LOCAL ZONING, REGIONAL NEEDS

A REGIONAL REVIEW OF HOW NEW YORK STATE AND ITS NEIGHBORS ARE HANDLING THE HOUSING CRISIS

PRODUCED BY **THE CENTER FOR HOUSING SOLUTIONS**

IN COLLABORATION WITH
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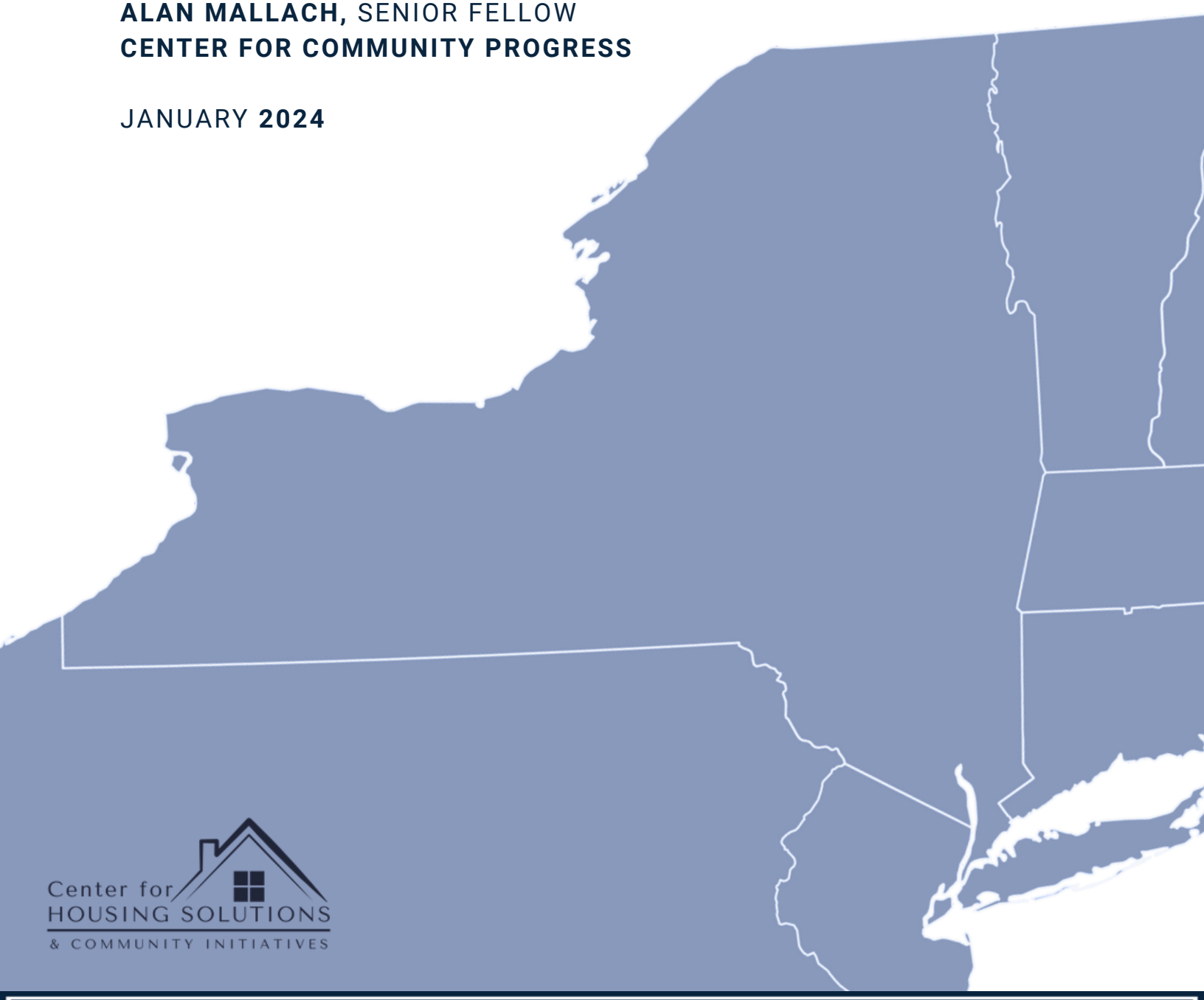

