

THE GOLDBLOCKS SOLUTION: CAREFULLY EXPANDED EXECUTIVE POWER TO COMBAT NEW YORK STATE’S HOUSING CRISIS

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INTRODUCTION

Consider this hypothetical. Annie is a single mom supporting two kids in Albany, New York. To attempt to pay for her one-bedroom apartment, Annie works one full-time job as a pharmacy clerk in addition to a part-time job as a waitress. Even though Annie spends most of her time working, she still cannot afford her monthly rent. To afford her monthly payments would require the impossible—two full-time jobs. Only this is not a hypothetical. This is the reality of the housing crisis in New York State. This crisis requires New York State to expand executive power.

The federal government’s frequent labeling of “crises” in its modern parlance has greatly expanded executive power and the definition of an “emergency.” In 2019, after Congress failed to fund the border wall, President Trump declared a “national emergency” at the U.S.–Mexico border

and diverted military funding to border wall construction.¹ In 2022, President Biden also attempted to expand executive power, albeit using the real crisis of the COVID-19 pandemic, invoking the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act), a post-9/11 relief statute, to cancel federal student debt.² More recently, in 2025, President Trump attempted to invoke the International Emergency Economic Powers Act (IEEPA) to impose global tariffs via executive order,³ and has declared by presidential proclamation that illegal immigration constitutes an “invasion,” triggering his ability to use the Alien Enemies Act of 1798 for aggressive deportation practices.⁴ While these instances of improperly expanded executive power based on perceived and actual “crises” have been viewed as threats to constitutional democracy⁵ or as negatively impacting vulnerable communities,⁶ New York State has previously expanded executive power to respond effectively to overt crises and directly benefitted vulnerable populations without endangering the balance of power.

Whereas “crises” enable dishonest expansions of executive power, New York State’s housing crisis demands executive intervention. From 2012 to 2022, New York State ranked thirty-second in the nation for new housing construction,⁷ with the housing stock in New York and neighboring states during this period rising by less than four percent.⁸ This lack of housing construction caused apartment vacancy rates to decrease to below “housing

1. See Elizabeth Goitein, *Emergency Powers: A System Vulnerable to Executive Abuse*, BRENNAN CTR. FOR JUST. (Dec. 15, 2023) [hereinafter Goitein, *Emergency Powers*], <https://www.brennancenter.org/our-work/analysis-opinion/emergency-powers-system-vulnerable-executive-abuse> [https://perma.cc/4LYC-4LLF].

2. See Elizabeth Goitein, *Biden Used ‘Emergency Powers’ to Forgive Student Debt? That’s a Slippery Slope.*, BRENNAN CTR. FOR JUST. (Sep. 8, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/biden-used-emergency-powers-forgive-student-debt-thats-slippery-slope> [https://perma.cc/U9SV-WNMY]. The Supreme Court in *Biden v. Nebraska* invalidated this use of the HEROES Act. See 600 U.S. 477, 483 (2023).

3. This invocation of executive power using the International Emergency Economic Powers Act was later ruled impermissible by the Supreme Court in *Learning Resources, Inc. v. Trump*. See 607 U.S. 229, 255 (2026).

4. See William A. Galston, *Is the Growth of Executive Power a Threat to Constitutional Democracy?*, BROOKINGS (July 2, 2025), <https://www.brookings.edu/articles/is-the-growth-of-executive-power-a-threat-to-constitutional-democracy> [https://perma.cc/WPR7-38TE].

5. See Galston, *supra* note 4.

6. See Goitein, *Emergency Powers*, *supra* note 1.

7. See N.Y. STATE COMPTROLLER, NEW YORKERS IN NEED: THE HOUSING INSECURITY CRISIS 1 (2024), <https://www.osc.ny.gov/files/reports/pdf/new-york-housing-insecurity.pdf> [https://perma.cc/A8XG-D2C3].

8. See Marcel Negret & Moses Gates, *State Zoning Reforms Are Key to Housing Opportunity*, RPA (Feb. 10, 2022), <https://rpa.org/news/lab/ny-zoning-reforms-housing-opportunity> [https://perma.cc/3BW9-EBE5].

emergency” levels⁹ and home prices to increase, elevating the costs of housing for all New Yorkers.¹⁰ In 2022, 2.9 million New York households were cost-burdened,¹¹ paying more than thirty percent of their gross income on housing.¹² Housing in New York State became unaffordable to those earning a minimum wage as they needed to work the equivalent of almost two full-time jobs to afford a one-bedroom apartment.¹³

Current economic and political factors threaten to push the state of housing in New York even deeper into crisis. Construction prices, which are still elevated from COVID-19-era inflation increases,¹⁴ are likely to further balloon from tariffs¹⁵ and from labor shortages caused by the Trump Administration’s mass deportations.¹⁶ Overall, in the New York-New Jersey-Connecticut area, there is projected to be a deficit of more than 450,000 homes being built over the next five years because of these price increases.¹⁷ The current administration also plans to cut the U.S. Department of Housing and Urban Development’s (HUD) funding almost in half,¹⁸ potentially excising a majority of the Section 8 housing program subsidies.¹⁹

9. See N.Y. STATE COMPTROLLER, *supra* note 7, at 29.

10. See discussion *infra* Part I.A.1.

11. See N.Y. STATE COMPTROLLER, *supra* note 7, at 6.

12. See N.Y. STATE COMPTROLLER, *supra* note 7, at 1.

13. See NAT’L LOW INCOME HOUS. COAL., 2026 STATE HOUSING PROFILE: NEW YORK 2 (2026), <https://nlihc.org/housing-needs-by-state/new-york> [<https://perma.cc/DAG9-6UX5>].

14. See ABC: Construction Materials Prices Increase 1.4% in January, Up 40.5% Since February 2020, ASSOCIATED BUILDERS & CONTRACTORS (Feb. 13, 2025), <https://www.abc.org/News-Media/News-Releases/abc-construction-materials-prices-increase-14-in-january-up-405-since-february-2020> [<https://perma.cc/4NEM-Y5D7>]; Paul Krugman, *The Year of Inflation Infamy*, N.Y. TIMES (Dec. 16, 2021), <https://www.nytimes.com/2021/12/16/opinion/inflation-economy-2021.html> (on file with the *Fordham Urban Law Journal*) (describing the inflationary effects of the COVID-19 pandemic).

15. See Corey Husak, Natalie Baker & Mimla Wardak, *Trump Administration Tariffs Could Result in 450,000 Fewer New Homes Through 2030*, CTR. FOR AM. PROGRESS (Dec. 16, 2025), <https://www.americanprogress.org/article/trump-administration-tariffs-could-result-in-450000-fewer-new-homes-through-2030/> [<https://perma.cc/BG9N-X8QS>].

16. See Jorge González-Hermoso, Christina Plerhoples Stacy & Hamutal Bernstein, *Mass Deportations Would Worsen Our Housing Crisis*, URB. INST. (Feb. 25, 2025), <https://www.urban.org/urban-wire/mass-deportations-would-worsen-our-housing-crisis> [<https://perma.cc/YZ5N-7SWT>].

17. See Husak, Baker & Wardak, *supra* note 15.

18. See Kim Johnson, *Trump Administration Releases Additional Details of FY26 Budget Request Slashing HUD Rental and Homelessness Assistance Programs – Take Action!*, NAT’L LOW INCOME HOUS. COAL. (June 2, 2025), <https://nlihc.org/resource/trump-administration-releases-additional-details-fy26-budget-request-slashing-hud-rental> [<https://perma.cc/HA52-5MSE>]; Rebecca Picciotto, *Affordable-Housing Projects Stall Over Proposed Cuts to Rental Assistance*, WALL ST. J. (July 22, 2025), <https://www.wsj.com/real-estate/trump-housing-projects-funding-cuts-aa284709?> (on file with the *Fordham Urban Law Journal*).

19. See Picciotto, *supra* note 18.

These federal subsidies currently allow low-income households to pay rent, provide a substantial revenue stream for landlords, and serve as an incentive for prospective developers.²⁰

The housing crisis in New York State has been exacerbated, in part, because of the compliance costs associated with the State Environmental Quality Review Act (SEQRA). SEQRA, a main tenet of New York State's environmental laws, requires environmental review for housing projects that agencies determine may have a significant impact on the environment.²¹ SEQRA affords those impacted by these projects a private right of action.²² SEQRA's costs are compounded by the "Not in My Backyard" (NIMBY) movement's use of SEQRA lawsuits to attempt to prevent affordable housing from being built.²³ NIMBYism, which began with low-income communities protesting sites such as toxic waste and nuclear power plants near their homes,²⁴ transformed in the 2000s as wealthy households moved back into the cities,²⁵ bringing with them a more restrictive regulatory environment and residents adept in blocking new development.²⁶ The result is expenditures associated with the preparation of environmental assessments, the delays they require, and NIMBY suits attempting to halt affordable housing development,²⁷ further pushing costs up for developers from litigation expenses and construction delays.²⁸ These costs for developers lead to decreased development and less supply which in turn increases housing prices for households.²⁹

This Note argues for a policy solution that allows affordable housing development to be unburdened by SEQRA compliance and consequential litigation, lowering costs for New York households, especially renters. Such

20. See Picciotto, *supra* note 18.

21. See discussion *infra* Part I.B.1.

22. See discussion *infra* Part I.B.1.

23. See discussion *infra* Part I.B.2.

24. See Cindy Rodriguez, *The Origins and Iterations of 'Not in My Backyard'*, WNYC NEWS (Apr. 17, 2017), <https://www.wnyc.org/story/not-my-backyard-its-origin-and-iterations> [<https://perma.cc/87SB-9CFZ>].

25. See Vicki Been, *City NIMBYs*, 33 J. LAND USE 217, 222 (2018).

26. See *id.*; Edward L. Glaeser, *Houston, New York Has a Problem*, CITY J. (2008), <https://www.city-journal.org/article/houston-new-york-has-a-problem> [<https://perma.cc/4NWN-ZT6B>]; Edward L. Glaeser, Joseph Gyourko & Raven Saks, *Why Is Manhattan So Expensive? Regulation and the Rise in House Prices* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 10124, 2003), https://www.nber.org/system/files/working_papers/w10124/w10124.pdf [<https://perma.cc/RTE7-PAWE>].

