys-affordable-housing-units-dwindled-since-2005-1537915298.

[8] Mara Gay, *There Are Solutions to New York's High Rents Right in Front of Us*, N.Y. Times, Mar. 28, 2022, https://www.nytimes.com/2022/03/28/opinion/new-york-affordable-housing.html.

[9] Binyamin Applebaum, *Long Island, We Need To Talk (About Housing)*, N.Y. Times, Feb. 24, 2022, https://www.nytimes.com/2022/02/24/opinion/long-island-housing.html.

[10] *Cont. Bldg. Co., Inc. v. N. Salem*, 211 A.D.2d 88, 93 (3d Dep't 1995) ("multifamily housing, given the nature of its construction and function as a whole, is one of the most affordable types of housing").

[11] *Robert E. Kurzius, Inc. v. Upper Brookville*, 51 N.Y.2d 338, 344 (1980) ("large-lot zoning may also be used as a means to exclude persons of low or moderate income").

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

[13] *See Sasso v. Osgood*, 86 N.Y.2d 374 (1995).

[14] *Halpern Development Venture, Inc. v. Tarrytown*, 247 A.D.2d 584 (2d Dep't 1998) (developer agreed to bear certain costs that were deemed unrecoverable after the municipality voted down the rezoning); *Cappelli Assocs. v. Meehan*, 247 A.D.2d 381 (2d Dep't 1998) (town encouraged developer to pursue rezoning, but terminated application midway through and after developer incurred substantial costs).

[15] *See Neeman v. Town of Warwick*, 184 A.D.3d 567 (2d Dep't 2020) ("This was an agreement binding on [an operator of a campground] to give a form of consideration in exchange for legislative action and to limit the Town Board's authority to change the bulk requirements in the zoning code until such time as [the campground] would not be negatively affected by such change").

[16] *Long Islanders Worry Zoning Changes Could Eliminate Single-Family Neighborhoods*, CBS News, Feb. 3, 2022, https://www.cbsnews.com/newyork/news/long-islanders-worry-zoning-changes-could-eliminate-single-family-neighborhoods.

[17] Joshua Solomon, *Hochul Pulls Most Controversial Element of 'Accessory Dwelling' Proposal*, Times Union, Feb. 18, 2022, https://www.timesunion.com/state/article/Hochul-backs-off-of-most-controversial-element-of-16930548.php.

[18] *See Kavanewsky v. Zoning Bd. of Appeals of Town of Warren*, 160 Conn. 397, 403 (1971) ("A zoning authority is endowed with a wide and liberal discretion. However, when the commission has not acted fairly, with proper motives and upon valid reasons, this discretion is to be overruled.") (internal citations omitted).

[19] *See Grasso v. City of New Bedford*, No. CIV. A. 92-01987, 1998 WL 795052, at *11 (Mass. Super. Nov. 2, 1998) ("The burden is on the landowner to demonstrate that the challenged regulatory actions do not meet the constitutional standard of substantially advancing the government's legitimate land use interests.").

[20] *See Martin Cnty. v. Yusem*, 690 So. 2d 1288, 1292–93 (Fla. 1997) ("the landowner has the burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance before the burden shifts to the government to demonstrate that maintaining the existing zoning classification accomplishes a legitimate public purpose").