Center for HOUSING SOLUTIONS & COMMUNITY INITIATIVES

HUDSON VALLEY **PATTERN** *for* **PROGRESS**

OVERVIEW

For years, Pattern for Progress has documented that communities across the Hudson Valley are suffering from a severe shortage of decent, dignified, affordable housing. The reverberations of this housing crisis are felt in every corner of our society. Data show that homelessness is increasing as housing availability and affordability decrease. Long waits for plumbers and electricians, restaurants and small businesses that struggle to find help, limited childcare and home health aid workers, and various other economic conditions can be traced back to a lack of housing to support a vibrant labor force. In a recent Pattern report, “The Great People Shortage and its Effects on the Hudson Valley,” we found that our region has seen a net out-migration of 130,000 residents since 1996. According to a 2023 U.S. Census Bureau survey, the most cited reasons for leaving New York State were housing-related, including the search for more affordable and higher-quality housing opportunities elsewhere in the country. Two-thirds of those who left New York in 2022-2023 due to housing-related reasons relocated to the neighboring state of New Jersey. (U.S. Census, Annual Social and Economic Supplements, 2023)

There is no silver bullet to meet the demand for housing. One obvious and necessary step, though, is to allow supply to increase. In 2023, Gov. Kathy Hochul proposed a statewide Housing Compact that would require and incentivize local municipalities to increase housing production. Though some elements of the governor’s housing policies were passed to support development, the Compact in its entirety was not adopted by the State Legislature. Some critics of the Compact have argued that, because New York is a home rule state, the governor’s plans constituted an inappropriate overreaching of state authority. They feared that the Compact’s requirements would supersede the authority of local governments to determine their own planning and zoning priorities.

This argument reflects a profound and widespread misunderstanding of the intent of home rule. Home rule allows municipalities to meet the needs of their constituents in ways that are tailored to their unique local context. However, each municipality must operate within the zoning enabling framework established by state law. Compared to neighboring states, many of which are also governed by home rule, New York is lagging in its efforts to address the severe underproduction of housing in its municipalities. Home rule does not absolve municipalities of their responsibilities toward the greater good and toward meeting regional needs. On the contrary, state law is intended to grant municipalities freedom and self-determination within the context of meeting the needs of the broader regional community.

The case of *Berenson vs. Town of New Castle* (1975) is legal precedent for requiring municipalities to contribute their fair share of housing under New York State Zoning Enabling Law, stating:

"There must be a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional needs be met. Although we are aware of the traditional view that zoning acts only upon the property lying within the zoning board's territorial limits, it must be recognized that zoning often has a substantial impact beyond the boundaries of the municipality. Thus, the court, in examining an ordinance, should take into consideration not only the general welfare of the residents of the zoning township, but should also consider the effect of the ordinance on the neighboring communities." (NY DOS, "Zoning and the Comprehensive Plan", 2015)

Despite this legal precedent, *Berenson* has not inspired mandates or programs in New York that would require its municipalities to diversify their zoning and allow for a broad range of housing types. Conversely, similar cases in other states have led to changes. In New Jersey, for example, legal action led to the establishment of a clear requirement for municipalities to meet their fair share of housing production. Importantly, the law in New Jersey, known as the Mount Laurel Doctrine, is not a Fair Housing issue, but rather is based on the basic premise that zoning is made to serve the public good of the state and all the state's people, which includes those of low and moderate income. Any zoning ordinance that does not allow enough housing development to meet the municipality's fair share of the regional housing need for people of modest means, by definition, fails to meet the broader public good.

The Mount Laurel Doctrine is only one example of how New York's neighboring states, most of whose cities and towns also enjoy home rule powers, have passed laws to ensure that municipalities fulfill their obligations to address regional housing needs. State law in Connecticut, Massachusetts, and New Jersey gives developers of projects including affordable housing strong legal recourse if their project is rejected by local governments, where the municipality has not met its state-mandated obligation to provide affordable housing. This appeal process, known as a Builder's Remedy, has contributed significantly to housing production in those states.