27. See discussion *infra* Part I.B.2.

28. See discussion *infra* Part I.B.2.

29. See SEAN CAMPION, CITIZENS BUDGET COMM'N, IMPROVING NEW YORK CITY'S LAND USE DECISION-MAKING PROCESS 23 (2022) [hereinafter CAMPION, LAND-USE].

a solution must also recognize that avoiding SEQRA in the short-term to benefit cost-burdened households will result in negative long-term environmental consequences if left unchecked.³⁰

Part I of this Note examines the housing crisis in New York State and describes the factors that are driving it, including New York's environmental law framework. Part II identifies possible policy solutions that would allow affordable housing developers to avoid the costs of SEQRA, increasing construction and consequentially reducing costs on households. Part III concludes that amending New York State's Executive Law would be the best solution to achieve lower housing costs because it would effectively abate the crisis, withstand legal challenges, and allow for SEQRA to be quickly reinstated.

I. NEW YORK STATE'S HOUSING CRISIS

The United States in general, and New York State in particular, are facing unprecedented housing crises because housing shortages are making purchasing prices and rents untenable for households. In the housing market, a "shortage" often refers not only to low supply with high demand, but also a mismatch between demand at affordable prices and available supply.³¹ This nationwide housing shortage stems from insufficient housing construction. Since the Great Recession in 2008, housing construction has plummeted.³² The nationwide historical average of housing units constructed per 100,000 people was 626 units from 1968–2006 but as of 2024, there were only 478 units per 100,000 people.³³ In the Tri-State Area (New York, New Jersey, and Connecticut), from 2012 to 2022, the housing stock only increased 3.5%.³⁴ This housing growth lagged behind the Tri-State Area's population growth³⁵ and job growth,³⁶ further impacting the

30. See discussion *infra* Part I.B.1.

31. See Elena Patel, Aastha Rajan & Natalie Tomeh, *Make It Count: Measuring Our Housing Supply Shortage*, BROOKINGS (Nov. 26, 2024), <https://www.brookings.edu/articles/make-it-count-measuring-our-housing-supply-shortage/> [https://perma.cc/2TC8-3Q74].

32. See Jared Bernstein, Michael Negron & Natalie Baker, *Build, Baby, Build: A Plan to Lower Housing Costs for All*, CTR. FOR AM. PROGRESS (Nov. 17, 2025), <https://www.americanprogress.org/article/build-baby-build-a-plan-to-lower-housing-costs-for-all/> [https://perma.cc/F36E-PZTA].

33. See Bernstein, Negron & Baker, *supra* note 32, at 2.

34. See Negret & Gates, *supra* note 8.

35. See Negret & Gates, *supra* note 8 (noting the Tri-State Area's housing stock only increased by about 3.5% from 2012 to 2022 while population increased by almost six percent during that period).

36. See Alex Horowitz & Adam Staveski, *New York's Housing Shortage Pushes Up Rents and Homelessness*, PEW CHARITABLE TRS. (May 25, 2023), <https://www.pew.org/en/research-and-analysis/articles/2023/05/25/new-yorks-housing-shortage-pushes-up-rents-and->

housing shortages. By 2024 this lagging housing growth contributed to a shortage of 540,000 housing units in the Tri-State Area that is expected to increase to 920,000 units by 2035.³⁷

Part I.A will describe the current housing crisis in New York State. Part I.A.1 will illustrate the factors that have caused housing conditions to reach crisis levels. Part I.A.2 will then detail current economic and political factors that have the capability to push the housing climate deeper into crisis but also could provide an opening for change. Part I.B will illustrate the regulatory factors that have contributed to the housing crisis in New York State. Part I.B.1 will provide an overview of SEQRA and how this environmental framework in practice can be costly and can stop or delay housing construction. Part I.B.2 will then describe how the NIMBY movement has used these regulations as a sword to stop the building of affordable housing and provide an example from New York City as a case study.

A. New York State Is Facing a Housing Crisis

New York State is in the midst of a housing crisis. Part I.A.1 will illustrate how high costs for households, stemming in large part from inadequate housing supply, have caused a housing crisis. Part I.A.2 will then detail current economic and political factors at the state and federal level that may worsen New York State's housing crisis but also could provide the right political moment for policy intervention.

1. New York's Current Housing Shortage and High Costs on Households

New York State's current housing shortage is demonstrated by low rental vacancy rates and households spending a large portion of their income on housing costs. Lower vacancy rates drive up housing costs because there are fewer apartments available than apartment seekers.³⁸ In 2022, the rental vacancy rate in New York State was at 3.5%,³⁹ down from four percent in

homelessness [<https://perma.cc/A6WZ-A5WT>] (explaining that from 2010 to 2023, job growth in New York State totaled twenty-two percent, and the increase in housing stock was only four percent); VICKI BEEN, JIAQI DONG & HAYLEY RAETZ, NYU FURMAN CTR., *CRITICAL LAND USE AND HOUSING ISSUES FOR NEW YORK STATE IN 2023*, at 7 (2023), <https://www.furmancenter.org/wp-content/uploads/2026/02/Critical-Land-Use-and-Housing-Issues-for-New-York-State-in-2023.pdf> [<https://perma.cc/N3VQ-FLQ5>] (stating that from 2009 to 2018 there was an average of 0.5 housing units per job in the New York metro region, down from 2.2 units per job in 2008).

37. MCKINSEY & Co., *IMPACT ANALYSIS OF HOUSING UNDERSUPPLY ON THE TRI-STATE REGION 1* (2024), https://s3.us-east-1.amazonaws.com/rpa-org/pdfs/20240502_Impact-analysis-of-housing-undersupply-on-RPA-region_Main-report_vS_III.pdf [<https://perma.cc/Y6ZA-8Y5Y>].

38. *See* BEEN, DONG & RAETZ, *supra* note 36, at 6 n.7.

39. *See* N.Y. STATE COMPTROLLER, *supra* note 7, at 10.

2021 and five percent in 2011.⁴⁰ This current 3.5% rental vacancy is below the five percent rental vacancy rate that New York State law considers a “housing emergency” for the purposes of rent regulation,⁴¹ a level at which competition fails to generate pressure for landlords to keep rents affordable.⁴² Two years later, in 2024, New York City’s rental vacancy rate dropped even further to 1.4%, a historic low since New York City began tracking this metric in the 1960s.⁴³

This insufficient supply of affordable housing causes housing prices to increase⁴⁴ and drives up rent for households.⁴⁵ As of 2022, New York State had 2.9 million cost-burdened households⁴⁶—households whose housing costs exceed thirty percent of gross income⁴⁷—which accounted for 38.9% of the state’s total households, the third highest rate in the U.S.⁴⁸ From this total, twenty percent of these households were severely cost-burdened, paying more than fifty percent of their income towards housing costs.⁴⁹ In 2026, to afford a one-bedroom rental in New York State at the Fair Market rate⁵⁰ and not be cost-burdened, a household needed to earn more than \$55,082 annually.⁵¹ For minimum wage workers, one would need to work the equivalent of almost two full-time jobs to afford a one-bedroom apartment and not be cost-burdened.⁵² In particular, New York City is home

40. See BEEN, DONG & RAETZ, *supra* note 36, at 6.

41. See BEEN, DONG & RAETZ, *supra* note 36, at 6.

42. See Letter from N.Y. State Legislature to Andrew M. Cuomo, Governor of N.Y. (Mar. 15, 2011), https://assembly.state.ny.us/write/upload/member_files/067/pdfs/20110324_0041532.pdf [<https://perma.cc/8Q5V-6QN3>].

43. See SEAN CAMPION, CITIZENS BUDGET COMM’N, A BUILDING CRISIS: THE QUALITY-OF-LIFE, POPULATION, AND ECONOMIC EFFECTS OF HOUSING UNDERPRODUCTION 3 (2024) [*hereinafter* CAMPION, BUILDING CRISIS].

44. See Been, *supra* note 25, at 229.

45. See Bernstein, Negron & Baker, *supra* note 32; Patel, Rajan & Tomeh, *supra* note 31.

46. See N.Y. STATE COMPTROLLER, *supra* note 7, at 10.

47. See N.Y. STATE COMPTROLLER, *supra* note 7, at 6.

48. See N.Y. STATE COMPTROLLER, *supra* note 7, at 6.

49. See N.Y. STATE COMPTROLLER, *supra* note 7, at 6.

50. The Fair Market Rents are used by HUD to determine payments for certain programs and are estimates of 40th percentile gross rents for standard units within an area. See *HUD Fair Market Rents (40th Percentile Rents)*, U.S. DEP’T OF HOUS. & URB. DEV.: OFF. OF POL’Y DEV. AND RSCH., <https://www.huduser.gov/portal/datasets/fmr.html> [<https://perma.cc/49BV-7EYW>] (last visited Sep. 17, 2026).

51. See NAT’L LOW INCOME HOUS. COAL., *supra* note 13, at 2.

52. See NAT’L LOW INCOME HOUS. COAL., *supra* note 13, at 2. As of 2026, the average Fair Market Rent for a one-bedroom apartment in New York State is \$1,377. See *id.* To afford this amount of rent without paying more than thirty percent of their income on housing, a household must earn over \$4,590 per month or \$55,082 per year. See *id.* Assuming that an individual can work forty-hour work weeks for all fifty-two weeks in a year, this would require an hourly wage of \$26.48, almost double the \$16 that a minimum wage worker outside

to the highest housing costs in the state, where forty-three percent of households are cost-burdened.⁵³ Overall, cost-burdened households are more prevalent in urban areas, including more than one-third of the households in Buffalo, Syracuse, Albany, Rochester, and Yonkers.⁵⁴

According to one estimate in 2022, New York State needs to build 817,600 new housing units within the next ten years to compensate for population growth, owner and rental vacancy rates, uninhabitable housing stock due to dilapidated housing, and overcrowding.⁵⁵ This estimate is in line with Governor Hochul's plan to address the housing crisis by building 800,000 new homes over the next decade.⁵⁶ This amount of necessary housing is more than one and a half times the 462,000 housing units that New York State added between 2012 and 2022.⁵⁷

2. *The Current Economic and Political Climate Affecting the Crisis*

The present economic and political climate in the United States is harmful for a housing market already in crisis but also signals the potential for reform. Current U.S. international and domestic policies have increased and will continue to increase costs on construction and the consequential costs on households. In early 2025, President Trump issued two new tranches of tariffs on residential construction-related goods: one under the guise of national security⁵⁸ and another under emergency powers with IEEPA.⁵⁹ According to one estimate, the increase in construction costs as a consequence of President Trump's tariffs will result in 450,000 fewer homes being built over the next five years.⁶⁰ While the Supreme Court affirmed the

of New York City, Long Island, and Westchester counties earn in 2026. *See Your New York State Minimum Wage*, N.Y. STATE DEP'T OF LAB., <https://dol.ny.gov/minimum-wage> [<https://perma.cc/2M6X-PS37>] (last visited Aug. 10, 2026).

53. *See* N.Y. STATE COMPTROLLER, *supra* note 7, at 7.

54. *See* N.Y. STATE COMPTROLLER, *supra* note 7, at 7–8.

55. *See* Marcel Negret et al., *Meeting Housing Need and the Pace of Growth in New York State*, RPA (Dec. 19, 2022), <https://rpa.org/news/lab/meeting-housing-need-and-the-pace-of-growth-in-new-york-state> [<https://perma.cc/TV93-3PF2>].

56. *See FY 2024 Executive Budget Highlights*, N.Y. STATE GOVERNOR'S OFF. (Feb. 1, 2023), <https://www.governor.ny.gov/fy-2024-executive-budget/fy-2024-executive-budget-highlights> [<https://perma.cc/KZ8Y-EWXZ>].

57. *See* N.Y. STATE COMPTROLLER, *supra* note 7, at 1.

58. President Trump issued tariffs on steel and aluminum under Section 232 of the Trade Expansion Act, citing national security concerns. *See* Elena Patel, Robert McClelland & John Wong, *Recent Tariffs Threaten Residential Construction*, BROOKINGS (Oct. 3, 2025), <https://www.brookings.edu/articles/recent-tariffs-threaten-residential-construction/> [<https://perma.cc/99B9-QLDL>]. Trump also placed a tariff on lumber and its derivative products through this national security rationale. *See id.*; Proclamation No. 10976, 90 Fed. Reg. 48127 (Sep. 29, 2025).

59. *See* Patel, McClelland & Wong, *supra* note 58.

60. *See* Husak, Baker & Wardak, *supra* note 15.

invalidation of President Trump's use of IEEPA in *Learning Resources, Inc. v. Trump*,⁶¹ the other tariffs on housing construction inputs remain.

U.S. policy may also worsen the housing crisis by exacerbating a construction labor shortage. As one-eighth of the construction workforce is estimated to be undocumented, the Trump Administration's immigration policy of mass deportations will potentially add to the already existing construction worker shortage.⁶² Further exacerbating the worker shortage would increase labor costs due to a lack of labor supply, translating into higher housing costs for consumers and deepening the housing crisis.⁶³

Federal government downsizing also will likely decrease the supply of housing and further increase costs for New Yorkers. In particular, the proposed HUD funding cuts are likely to negatively affect housing supply and increase cost-burdens to households. In May 2025, President Trump and HUD Secretary Scott Turner announced a budget request that would cut HUD's funding by \$27 billion, about forty-four percent of its previous budget.⁶⁴ Section 8, the federal program that provides rental assistance to low-income households, is likely to be greatly affected.⁶⁵ Section 8 allows its low-income participants to find suitable housing in the private market by providing federally subsidized grants to compensate landlords for the difference between thirty percent of the tenants' annual income and the total rent amounts due.⁶⁶ This Section 8 subsidy is vital to the New York State housing market as it provides landlords of affordable housing with a crucial revenue stream to maintain and pay debt on over 350,000 housing units.⁶⁷ These Section 8 funding cuts could cause the risk of default on \$50 billion of multi-family building loans.⁶⁸ This financial uncertainty has already caused developers to stall or cancel new projects as they face the prospective unavailability of these federal funds.⁶⁹

Although recently enacted legislation may alleviate some burdens that have prevented housing construction, the scope of potential spending cuts and current economic realities limit its impact. Legislation enacted during the Trump Administration has made it easier for developers to build affordable housing by expanding the low-income housing tax credit

61. See 607 U.S. 229, 255 (2026).

62. See González-Hermoso, Plerhoples Stacy & Bernstein, *supra* note 16.

63. See González-Hermoso, Plerhoples Stacy & Bernstein, *supra* note 16.

64. See Johnson, *supra* note 18; see also Picciotto, *supra* note 18.

65. See Picciotto, *supra* note 18.

66. See *Section 8 Housing Choice Voucher Program (HCV)*, NYU FURMAN CTR., <https://furmancenter.org/coredata/directory/entry/section-8-housing-choice-voucher-program> [<https://perma.cc/DJS8-6AT2>] (last visited Sep. 22, 2026).

67. See Picciotto, *supra* note 18.

68. See Picciotto, *supra* note 18.

69. See Picciotto, *supra* note 18.

(LIHTC),⁷⁰ a tax credit issued for the construction of rental housing targeted towards lower-income households.⁷¹ Even so, the prospect of vastly diminished HUD funding is problematic, especially to New York City, as the City and its private sector partners have invested more than \$10 billion in affordable housing deals tied to long-term HUD contracts threatened by these cuts.⁷² Inflation also has especially impacted the construction industry, with construction costs increasing 40.5% over the past five years from supply chain issues created by the COVID-19 pandemic.⁷³

While these economic conditions signal a lack of affordability, as described in Part I.A.1, the political conditions signal a current willingness to enact policy that would create more affordable housing. Political tailwinds both nationally and in New York State point towards support of housing reform. At the national level, Congress passed the 21st Century ROAD to Housing Act, which aims to broadly increase housing production on the supply side.⁷⁴ Specifically, the law allows for simplified compliance with federal environmental law for certain types of housing.⁷⁵ While President Trump did not sign this bill into law, his failure to veto after ten days meant that the passed bill became a law.⁷⁶ But importantly for this Note, this bill does not (and cannot) alter the state and local regulatory requirements for housing construction. For New York State, in the

70. The One Big Beautiful Bill Act (H.R. 1), passed in Summer 2025, expanded two provisions of the LIHTC program. See *16-2 Impacts of the "One Big Beautiful Bill Act,"* NAT'L LOW INCOME HOUS. COAL. (Sep. 25, 2025), <https://nlihc.org/resource/16-2-impacts-one-big-beautiful-bill-act> [<https://perma.cc/6YVP-SM5T>].

71. See *Low-Income Housing Tax Credit (LIHTC) Program Data*, U.S. DEP'T OF HOUS. & URB. DEV.: OFF. OF POL'Y DEV. & RSCH., <https://www.huduser.gov/portal/datasets/lihtc.html> [<https://perma.cc/QC69-FLSF>] (last visited Sep. 22, 2026).

72. See *NYHC Releases New Policy Brief on HUD Cuts with Analysis Featured in WSJ*, N.Y. HOUS. CONF. (July 22, 2025), <https://thenyhc.org/2025/07/22/new-nyhc-analysis-hud-funding-cuts-july2025/> [<https://perma.cc/5KNH-LPRF>].

73. See ASSOCIATED BUILDERS & CONTRACTORS, *supra* note 14; Krugman, *supra* note 14.

74. See *Client Alert: Senate Advances 21st Century ROAD to Housing Act*, LATHAM & WATKINS LLP (Mar. 11, 2026), <https://www.lw.com/en/insights/senate-advances-21st-century-road-to-housing-act> [<https://perma.cc/YD89-G7GB>].

75. See Emma Waters, *Inside the Deal: What's in the Final 21st Century ROAD to Housing Act? A Section-by-Section Summary of the Final Law*, BIPARTISAN POL'Y CTR. (June 23, 2026), <https://bipartisanpolicy.org/issue-brief/inside-the-deal-whats-in-the-final-21st-century-road-to-housing-act> [<https://perma.cc/ZQW5-NAPV>]. The 21st Century ROAD to Housing Act includes changes to the National Environmental Policy Act (NEPA), the federal statute that the New York State equivalent, SEQRA, is modeled after. See discussion *infra* Part I.B.1.

76. See Michael Gold, *Bipartisan Housing Bill Becomes Law Even Though Trump Refuses to Sign It*, N.Y. TIMES (July 10, 2026), <https://www.nytimes.com/2026/07/10/us/politics/trump-housing-bill.html?login=email&auth=login-email> (on file with the *Fordham Urban Law Journal*).

beginning of 2026, Governor Hochul, in her “State of the State” address, endorsed reforms to build more housing and infrastructure by reducing regulatory burdens.⁷⁷ In May 2026, the New York State Legislature passed the Fiscal Year 2027 Budget, which, as will be discussed later, included modest SEQRA reform to boost the building of affordable housing.⁷⁸

B. Factors Contributing to New York State’s Housing Crisis

Crisis-level costs for New York households are caused, in part, by regulatory burdens for developers. Part I.B will discuss the regulatory factors that have impeded the building of housing, worsening the crisis. Part I.B.1 will provide an overview of New York’s State Environmental Quality Review Act, detailing its purpose as well as its costly regulatory procedures. Part I.B.2 will discuss how social movements have leveraged SEQRA to accomplish their goal of preventing the construction of affordable housing.

1. New York’s State Environmental Quality Review Act

Regulatory impediments to affordable housing have obstructed the construction of affordable housing in New York,⁷⁹ especially those required under SEQRA.⁸⁰ Enacted in 1975, SEQRA was a response to lawmakers’ concern that agencies empowered to issue permits or approve proposed projects were not giving sufficient consideration to the environmental consequences of their actions.⁸¹ The Legislature sought to ensure that all agencies conduct their affairs with an awareness of their obligation to protect the environment.⁸² The Department of Environmental Conservation (DEC), a state agency charged with conserving and protecting natural resources and the environment,⁸³ was tasked by the statute to create a regulatory framework

77. See *Let Them Build: Governor Hochul Unveils Landmark Reforms to Cut Red Tape and Build More Housing and Infrastructure*, N.Y. STATE GOVERNOR’S OFF. (Jan. 13, 2026), <https://www.governor.ny.gov/news/let-them-build-governor-hochul-unveils-landmark-reforms-cut-red-tape-and-build-more-housing> [https://perma.cc/4PM4-NR7E].

78. See Kate Lisa & Rebecca C. Lewis, *Here’s What’s in the FY 27 New York State Budget*, CITY & STATE: N.Y. (May 27, 2026), <https://www.cityandstateny.com/policy/2026/05/heres-whats-fy-27-new-york-state-budget/413729/> [https://perma.cc/R3FQ-EYAZ].