Some states have required that municipalities provide an affordable housing plan. This is an effective way to ensure that municipalities are thinking about affordable housing and adjusting their regulations and ordinances to allow for its production. To work, however, states must review and approve the local plans, which in turn requires the political will to enforce the plans. The Builder's Remedy acts as a built-in enforcement feature. In fact, the threat of the Builder's Remedy is often enough to nudge municipalities to meet fair-share requirements, thereby avoiding legal repercussions. Without a clearly established Builder's Remedy in New York, the path is often too risky, lengthy, and expensive for developers looking to pursue legal recourse in response to exclusionary zoning.

New York's neighboring states have pursued many valuable and effective initiatives to address the growing need for housing. This paper offers a brief outline of these initiatives, in the hope that it will inspire our state and local leaders to make real the intent of home rule and the Berenson decision, and take steps to meet the growing demand for safe, stable, and attainable housing for everyone.

GLOSSARY OF TERMS

Home Rule: In a home rule system of governance, local municipalities can govern their communities and pass laws freely, as long as the actions they take are not prohibited according to state law.

Dillon's Rule: In a Dillon's Rule system of governance, local municipalities only have the freedom to enact laws that are expressly permitted by the state.

Accessory Dwelling Unit: Accessory Dwelling Units (ADUs) are attached or detached dwelling units that are located on the same parcel as a primary dwelling unit, where the owner of the parcel lives in one of the units. Some places allow more than one ADU on the same parcel, as long as those units are in fact accessory to a primary dwelling unit and the owner lives on site.

Builder's Remedy: A Builder's Remedy (BR) is a process that gives developers the option of strong legal recourse if their project is rejected by local governments. Conditions for utilizing the BR often include a requirement for affordable housing in the development itself, or a demonstration that the municipality has not met its state-mandated targets for affordable housing.

Fair Housing: The Fair Housing Act was passed in 1968 to legally prohibit housing discrimination by housing providers, such as real estate agents, landlords, and others. Tenants and homebuyers alike are entitled to be free from experiencing discrimination when seeking a place to live.

State Profile: **CONNECTICUT**

Home Rule or Dillon's Rule? Home rule.

Local Responsibilities for Meeting Regional Needs: Connecticut adopted a Builder's Remedy in 1990, thereby establishing a process for developers of affordable housing to appeal municipal decisions vis-à-vis the court system in cases where municipalities either deny approvals or place onerous conditions on the developer.

In 2021, Connecticut passed new zoning reforms that require municipalities to increase the variety of housing types they allow in order to "affirmatively further fair housing." This act prohibits municipalities from adopting various discriminatory and exclusionary land use regulations. For example, municipalities can no longer cap the number of units allowed in a multifamily development, and "neighborhood character" cannot be cited as a reason to deny approvals by land use boards. The reforms also included laws allowing Accessory Dwelling Units (ADUs) by right statewide and limiting the number of parking spaces required by local zoning laws.

Backstory: Connecticut is historically one of the most segregated states in the country, where its suburbs and rural areas are majority white and its urban cores are majority-minority. Advocacy organizations, including Desegregate Connecticut and the Center for Housing Opportunity (CHO), successfully advocated for housing reforms in 2021 that aim to promote equity through increased housing choice and economic diversity throughout the state. To address political pushback regarding the reforms, a clause was included that allowed municipalities to opt out of the ADU requirements and parking limitations by a two-thirds vote and public hearing prior to January 1, 2023. According to the CHO, while many localities opted out of the state standards, they still permit ADUs under local standards.

State Profile: **MASSACHUSETTS**

Home Rule or Dillon's Rule? Home rule.

Local Responsibilities for Meeting Regional Needs: Massachusetts established a statewide zoning appeal procedure in 1969 under Chapter 40B of its Comprehensive Permit Law, widely known as the Anti-Snob Zoning Act. Under this act, when a municipality rejects a development project or imposes onerous conditions for approval, the developer is entitled to appeal the municipal decision to a statewide Housing Appeals Committee, as long as the project includes at least 20-25% affordable housing. In such cases, the Housing Appeals Committee has the authority to reverse the municipal action and order the plan approved, or to remove the onerous conditions to facilitate the development. Municipalities in which 10% or more of the housing is already affordable housing are not subject to the Committee's authority.