79. See, e.g., Glaeser, Gyourko & Saks, *supra* note 26, at 3; Glaeser, *supra* note 26.

80. See CAMPION, LAND-USE, *supra* note 29, at 25; discussion *infra* Part I.B.1.

81. See Gerald M. Levine, *The New York State Environmental Quality Review Act of 1975: An Analysis of the Parties’ Responsibilities in the Review/Permit Request Process*, 12 FORDHAM URB. L.J. 1, 3 (1984).

82. See N.Y. ENV’T CONSERV. LAW § 8-0103(8) (McKinney 2026).

83. See *About DEC*, N.Y. STATE DEP’T OF ENV’T CONSERVATION, <https://dec.ny.gov/about> [https://perma.cc/YE6F-AZX8] (last visited Sep. 22, 2026).

to implement SEQRA.⁸⁴ Accordingly, DEC promulgated the 6 N.Y.C.R.R. Part 617 (“Part 617”) framework, outlining the requirements and procedures of SEQRA.⁸⁵

Construction of affordable housing pertains to SEQRA as it falls within the definition of an “action” in Part 617. An “action” is a “project[] or physical activit[y],” or “adoption of agency rules, regulations and procedures.”⁸⁶ A project or physical activity includes “construction” which requires agency permitting approval from a state or local agency per New York State’s Uniform Code.⁸⁷

While the Legislature intended that agencies would always consider environmental factors at the earliest possible time,⁸⁸ it also expected these agencies to give appropriate weight to both social and economic considerations.⁸⁹ Access to affordable housing implicates both public health and economic consequences. Housing is a social determinant of health; families experiencing housing instability are more likely to report negative health outcomes, such as high blood pressure, depression and anxiety.⁹⁰ Inadequate housing also can affect households’ susceptibility to infectious and chronic disease, reproductive conditions, and injury.⁹¹ Higher cost burdens from housing insecurity are linked to poorer self-reported health and delayed doctor visits.⁹² Housing also has a myriad of economic consequences. Higher housing costs make it harder for households to move to areas with better-paying jobs and higher-quality schools.⁹³ Not only do

84. See N.Y. ENV’T CONSERV. LAW § 8-0113.

85. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.1 (2026). While elsewhere the entire legislative and regulatory framework is called “SEQRA” or “SEQR,” in this Note, regulations promulgated by DEC will be referred to as “Part 617” and the enabling statute as “SEQRA” to avoid confusion.

86. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(b) (2026).

87. The Residential Code of New York State Chapter 1, Section R105.2 and the Building Code of New York State Chapter 1, Section 105.2 state that housing construction requires building permits.

88. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.1(c) (2026).

89. See N.Y. ENV’T CONSERV. LAW § 8-0101.

90. See Kathleen Hoke, *The Public Health Implications of Housing Instability, Eviction, and Homelessness*, THE NETWORK FOR PUB. HEALTH L. (Nov. 30, 2023), <https://www.networkforphl.org/wp-content/uploads/2025/01/The-Public-Health-Implications-of-Housing-Instability-Eviction-and-Homelessness> [https://perma.cc/E798-U8KA].

91. See Diana Hernández & Carolyn B. Swope, *Housing as a Platform for Health and Equity: Evidence and Future Directions*, 109 AM. J. PUB. HEALTH 1363, 1363 (2019).

92. See Roshanak Mehdipanah, *Without Affordable, Accessible, and Adequate Housing, Health Has No Foundation*, 101 MILBANK Q. 419, 421–22 (2023).

93. See KRISTEN KLURFIELD, BIPARTISAN POL’Y CTR., EXPLORING THE AFFORDABLE HOUSING SHORTAGE’S IMPACT ON AMERICAN WORKERS, JOBS, AND THE ECONOMY 4 (2024), <https://bipartisanpolicy.org/wp-content/uploads/2024/03/Exploring-the-Aff-Housing->

these high costs significantly stunt current economic productivity,⁹⁴ but their effect on households' ability to move to more affluent areas has significant implications for generational economic mobility.⁹⁵

SEQRA's applicability to housing construction aligns with the purpose of the regulations, as this type of action can have substantial environmental consequences. Waste from housing construction pollutes the environment through its release of chemicals and other materials.⁹⁶ Demolition and construction are the largest segments of many urban waste streams.⁹⁷ The buildings sector, including housing construction, also contributes to more than one-third of global CO₂ emissions.⁹⁸ In 2018, it was estimated that 600 million tons of construction and demolition debris were generated in the United States, with over 143 million tons ending up in landfills.⁹⁹

As housing construction triggers SEQRA as intended, after an agency determines that the construction of housing is an action as defined under Part 617, it must make a determination as to whether the action will have a significant environmental impact,¹⁰⁰ which implicates whether environmental review will be required.¹⁰¹ Under SEQRA, the "environment" is both the physical conditions—land, air, water, flora, and fauna—which the proposed action will impact, as well as broader aspects of

Shortage-Impact-on-American-Workers-Jobs-and-the-Economy_BPC-3.2024.pdf
[<https://perma.cc/Z2H9-UYGM>].

94. See *id.* at 7.

95. See Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility I: Childhood Exposure Effects*, 133 Q. J. ECON. 1107, 1159 (2018) (discussing how children's economic mobility is impacted by the neighborhood they grew up in).

96. See Shitaw Tafesse, Yidnekachew Esayas Girma & Eliyas Dessalegn, *Analysis of the Socio-Economic and Environmental Impacts of Construction Waste and Management Practices*, 8 HELIYON 1, 8 (2022).

97. See *Why Cities Need to Address the Hidden Impact of the Construction Sector*, C40 KNOWLEDGE HUB, https://www.c40knowledgehub.org/s/article/Why-cities-need-to-address-the-construction-sectors-hidden-emissions?language=en_US (last updated Sep. 2025) (on file with the *Fordham Urban Law Journal*); see also EPA, BUILDINGS AND THEIR IMPACT ON THE ENVIRONMENT: A STATISTICAL SUMMARY 6 (Apr. 22, 2009), <https://archive.epa.gov/greenbuilding/web/pdf/gbstats.pdf> [<https://perma.cc/E7PR-DTPQ>].

98. See *Here's How Buildings Contribute to Climate Change – and What Can Be Done About It*, U.N. ENV'T PROGRAMME (Apr. 30, 2025), <https://www.unep.org/news-and-stories/story/heres-how-buildings-contribute-climate-change-and-what-can-be-done-about-it> [<https://perma.cc/9ELK-SMXW>].

99. See *Construction and Demolition Debris: Material-Specific Data*, EPA (Oct. 23, 2025), <https://www.epa.gov/facts-and-figures-about-materials-waste-and-recycling/construction-and-demolition-debris-material> [<https://perma.cc/SM9N-2BF7>].

100. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7 (2026).

101. See *id.* § 617.1(c) ("SEQR requires that all agencies determine whether the actions . . . have a significant impact on the environment, and, if it is determined the action may have a significant adverse impact, prepare or request an environmental impact statement.").

the environment such as noise, historical or aesthetic significance, existing patterns of population concentration, and existing neighborhood character.¹⁰² A significant environmental impact is not directly defined in SEQRA or Part 617,¹⁰³ but there are three aspects of SEQRA that factor into an agency's determination of environmental significance: evaluation of the "Type" of action, evaluation of the Environmental Assessment Form (EAF), and application of criteria set forth in Part 617.7(c).

First is whether the proposed action is a "Type I" or "Type II action." Type I actions are actions enumerated by DEC in Part 617 that are likely to have a significant adverse impact on the environment¹⁰⁴ and include certain types of new residential construction.¹⁰⁵ If the proposed housing construction is on the Type I list, there is a presumption of a significant environmental impact.¹⁰⁶ Type II actions, by contrast, are actions predetermined by DEC to not have a significant impact on the environment.¹⁰⁷ Actions that are neither Type I nor Type II are called "Unlisted Action[s]" and carry no presumption of environmental significance.¹⁰⁸

If an agency deems a proposed action to fall into a Type II category, then the action is not subject to further review under Part 617.¹⁰⁹ For Type I and Unlisted Actions, the agency must complete an EAF, consider Part 617 criteria, and issue a positive or negative declaration.¹¹⁰ An EAF requires the identification of factual information concerning the action, such as the physical characteristics of the construction site, and an evaluation of the proposed action in light of the information obtained.¹¹¹ When considering the criteria set forth in Part 617.7(c), the agency examines factors such as substantial adverse change to existing air or water quality, and other

102. See N.Y. ENV'T CONSERV. LAW § 8-0105(6) (McKinney 2026).

103. See 1 MICHAEL B. GERRARD, DANIEL A. RUZOW & PHILIP WEINBERG, ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 4.01 (Matthew Bender ed. 2025).

104. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.4(a) (2026).

105. See *id.* § 617.4(b)(5) (2026). Michael Gerrard documents that residential projects with more than 100 units usually are found to have a significant impact on the environment; however, he also documents cases in which these projects have been found to not have a significant environmental impact. See GERRARD, RUZOW & WEINBERG, *supra* note 103, § 4.01.

106. See GERRARD, RUZOW & WEINBERG, *supra* note 103, § 4.01.

107. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.5(a) (2026).

108. See *id.* § 617.2(al).

109. See *id.* § 617.7(a)(2).

110. See *id.* §§ 617.6, 617.7.

111. See GERRARD, RUZOW & WEINBERG, *supra* note 103, § 3.04.

information contained in the EAF.¹¹² A negative declaration by the agency concludes the environmental review process.¹¹³

If an action is deemed a Type I or Unlisted Action and determined to have a significant environmental impact based on the Part 617 criteria and an evaluation of the EAF, then the agency issues a positive declaration.¹¹⁴ Once a positive declaration is issued, the agency is required by statute to prepare environmental impact statements (EIS).¹¹⁵ The EIS process begins with a draft environmental impact statement (DEIS)¹¹⁶ and is followed by notice and public comment.¹¹⁷ Usually after notice and comment, the EIS process ends with the creation of a final environmental impact statement (FEIS) which combines the DEIS, responses from the public, and any subsequent revisions from the public comment process.¹¹⁸ This FEIS forms the basis for the agency's decision to approve or disapprove the action.¹¹⁹ The FEIS is required by SEQRA to be prepared by the agency,¹²⁰ but in practice, the preparation of the FEIS is a cooperative effort between the agency and the applicant's EIS consultants who are frequently asked to prepare all or part of the FEIS.¹²¹ This need to hire environmental consultants adds to applying parties' costs of construction.¹²² Occasionally, a supplemental environmental impact statement (SEIS) is required after the publishing of a FEIS when there are changes to the project, newly discovered information, or changes in circumstances related to the project.¹²³

SEQRA and Part 617 also authorize municipal agencies to adopt their own local environmental review procedures, including Type II action lists, as long as SEQRA regulations are incorporated to the greatest extent practicable and the local agency procedures are no less protective of the environment than the state's.¹²⁴ The most prominent example of local agencies crafting their

112. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7(c) (2026).

113. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7(a)(2) (2026).

114. See N.Y. ENV'T CONSERV. LAW § 8-0109(4) (McKinney 2026).

115. See *id.* § 8-0109(2).

116. See *id.* § 8-0109(4).

117. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.12(a)(2)(iii) (2026).

118. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(a)(5) (2026); GERRARD, RUZOW & WEINBERG, *supra* note 103, § 3.11.

119. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(a)(5) (2026); GERRARD, RUZOW & WEINBERG, *supra* note 103, § 3.11.

120. See N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.2(n), 617.9(a)(5).

121. See GERRARD, RUZOW & WEINBERG, *supra* note 103, § 3.11.

122. See CAMPION, LAND-USE, *supra* note 29, at 41. In New York City, the cost of an EIS by consultants can reach up to \$2.5 million. See HOPE COHEN, MANHATTAN INST. FOR POL'Y RSCH., RETHINKING ENVIRONMENTAL REVIEW: A HANDBOOK ON WHAT CAN BE DONE 5 (2007).

123. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(a)(7)(i) (2026).

124. See *id.* §§ 617.14(b), 617.5(a)–(b).

own environmental review procedures is the New York City Environmental Quality Review (CEQR).¹²⁵

Unless there is a Type II action at issue, SEQRA's environmental assessment and reporting provisions greatly increase the cost and amount of time it takes for developers to build housing. If an agency issues a positive declaration and a housing project must go through the EIS process, the EISs themselves can take at least four months, and often over a year, to complete.¹²⁶ If an agency requires multiple EIS submissions, there is no maximum required time period under SEQRA or Part 617 for the preparation and submissions of these revised EISs, and so in practice there is no procedural limit to how long this EIS process can take.¹²⁷

SEQRA not only greatly increases the time required to build, but consequently also increases the cost of building. For a two-year SEQRA process, the estimated increase to the total costs for a high-rise project with 600 units is nine percent and for a mid-rise project with 170 units is eleven percent.¹²⁸ These increased costs from delay are caused largely by inflation and interest payments for construction financing, which for large projects can result in millions of extra dollars per year.¹²⁹

SEQRA's costs also include litigation expenses because SEQRA's private right of action allows any individual who alleges they were or will be harmed by the residential construction to sue developers.¹³⁰ For residential housing construction projects, private citizens have standing to assert SEQRA challenges once they show injury in fact and that their asserted interest is within the zone of interest protected by the statute.¹³¹ Petitioners¹³² suing under SEQRA have a higher than normal burden for showing injury in fact and must show they would suffer an injury that is in some way different from that of the public at large.¹³³ However, neighbors of residential housing

125. See 2 MICHAEL B. GERRARD, MARK A. CHERTOK & ELIZABETH KNAUER, ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 8A.02 (Matthew Bender ed. 2026).

126. See COHEN, *supra* note 122, at 18.

127. See COHEN, *supra* note 122, at 15.

128. See CAMPION, LAND-USE, *supra* note 29, at 43.

129. See CAMPION, LAND-USE, *supra* note 29, at 43.

130. See discussion *infra* Part I.B.2.

131. See *Dairyalea Coop., Inc. v. Walkley*, 339 N.E.2d 865, 867 (N.Y. 1975).

132. Because individuals are challenging an agency action under Article 78 which is a special proceeding, those suing under SEQRA's private right of action are called petitioners rather than plaintiffs. See *Legal Glossary*, N.Y. STATE UNIFIED CT. SYS., <https://www.nycourts.gov/CourtHelp/GoingToCourt/glossary.shtml#P> (on file with the *Fordham Urban Law Journal*) (last visited Sep. 24, 2026).

133. See *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 918 N.E.2d 917, 922 (N.Y. 2009).

projects often satisfy this standing requirement for SEQRA violations¹³⁴ as they are able to show that their interests in statutorily defined aspects of the environment such as air, water, and noise are affected in this way.¹³⁵

Petitioners bring these private actions against agency determinations for housing projects on two substantive fronts.¹³⁶ The first is a challenge to the initial determination of significance by the agency, and the second is a challenge to the substance of the EIS itself.¹³⁷ Agencies generally have been given deference by courts¹³⁸ in their decisions of environmental significance¹³⁹ and their assessment of environmental impacts,¹⁴⁰ and petitioners generally do not prevail on their claims.¹⁴¹ Regardless of these

134. *See, e.g.*, *Green Earth Farms Rockland L.L.C. v. Town of Haverstraw Plan. Bd.*, 60 N.Y.S.3d 381, 385 (N.Y. App. Div. 2017) (holding that owners and lessors of property across the street from the site of proposed development sufficiently alleged an injury different from the public at large); *see also* *Citizens for St. Patrick's v. City of Watervliet City Council*, 5 N.Y.S.3d 582, 584 (N.Y. App. Div. 2015) (holding that plaintiffs who resided across the street from the proposed project will suffer a direct harm different from the general public even without allegations of individual harm). Community organizations can also establish standing for SEQRA challenges; however, they must do so by satisfying a more scrutinizing four-factor test. *See* *Douglaston Civic Ass'n, Inc. v. Galvin*, 324 N.E.2d 317, 320 (N.Y. 1974).

135. *See, e.g.*, *Long Island Pine Barrens Soc'y, Inc. v. Cent. Pine Barrens Joint Plan. & Pol'y Comm'n*, 980 N.Y.S.2d 468, 471 (N.Y. App. Div. 2014) (upholding standing for a resident who alleged that proposed construction would have direct impact on his drinking water).

136. There are also many procedural challenges available to petitioners, however, this Note will not address these as they are project specific.

137. *See* GERRARD, RUZOW & WEINBERG, *supra* note 103, § 7.04 (discussing the differing standards of review for the challenging of procedures and substantive decisions).

138. *See* *Jackson v. N.Y. State Urb. Dev. Corp.*, 494 N.E.2d 429, 435 (N.Y. 1986) ("In a statutory scheme whose purpose is that the agency decision-makers focus attention on environmental concerns, it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively."); *see also* *Aldrich v. Pattison*, 486 N.Y.S.2d 23, 30 (N.Y. App. Div. 1985) ("A flexible standard of review, allowing considerable latitude for the exercise of discretion by the responsible administrative agency or governmental body, is particularly appropriate for the assessment of the environmental consequences of a project, which frequently involves technical and scientific issues more properly entrusted to the expertise of an agency, rather than to a court of general jurisdiction.").

139. Courts review significance determinations to determine if the agency has identified the relevant areas of environmental concern, took a "hard look" at those areas, and made a "reasoned elaboration" of the basis of its determination. *See* *H.O.M.E.S. v. N.Y. State Urb. Dev. Corp.*, 418 N.Y.S.2d 827, 832 (N.Y. App. Div. 1979).

140. Courts review EISs using a mix of the "hard look," rule of reason, and substantial evidence tests, but overall, "[a]n EIS that was prepared in accordance with the proper procedures will not be struck down on the basis of its content unless the document is exceptionally poor in some specific respect." GERRARD, RUZOW & WEINBERG, *supra* note 103, § 7.04.

141. *See, e.g.*, Michael B. Gerrard & Edward McTiernan, *Survey of 2016 Cases Under New York State Environmental Quality Review Act*, 258 N.Y.L.J. (July 13, 2017), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=4069&context=faculty_sc

lawsuits' outcomes, however, these suits still result in litigation costs, increase the overall costs for projects under review, and chill future housing proposals.¹⁴² Anticipating that their determinations and assessments are likely to be challenged (even if to be eventually upheld), agencies err on the side of caution and require voluminous EISs, adding further costs for developers.¹⁴³

2. *The NIMBY Movement and Its Use of Regulation as a Weapon*

A contributing factor to New York State's housing crisis is the detrimental confluence between the NIMBY movement and high levels of regulation. While first appearing in the mid-1970s in response to the construction of nuclear-powered generating stations in low-income communities,¹⁴⁴ NIMBYism today describes white middle- and upper-class residents who use socioeconomic and political power to prevent new development in their neighborhoods.¹⁴⁵ Modern NIMBY residents oppose new housing development, in part, because they believe the presence of lower income households in their neighborhoods will depreciate home values.¹⁴⁶ As the NIMBY movement traveled from the suburbs to urban centers as a result of wealthier households moving back to cities from suburbs in the 2000s,¹⁴⁷ it brought with it an increasingly restrictive regulatory environment.¹⁴⁸ These regulations, paired with capable activist residents,¹⁴⁹ have constrained

holarship (on file with the *Fordham Urban Law Journal*) (noting that, during 2016, no court overturned an agency decision where an EIS was prepared, and where there was no EIS, challengers only won four out of twenty-four cases).

142. See CAMPION, LAND-USE, *supra* note 29, at 12.

143. See Karen Meara & Christopher Rizzo, *Looking to California to Reform New York's Environmental Review Laws Amid a Housing Crisis*, ALM: LAW.COM (Oct. 10, 2025), <https://www.clm.com/wp-content/uploads/2025/10/LAW1013202568445Carter.pdf> [<https://perma.cc/DXF9-GTT9>]; see also Michael B. Gerrard, *Judicial Review Under SEQRA: A Statistical Study*, 65 ALB. L. REV. 365, 366–67 (2001) (analyzing SEQRA cases from 1990 to 2000 and noting that the single greatest predictor as to the success of a SEQRA case was whether an EIS has been prepared).

144. See Rodriguez, *supra* note 24.

145. See Georgina McNee & Dorina Pojani, *NIMBYism as a Barrier to Housing and Social Mix in San Francisco*, 37 J. HOUS. & BUILT ENV'T 553, 555 (2021).