In addition, since 2022, all municipalities served by the Massachusetts Bay Transit Authority (MBTA)—including municipalities adjacent to those served directly by the MBTA—are required to establish at least one zoning district where multifamily housing is permitted by right. The district must be within ½ mile of a transit station: either commuter rail, bus, subway, or ferry terminal. Within this transit-oriented development district, development must be permitted at a minimum gross density of 15 units per acre, may not be subject to age restrictions and must be suitable for families with children. The size of the district is not determined by Massachusetts state law. Although the law specifies requirements for density and location, it still allows quite a bit of flexibility for local municipalities to decide how to implement their multifamily district.

Backstory: As of 2010, Chapter 40B had been used to produce approximately 58,000 housing units, including nearly 31,000 units of housing for low- and moderate-income households and 27,000 market-rate units. The majority of units—70 percent— produced under Chapter 40B were rentals and the rest were for homeownership. Despite this, the state has continued to suffer from a severe lack of housing, particularly in the Boston metropolitan area, leading to the enactment of the multifamily zoning law in 2022. The mandatory multifamily zones are an effort to ease the housing crisis by reducing barriers to multifamily housing development, catalyzing the creation of more housing with access to public transit and other services. The multifamily requirement applies to 177 municipalities in Massachusetts that are served by the MBTA, excluding the City of Boston and Cape Cod.

State Profile: **NEW JERSEY**

Home Rule or Dillon's Rule? Home rule.

Local Responsibilities for Meeting Regional Needs: All municipalities in New Jersey are required to provide their "fair share" of affordable housing, according to the law known as the Mount Laurel Doctrine. This "fair share" is recalculated every 10 years, based on population and economic growth trends. The next update will take place in 2025.

All housing must be affordable to low- and moderate-income households, with half of the fair share target affordable to moderate income households earning 50-80% of the Area Median Income (AMI) as determined by HUD, while the other half must be affordable to low-income households (below 50% AMI). At least 13% of the low-income units must be set aside for very low-income households (below 30% AMI).

No more than 25% of the affordable units in a New Jersey municipality may be age restricted, and at least half of all affordable units built in each New Jersey municipality must be suitable for families, to ensure that units are accessible to people of all ages and all family types. At least 25% of units built must be rentals, while the remaining 75% can be owner-occupied.

Backstory: In 1972, the Southern Burlington County NAACP successfully sued the Township of Mount Laurel over their exclusionary zoning policies in a case that was decided by the New Jersey State Supreme Court in 1975, and came to be known as *Mount Laurel I*. That decision lacked enforcement mechanisms, and as a result, in 1983, the State Supreme Court reaffirmed *Mount Laurel I* and established a body of procedures, including the Builder's Remedy, for enforcing the "fair share" obligation. These two cases established what is known as the Mount Laurel doctrine, leading to enactment of the New Jersey Fair Housing Act in 1985. Since 1980, the Mount Laurel process has led to the development of 72,000 low- and moderate-income housing units, including 22,000 since 2015.

A key element in the success of the Mount Laurel doctrine in recent years has been the role of the Fair Share Housing Center, a nonprofit organization which acts to represent the public interest in litigation brought under the doctrine. Since 2015, the center has settled hundreds of cases and helped bring more than 300 towns into compliance with their affordable housing obligations.

State Profile: **NEW YORK**

Home Rule or Dillon's Rule? Home rule.

Local Responsibilities for Meeting Regional Needs: New York has no formal policies or mandates for state intervention in local zoning for the sake of increased housing production, affordable or not.

Backstory: According to New York Zoning Enabling Law, municipalities are granted authority to administer their own planning and zoning affairs. In 1975, the case of *Berenson vs. Town of New Castle* challenged municipal zoning in the Town of New Castle to allow for multifamily housing. The rationale was that zoning was established in order to ensure municipalities contribute to regional needs, and housing should be considered a regional need. In a similar case, *Land Master Montg I vs. Town of Montgomery*, a developer challenged the Town of Montgomery for removing its sole multifamily zone after the developer proposed a multifamily affordable development. The courts agreed that the removal of the multifamily zone would be exclusionary in nature.