146. See McNee & Pojani, *supra* note 145, at 555.

147. See Been, *supra* note 25, at 222.

148. See Glaeser, *supra* note 26.

149. See Glaeser, Gyourko & Saks, *supra* note 26, at 3.

housing and led to higher housing prices,¹⁵⁰ especially for large-scale development.¹⁵¹

The Brooklyn Bridge Park project in Brooklyn, New York was an example of NIMBY residents' use of SEQRA to delay and increase the cost of the construction of affordable housing funded by New York State and New York City. In 2004, landscape architects and environmental consultants were hired¹⁵² to prepare a master plan for construction including an EIS.¹⁵³ By 2005, the state agency had completed and issued the FEIS for the project.¹⁵⁴ A not-for-profit corporation then challenged the FEIS, alleging the impact statement was defective as it had relied on an inadequate study of environmental impacts.¹⁵⁵ In November 2006, a New York State Supreme Court held that the agency had satisfied its obligations under SEQRA by taking the requisite "hard look" at the environmental factors.¹⁵⁶ The petitioners then appealed to the Appellate Division, Second Department, which in April 2008 affirmed the lower court's decision.¹⁵⁷ Construction on the Brooklyn Bridge Park project began in February 2008,¹⁵⁸ three years after the FEIS was originally submitted and four years after the SEQRA process began.

In July 2014, another NIMBY SEQRA action sought to stop the Brooklyn Bridge Park development, this time the construction of two sites to be built on Pier 6.¹⁵⁹ Mayor Bill de Blasio had mandated that thirty percent of the units in the new buildings on Pier 6 would be reserved for affordable housing.¹⁶⁰ A community group formed and sued the developers, arguing that the neighborhood had changed since the original FEIS in 2005, requiring

150. See Been, *supra* note 25, at 227; see also Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply*, in 5 HANDBOOK OF REGIONAL & URBAN ECONOMICS 1289, 1317 (Gilles Duranton et al. eds., 2015).

151. See Been, *supra* note 25, at 225; see also Bernstein, Negron & Baker, *supra* note 32 (describing how regulatory expenses are a factor in the chronic undersupply of housing).

152. See Brooklyn Bridge Park Legal Def. Fund, Inc. v. N.Y. State Urb. Dev. Corp., 825 N.Y.S.2d 347, 351 (N.Y. Sup. Ct. 2006).

153. See *Brooklyn Bridge Park History*, NYC.Gov, <https://brooklynbridgepark.org/about/history> [<https://perma.cc/BR7X-5WXT>] (last visited Sep. 23, 2026).

154. See *id.*

155. See *Brooklyn Bridge Park Legal Def. Fund, Inc.*, 825 N.Y.S.2d at 351.

156. See *id.* at 350.

157. See Brooklyn Bridge Park Legal Def. Fund, Inc. v. State Urb. Dev. Corp., 856 N.Y.S.2d 235, 236–37 (N.Y. App. Div. 2008).

158. See *Brooklyn Bridge Park History*, *supra* note 153.

159. See Liz Robbins, *The Battle of Brooklyn Bridge Park*, N.Y. TIMES (Aug. 1, 2014), <https://www.nytimes.com/2014/08/03/nyregion/the-battle-of-the-brooklyn-bridge-park.html> (on file with the *Fordham Urban Law Journal*).

160. See *id.*

the agency to conduct a SEIS.¹⁶¹ This case settled in May 2015 with the promise that the developers would reconsider their project plan, but the settlement did not include any provisions on the requirement of a SEIS.¹⁶² Two years later, a community organization commenced a new and separate SEQRA lawsuit, arguing that the agency should have conducted a SEIS because of changed circumstances.¹⁶³ This new community organization argued that because the project fund was bigger than originally expected and the area's school population had changed since the FEIS, there were changed circumstances which necessitated a SEIS.¹⁶⁴ In February 2018, the court, giving deference to the agency, held that the financial and school population changes did not warrant a SEIS.¹⁶⁵

In September 2018, the lottery for 100 of the new affordable housing units launched,¹⁶⁶ four years after the mayor had directed the units to be designated as affordable housing. While other issues, such as in financing or in construction itself, may have contributed to the four-year postponement in providing this affordable housing, the SEQRA process resulted in costly litigation and delay.

II. POLICY SOLUTIONS TO ADDRESS THE COSTS OF SEQRA ON AFFORDABLE HOUSING

Given SEQRA's ability to stultify affordable housing construction, a change in policy can better provide for the building of affordable housing in the short-term while remaining true to SEQRA's goal of protecting long-term environmental health. This Part surveys three policy solutions that seek to increase affordable housing stock by leapfrogging SEQRA regulatory hurdles.

Part II.A discusses a possible state-level agency rulemaking that would create a Type II category for certain types of affordable housing, forgoing the need for the EIS process. Part II.B explores potential legislation that would create exemptions to SEQRA's statutory framework for the construction of certain types of affordable housing based on population size. Part II.C reviews the prospect of amending New York State's Executive Law

161. See *Brooklyn Heights Ass'n, Inc. v. N.Y. State Urb. Dev. Corp.*, 58 Misc. 3d 1222(A), 1, 5 (N.Y. Sup. Ct. 2018).

162. See *id.*

163. See *id.* at 15.

164. See *id.*

165. See *id.* at 21.

166. See Dana Schulz, *Affordable Housing Lottery Launches for 100 Units at Brooklyn Bridge Park's Pier 6*, 6SQFT (Sep. 10, 2018), <https://www.6sqft.com/affordable-housing-lottery-launches-for-100-units-at-brooklyn-bridge-pier-6/> [https://perma.cc/62PS-45YV].

relating to disaster emergencies which would give the Governor the power to suspend, modify, or alter SEQRA for the construction of affordable housing. Each of these sections will proceed as follows: first, the potential substance of the proposal will be outlined; then, practical considerations including implementation and legal challenges will be explained; finally, each section will end by discussing the policy's ability to be removed to protect long-term environmental health.

A. State-Level Agency Rulemaking

Part II.A.1 will discuss the substance of a possible state-level agency rulemaking that would be effective in mitigating the housing crisis, drawing from previous actions taken by New York City and New York State. Part II.A.2 will then explore the practical implications of a rulemaking of this type and size, including implications regarding its execution, possible legal challenges, and its ability to be rescinded for environmental protection.

1. The Potential Substance of State-Level Agency Rulemaking Creating a Type II Category

One possible policy solution to alleviate the burden of SEQRA compliance on affordable housing construction is state-level rulemaking that would create a Type II category for certain types of affordable housing. This rule would designate certain types of affordable housing construction as not having a significant environmental impact, allowing construction to bypass the EIS process.¹⁶⁷

The substance of this hypothetical rule could contain similar aspects to a Type II addition created by New York City¹⁶⁸ and be more expansive than the recently adopted Amendments to Part 617 by DEC.¹⁶⁹ As authorized under SEQRA,¹⁷⁰ New York City's Department of City Planning (DCP) recently added a new category to its Type II list. The DCP's Green Fast Track Amendment, which went into effect in June 2024, added to the city-level Type II list residential buildings that use electric heating for heat and hot water and have up to 125 units in low density areas and up to 250 units in higher density areas.¹⁷¹ DCP proffered that if its new Type II category

167. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7(a)(2) (2026).

168. See N.Y.C. DEP'T OF CITY PLAN., GREEN FAST TRACK FOR HOUSING CEQR TYPE II RULEMAKING 3 (Dec. 8, 2023).

169. See *Adopted Amendments to 6 NYCRR Part 617*, N.Y. STATE DEP'T OF ENV'T CONSERVATION, <https://dec.ny.gov/regulatory/regulations/proposed-emergency-recently-adopted-regulations/state-environmental-quality-review-act-regulatory-revisions> [https://perma.cc/B2SG-4HFM] (last visited Sep. 10, 2026).

170. See N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.14(b), 617.5(a)–(b) (2026).

171. See N.Y.C. DEP'T OF CITY PLAN., *supra* note 168, at 10.

had been in effect ten years ago, 12,000 housing units would have been built more quickly over that period.¹⁷² DCP also noted that its creation of this Type II category would decrease the administrative process by up to two years and eliminate \$100,000 of costs.¹⁷³

Similar to DCP's expansion of Type II actions in New York City, DEC also expanded its state-wide Type II list to increase the amount of affordable housing, albeit at a much smaller scale. On April 24, 2026, DEC adopted amendments to 6 N.Y.C.R.R. Part 617 ("Part 617 Amendments")¹⁷⁴ which included a rule adding multi-family housing with six to eight apartments to the state-level Type II list.¹⁷⁵ DEC believed that these types of multi-unit apartments would help "expedit[e] [the] building [of] construction and reliev[e] cost burden in rural and suburban areas."¹⁷⁶ These Amendments went into effect on June 12, 2026.¹⁷⁷

With the need for over 800,000 new housing units by 2032,¹⁷⁸ a more than seventy-three percent increase from New York State's housing growth during 2012–2022, any state-wide DEC rulemaking will need to substantially increase the availability of higher density housing to have a meaningful impact. DEC's Part 617 Amendments creating a Type II category for only up to eight units is insufficient to meet that challenge, especially for cities like New York City, Buffalo, Syracuse, Albany, Rochester, and Yonkers that have a high percentage of cost-burdened households¹⁷⁹ and large populations.¹⁸⁰ To be effective in addressing the affordable housing needs of New York State, something at least as expansive as New York City DCP's Type II category must be created on a state-wide level, or at least provide for variation by population size.¹⁸¹

172. See N.Y.C. PLANNING, GET STUFF BUILT: GREEN FAST TRACK FOR ENVIRONMENTAL REVIEW 21 (Dec. 11, 2023), <https://www.nyc.gov/assets/planning/downloads/pdf/our-work/plans/citywide/green-fast-track-for-housing/green-fast-track-cpc-presentation.pdf> [<https://perma.cc/75J4-XA8A>].

173. See *Green Fast Track for Housing*, N.Y.C. DEP'T OF CITY PLAN., <https://www.nyc.gov/content/planning/pages/our-work/plans/citywide/green-fast-track-for-housing> [<https://perma.cc/MK78-PYFC>] (last visited Sep. 13, 2026).

174. See *Adopted Amendments to 6 NYCRR Part 617*, *supra* note 169.

175. See N.Y. STATE DEP'T OF ENV'T CONSERVATION, REGULATORY IMPACT STATEMENT 13 (2026), <https://dec.ny.gov/sites/default/files/2025-01/part%20617ris.pdf> [<https://perma.cc/Z7V8-UWET>]. DEC described these homes as "multi-unit house-scale buildings" that are "compatible . . . with detached single-family homes." See *id.* at 13.

176. See *id.*

177. See N.Y. STATE DEP'T OF ENV'T CONSERVATION, *supra* note 169.

178. See N.Y. STATE GOVERNOR'S OFF., *supra* note 56.

179. See N.Y. STATE COMPTROLLER, *supra* note 7, at 7–8.

180. See *infra* notes 239–43 and discussion *infra* Part II.B.1 (discussing the population sizes of these cities, and the required scope of policy solution necessary given their size).