Another legal frame of analysis was introduced following the 1988 court case, *County of Monroe vs. City of Rochester*, in which Monroe County was enabled to supersede local zoning for the sake of a regional infrastructure need. This framework does not apply to private parties, but grants immunity from local zoning to levels of government that are higher than the local municipality. To make the determination in *Monroe*, the court assessed the following 9 points (NYS Department of State, Memorandum of Law LU 14, 2020):

1. *The nature and scope of the instrumentality seeking immunity;*
2. *The encroaching government's legislative grant of authority;*
3. *The kind of function or land use involved;*
4. *The effect local land use regulation would have upon the enterprise concerned;*
5. *Alternative locations for the facility in less restrictive zoning areas;*
6. *The impact upon legitimate local interests;*
7. *Alternative methods of providing the proposed improvement;*
8. *The extent of the public interest to be served by the improvements; and*
9. *Intergovernmental participation in the project development process and an opportunity to be heard.*

While this would appear to offer a legal framework for requiring affordable housing, legal precedent has not been established to extend this framework to encompass housing as a regional need. To do so, county or state government would need to take initiative in development, and, if need be, sue the municipality to trigger a court decision. This would be an unlikely chain of events. Despite the legal precedents described here, New York State has not taken action to create affordable housing mandates, as in New Jersey or Massachusetts. Cases have not yielded any effective process through which municipalities would be required to adjust their municipal zoning to allow for more diverse housing types.

State Profile: **PENNSYLVANIA**

Home Rule or Dillon's Rule? Home rule.

Local Responsibilities for Meeting Regional Needs: Pennsylvania has no formal policies for state intervention in local zoning for the sake of increased housing production, affordable or not. Court decisions in a series of cases in the 1960s and 1970s have led to a doctrine, subsequently embodied in the Pennsylvania Municipalities Planning Code, that requires that municipal land use ordinances allow for a variety of housing types, "encompassing all basic forms of housing, including single-family and two-family dwellings, and a reasonable range of multifamily dwellings in various arrangements, mobile homes and mobile home parks."

Backstory: Pennsylvania passed its Municipalities Planning Code in 1968. There is no formal agency or process to enforce the requirement for diverse housing options in the code, nor are there specific standards to determine what is expected. As a result, the law is not broadly enforced. While the requirement for a variety of housing types has encouraged developer lawsuits, there is evidence to suggest that those cases have led to a diverse housing stock being provided in Pennsylvania in both urban and suburban areas. However, without any provision for affordable housing, it is uncertain whether the law does much to meet the needs of low- and moderate-income residents.

State Profile: **VERMONT**

Home Rule or Dillon's Rule? Dillon's Rule.

Local Responsibilities for Meeting Regional Needs: Vermont passed comprehensive zoning reforms in 2023 to increase housing production. Municipalities must now zone all areas served by public water and sewer at a minimum density of five dwelling units per acre, permit duplexes in all single-family zones, allow at least one accessory dwelling unit per lot, and grant an as-of-right automatic 40% density increase for affordable housing developments. Appeals against projects containing affordable housing on the basis of "character of the area" are prohibited.

Furthermore, parking requirements in Vermont are now limited by state law. Local zoning codes are prohibited from requiring more than one parking space per unit in areas served by public water and sewer, and no more than 1.5 space per dwelling unit in areas not connected to public utilities.

Backstory: As a response to the growing housing crisis, Vermont passed sweeping zoning reforms to increase opportunities for affordable housing statewide. The legislation was the result of an extended process to build consensus among housing advocates, environmental advocates and the Vermont League of Cities and Towns. A key element in achieving consensus was the inclusion of simultaneous reforms to Act 250, the state's ambitious environmental review law; the reforms included certain exemptions for environmental review for affordable housing in state-designated population centers.

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Hudson Valley Pattern for Progress is a nonprofit organization that provides objective research, planning, and educational training throughout the region. Its work identifies civic challenges and promotes regional, equitable, and sustainable solutions to constantly improve the quality of life in Hudson Valley communities. Pattern develops its work upon a considerable foundation of facts and experience, without political aims or affiliations. Pattern was founded in 1965 by the region's academic, business, and nonprofit leaders. Our work focuses on housing, community and urban planning, downtown revitalization, infrastructure, transportation, demographic change, and more. We serve the counties of Columbia, Dutchess, Greene, Orange, Putnam, Rockland, Sullivan, Ulster and Westchester.

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