181. See discussion *infra* Part II.B.1 (discussing a legislative proposal which provides an exemption to SEQRA based, in part, on population size).

2. Practical Considerations of State-Level Agency Rulemaking Creating a Type II Category

i. Implementation

Under the New York State Administrative Procedure Act (SAPA), an agency must publish a proposed rule at least sixty days before a final rule goes into effect and provide the opportunity for public comment.¹⁸² An agency must also provide reports that pertain to regulatory impact addressing: impact on jobs and employment,¹⁸³ regulatory impact,¹⁸⁴ and small business¹⁸⁵ and rural area¹⁸⁶ flexibility. In particular, the regulatory impact report must, in part, address the needs and benefits of the rule and its costs. When an agency adopts a rule, it must publish an assessment of the public comments submitted for the rule and provide revised regulatory impact statements as well as flexibility analyses reflecting these comments.¹⁸⁷ As there would be no significant environmental impact for the creation of a Type II category itself, DEC would not have to prepare an EIS,¹⁸⁸ and the rule could be promulgated by only satisfying the SAPA sixty-day notice and comment requirement.¹⁸⁹

DEC then would still need to review the comments gathered in the comment period, publish an assessment of public comments, and revise its initial regulatory and flexibility assessments to address the public comments before the Amendments could go into effect.¹⁹⁰ An illustrative example of an agency's revised assessment was the DCP's consideration of the Green Fast Track amendments. The DCP justified its decision to add its Green Fast Track amendments through a "look back" analysis of a ten-year period and a total of 1,143 environmental assessment records.¹⁹¹ This analysis revealed that ninety-three percent of projects similar to those in the proposed

182. See N.Y. A.P.A. LAW § 202(1)(a) (McKinney 2026).

183. See *id.* § 201-a.

184. See *id.* § 202-a.

185. See *id.* § 202-b.

186. See *id.* § 202-bb.

187. See *id.* §§ 202(5)(b)–(c).

188. See N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.7(a)(1)–(2) (2026).

189. See N.Y. A.P.A. LAW § 202(1)(a). This contrasts with earlier rulemakings promulgated by DEC that amended Part 617 to not only add Type II categories but also other substantive changes that were deemed to have significant environmental impacts and thus required the full EIS process. See N.Y. STATE DEP'T OF ENV'T CONSERVATION: DIV. OF REGUL. SERVS., FINAL GENERIC ENVIRONMENTAL IMPACT STATEMENT ON THE PROPOSED AMENDMENTS TO THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) REGULATIONS 1 (1995), https://extapps.dec.ny.gov/docs/permits_ej_operations_pdf/finalgeis.pdf [<https://perma.cc/FS3V-4CCA>].

190. See N.Y. A.P.A. LAW §§ 202(5)(b), (c).

191. See N.Y.C. DEP'T OF CITY PLAN., *supra* note 168, at 10.

rulemaking resulted in negative declarations, while five percent resulted in positive declarations and two percent in conditional negative declarations.¹⁹² In 1995, DEC used a similar “look back” analysis to justify its significance determination for the addition of new Type II categories, adding single, two, or three family residences.¹⁹³ This analysis reviewed all declarations issued for construction similar to the proposed Type II categories for four years in the period of 1988–1992.¹⁹⁴ For the period analyzed, of the 206 total construction actions identified, nine percent resulted in positive declarations and ninety-one percent resulted in negative declarations.¹⁹⁵ DEC then would likely look to support its rulemaking by use of something like a “look back” analysis.

ii. Legal Challenges in Promulgation

DEC rules, and the reasoning in support of them such as the “look back” analysis, are subject to challenge through New York Civil Practice Law and Rules (CPLR) Article 78 proceedings.¹⁹⁶ CPLR § 7803(3) provides a legal means to challenge an agency action if it is allegedly arbitrary and capricious or results from an abuse of discretion.¹⁹⁷ It is likely that some private party, either a neighbor or community group, would be able to establish standing because creating a Type II category would allow housing construction near their homes, impacting their environmental interests.¹⁹⁸

Challenges that this rule as promulgated is arbitrary and capricious are heavily dependent on the ability of DEC to gather evidence to support this

192. See N.Y.C. DEP’T OF CITY PLAN., *supra* note 168, at 10–11.

193. See N.Y. STATE DEP’T OF ENV’T CONSERVATION: DIV. OF REGUL. SERVS., *supra* note 189, at 24, 30.

194. See *id.* at 24, 29. While this “look back” analysis was presented by DEC in a final environmental impact statement, its form was due to other amendments in the rulemaking having a positive declaration and thus the EIS process was required.

195. See *id.* at 30.

196. CPLR § 7803(3) actions are also known and will be referred to throughout this Note as “Article 78” proceedings or challenges.

197. See N.Y. C.P.L.R. § 7803(3) (McKinney 2026). An abuse of discretion is the equivalent to an arbitrary and capricious challenge and so will not be analyzed separately in this Note. See *Shand v. Aetna Ins. Co.*, 428 N.Y.S.2d 462, 468 n.3 (N.Y. App. Div. 1980) (“[arbitrary and capricious] was added to the CPLR as an equivalent to ‘abuse of discretion’ in order to broaden review of discretionary exercises because of lingering distinctions that limited review based on mandamus instead of certiorari”).

198. Similar to SEQRA challenges outlined in Part I, to have standing to bring an Article 78 proceeding against DEC for its Type II list additions for types of residential construction, a petitioner must demonstrate injury in fact that is different from the public at large and that the affected interest is within the interests protected by SEQRA. See *Save the Pine Bush, Inc. v. Common Council*, 918 N.E.2d 917, 922 (N.Y. 2009).

Type II addition.¹⁹⁹ DEC may be able to provide a similar analysis as New York City DCP's "look back" analysis with an overwhelming proportion of negative declarations, and if so, this challenge is weak. To survive an arbitrary and capricious challenge, an agency action must be supported by proof in the agency record.²⁰⁰ In *West Village Committee Inc. v. Zagata*,²⁰¹ the Appellate Division, Third Department upheld the 1995 Type II additions, holding that DEC identified the primary environmental impacts, explained why they were not significant, and addressed the comments submitted during the SEQRA process.²⁰² The court also noted that, in part, its deference to DEC's expertise stemmed from petitioner's failure to provide evidentiary proof that DEC's analysis, supported by years of previous construction projects, was founded upon "spurious" or "deficient" data.²⁰³ From *Zagata*, it is clear that if DEC could provide an analysis similar to that of DEC's 1995 amendments, then it would likely survive an Article 78 challenge. New York City DCP's ability to provide this level of analysis to support its rule promulgation²⁰⁴ lends credence to the viability of this avenue if pursued by the state.

However, it is likely that DEC would not be able to produce a state-wide "look back" analysis with results similar to its 1995 amendments or DCP's Green Fast Track Amendment. In assessing public comments for the 2026 Amendments to Part 617, DEC rejected a Type II category based on population size and density.²⁰⁵ In its rejection, DEC acknowledged that it had dismissed a similar provision in its 2018 Amendments, in part because it could not accurately conclude that this type of amendment would not have

199. Petitioners can also challenge that agency actions are taken in violation of lawful procedures or are errors of law, but here, these challenges would likely fail. Challenges based on violation of lawful procedure or errors of law usually involve an allegation that the agency improperly interpreted or applied a statute or regulation. *See, e.g.,* N.Y.C. Health & Hosps. Corp. v. McBarnette, 639 N.E.2d 740, 745 (N.Y. 1994) (analyzing whether an agency's rate adjustment regulation was an irrational construction of the governing statutes). SEQRA explicitly dictates that DEC should adopt rules and regulations that, in part, identify actions or classes of action which have been determined not to have a significant effect on the environment and thus do not require an EIS. *See* N.Y. ENV'T CONSERV. LAW § 8-0113(2)(c)(ii) (McKinney 2026). This broad mandate makes improper interpretation or application of SEQRA unlikely.

200. *See* Jewish Mem'l Hosp. v. Whalen, 391 N.E.2d 1296, 1301 (N.Y. 1979).

201. *See* 669 N.Y.S.2d 674, 677–78 (N.Y. App. Div. 1998).

202. *See id.*

203. *See id.*

204. *See* N.Y.C. DEP'T OF CITY PLAN., *supra* note 168, at 10.

205. *See* N.Y. STATE DEP'T OF ENV'T CONSERVATION, RESPONSE TO COMMENTS: PROPOSED PART 617 RULEMAKING 36 (2026), <https://dec.ny.gov/sites/default/files/2026-05/assesspubcommentspart617.pdf> (on file with the *Fordham Urban Law Journal*).

a significant environmental impact.²⁰⁶ The feasibility of a rule of this scope is therefore unlikely.

iii. Ability to Rescind the Rule to Protect Long-Term Environmental Health

Given the amount of housing that would be constructed under a rule of this scope, it is likely that environmental harm from construction would result in long-term damage,²⁰⁷ necessitating an eventual rescission by DEC. This is true even if steps are taken to mitigate environmental harm in building requirements—such as requiring all electric heating as New York City DCP did²⁰⁸—because of the environmental impact of construction itself.²⁰⁹ Even if certain projects have been deemed on a project-by-project basis to not have a significant impact on the environment,²¹⁰ in the aggregate, their construction could lead to substantial environmental damage.²¹¹ Eventually, a Type II expansion of this scope would have to be rescinded to safeguard long-term environmental health. While a rule creating this size of a Type II category for affordable housing construction may survive an arbitrary and capricious challenge after promulgation, it would likely become vulnerable to that same type of challenge on rescission.

Rule rescissions must follow the same procedures as rulemaking and are subject to scrutiny by courts. Rule rescissions fall under the definition of a “rule” in SAPA,²¹² so when the agency rescinds the rule, it must follow the SAPA notice and comment procedures and, again, be subject to challenges under Article 78 as an agency action.²¹³ Unlike adjudications, which require an explanation of a change when decisions are made inconsistent with previous agency actions, agencies have no such obligation in its rulemaking role.²¹⁴ Nevertheless, administrative rules are not reviewed in a vacuum and are scrutinized for “genuine reasonableness and rationality in [their] specific context.”²¹⁵ When rescissions are challenged, courts will carefully review agency actions when agencies promulgate rules which have an effect on parties and then rescind or change that rule.²¹⁶

206. *See id.*

207. *See* discussion *supra* Part I.B.1.

208. *See* N.Y.C. DEP’T OF CITY PLAN., *supra* note 168, at 10.

209. *See* discussion *supra* Part I.B.1.

210. *See, e.g.,* N.Y.C. DEP’T OF CITY PLAN., *supra* note 168, at 10.

211. *See* discussion *supra* Part I.B.1.

212. *See* N.Y. A.P.A. LAW § 102(2)(a) (McKinney 2026).

213. *See, e.g.,* N.Y. State Ass’n of Cntys. v. Axelrod, 577 N.E.2d 16, 21 (N.Y. 1991) (analyzing an Article 78 challenge to a rule rescission for medical reimbursements).

214. *See* Ins. Premium Fin. Ass’n v. State Dep’t of Ins., 688 N.E.2d 399, 403 (N.Y. 1996).

215. *Axelrod*, 577 N.E.2d at 20–21.

216. *See id.*

It is unlikely that DEC could successfully rescind this rule. To rescind this Type II addition, DEC must make an about face and argue the actions it previously alleged had no significant environmental impact now do. A court would find this argument unreasonable. In *New York State Ass'n of Counties v. Axelrod*, the New York Department of Health (DOH) promulgated a rule creating a reimbursement formula so that reimbursement rates would reflect relative resources expended on behalf of patients.²¹⁷ After seven months, DOH rescinded the rule and promulgated a new rule adjusting the reimbursement rates downward for all facilities.²¹⁸ To support its rescission and new promulgation, DOH argued that increases in reporting accuracy demonstrated that the previous reimbursement rates were too high.²¹⁹ The New York Court of Appeals held the new blanket reimbursement system to be arbitrary and capricious, as DOH failed to substantiate what “amounted only to a theory and assumption” that was not supported by empirical evidence, assessment, and evaluation.²²⁰

If an agency does provide the necessary empirical support post-promulgation, however, it can survive an arbitrary and capricious challenge.²²¹ In *Brodsky v. Zagata*, DEC supported its decision to rescind a rule that had limited the concentration of DEET by citing to a study published after the rule had been promulgated which contradicted the agency’s initial determination.²²² The Appellate Division, Third Department upheld DEC’s rescission, holding that the new study’s evidence, which contradicted or cast doubt upon the reasons originally advanced for the implementation of the rule, provided ample basis for the agency’s decision to repeal the restrictions.²²³ Therefore, while an agency may be required to provide empirical evidence to present a justification in the record for its action of rescission, new post-promulgation information can provide an adequate basis for agency rescission.

The potential problem with an agency rescission of these proposed Type II additions is that post-promulgation proof of significant environmental impact would be difficult, if not impossible, to establish. An agency seeking to create this Type II category would have to, in the first instance, take the position that these proposed housing construction actions did not have a significant impact on the environment and issue a negative declaration.²²⁴

217. *See id.*

218. *See id.* at 18–19.

219. *See id.*

220. *Id.* at 21–22.

221. *See Brodsky v. Zagata*, 646 N.Y.S.2d 188, 189 (N.Y. App. Div. 1996).

222. *See id.* at 189–90.

223. *See id.* at 190–91.

224. *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7(a)(2) (2026).

To rescind the rule, the agency would then have to reverse its previous position and provide support that these actions do, in fact, have a significant environmental impact.²²⁵ Because the agency initially proved in its promulgation no significant environmental impact, based on declarations or EISs,²²⁶ pre-promulgation data would likely not support this finding of a positive declaration. Post-promulgation, the construction actions would be Type II actions and would automatically result in negative declarations (per their Type II status).²²⁷ This would make it so that there would be no agency-created post-promulgation data supporting that these actions resulted in positive declarations.²²⁸ Without agency-created post-promulgation data, as in *Axelrod*, the agency's support would likely only amount to a "theory and assumption."²²⁹ Accordingly, an agency's rescission of this Type II addition, which will likely have to occur to prevent long-term environmental damage from construction, would likely be subject to a strong challenge that it is arbitrary and capricious. While a rulemaking creating a Type II category for affordable housing could be implemented quickly, it would likely face strong legal challenges after both its promulgation and its needed rescission to protect environmental health.

B. Statutory Exemptions Through State-Level Legislation

A second possible policy solution to allow for affordable housing construction without the financial costs of SEQRA is to create a legislative exemption to SEQRA. Part II.B.1 will discuss the necessary substance of a potential bill creating an effective SEQRA exemption for affordable housing construction, discussing a recent proposal from the State Legislature. Part II.B.2 will then discuss the practical implications of such a law, detailing challenges to implementation, legal challenges, and the possibility of a sunset provision to mitigate long-term environmental harm.

225. See N.Y. State Ass'n of Cntys. v. Axelrod, 577 N.E.2d 16, 21–22 (N.Y. 1991) (analyzing agency's support in reversal of previous rule through a "searching" judicial review).

226. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7(a)(2) (2026).

227. See *id.*

228. See discussion *supra* Part II.A.2.iii.

229. 577 N.E.2d at 21–22. It is possible that a third party produces data that contradicts the agency's initial findings or conducts an empirical study of environmental impacts post-promulgation, and the agency uses these as support for its about-face. But based on the sample size and time frame of past "look back" analyses, it may take years for strong post-promulgation data to be available. See N.Y. STATE DEP'T OF ENV'T CONSERVATION DIV. OF REGUL. SERVS., *supra* note 189, at 24 (describing an analysis over a four-year period and 206 actions); N.Y.C. DEP'T OF CITY PLAN., *supra* note 168, at 10 (describing an analysis over a ten-year period and 1,143 records).

1. The Potential Substance of State-Level Legislation Creating SEQRA Exemptions

Another policy solution that could circumvent SEQRA to increase the amount of affordable housing in New York State is to enact legislation that would create a statutory exemption for certain types of affordable housing. This policy solution would require that a bill pass through the New York State Assembly and New York State Senate and be signed into law by the Governor.²³⁰ New York State Senate Bill 3492A (the “Senate Bill”) is an example of a bill that creates a sufficient exception to be effective in combating the housing crisis.

In January 2025, a New York State Senator introduced a bill which would streamline housing construction in developed areas by exempting certain types of residential projects from SEQRA environmental review.²³¹ According to the Senate Bill, the number of units allowed per exempt building would depend on population size.²³² The bill would provide a minimum exemption for the construction of buildings with fewer than ten units (in municipalities that have not adopted zoning or subdivision regulations) and a maximum exemption for buildings with fewer than 1,000 units for areas with 1 million or more persons.²³³ For example, the Senate Bill provides developers in geographic areas with between 90,000 and 1 million people the ability to construct up to 500 residential units without undergoing the SEQRA process.²³⁴ To ensure that the exemption pertains to the construction of affordable housing, the buildings also have to be limited in commercial or community uses and qualify as affordable housing by the New York Division of Housing and Community Renewal (DHCR).²³⁵

In early 2026, Governor Hochul also announced in her “State of the State,” a “Let Them Build Agenda” which included the promise of amending SEQRA to re-classify “certain types of housing projects that are compliant with local zoning and have no significant impacts on the environment” for the housing needs and contexts of different parts of the state.²³⁶ However, the Governor and Legislature added a requirement in the final budget that agencies must make a determination that a project fits under the “qualified

230. See N.Y. CONST. art. III, § 14 (requiring a majority of both legislative houses to pass a bill); N.Y. CONST. art. IV, § 7 (requiring presentment to governor).

231. See S.B. 3492A, 2025 Leg., Reg. Sess. §§ 2–5 (N.Y. 2025).

232. See *id.* at 2.

233. See *id.* at 1–2.

234. See *id.*

235. See *id.*

236. Governor Kathy Hochul, 2026 *State of the State, Chapter 4: Cutting Red Tape to Better Serve New Yorkers* (Jan. 13, 2026), https://digital.ny.gov/state-of-the-state-book-2026/#_Toc219064647 [<https://perma.cc/YX6K-7U7B>].

action” exemption, adding an additional regulatory step that may not streamline the SEQRA process as would an outright exemption.²³⁷

A legislative exemption is therefore still needed, and a proposal with the scope of the Senate Bill would be effective in mitigating New York State’s housing crisis. It would allow smaller cities with high percentages of cost-burdened households²³⁸ (such as Buffalo,²³⁹ Syracuse,²⁴⁰ Albany,²⁴¹ Rochester,²⁴² and Yonkers²⁴³) to construct enough housing to have a substantive impact on the crises in their areas. A bill like the Senate Bill also would provide an exemption for buildings with up to 1,000 units in an area like New York City,²⁴⁴ which has been particularly impacted by the housing crisis.²⁴⁵ A formula for SEQRA exemptions based on population will allow for increases in housing over time without the need for additional legislation.²⁴⁶ The residential requirement would also ensure that this exemption is not overbroad, leading to unnecessary environmental harms.²⁴⁷

237. See Laura M. Smith, Deborah VanAmerongen & Kelly Sprague, *New York SEQRA Changes: Eligibility for Affordable Housing Projects*, NIXON PEABODY (May 28, 2026), <https://www.nixonpeabody.com/insights/alerts/2026/05/28/new-york-seqra-changes---eligibility-for-affordable-housing-projects> [<https://perma.cc/6VP4-TJWL>].

238. See N.Y. STATE COMPTROLLER, *supra* note 7, at 8–9.

239. Buffalo had a population of 278,349 as of the 2020 census. See *Buffalo City, New York*, U.S. CENSUS BUREAU, https://data.census.gov/profile/Bufalo_city,_New_York?g=160XX00US3611000 [<https://perma.cc/WTH8-LWFK>] (last visited Sep. 24, 2026).

240. Syracuse had a population of 148,620 as of the 2020 census. See *Syracuse City, New York*, U.S. CENSUS BUREAU, <https://data.census.gov/all?q=Syracuse+city,+New+York> [<https://perma.cc/W2PX-UFA3>] (last visited Sep. 24, 2026).

241. Albany had a population of 99,224 as of the 2020 census. See *Albany City, New York*, U.S. CENSUS BUREAU, <https://data.census.gov/all?q=Albany+city,+New+York> [<https://perma.cc/83SV-A23J>] (last visited Sep. 24, 2026).

242. Rochester had a population of 211,328 as of the 2020 census. See *Rochester City, New York*, U.S. CENSUS BUREAU, <https://data.census.gov/all?q=Rochester+city,+New+York> [<https://perma.cc/9EGJ-7ZTP>] (last visited Sep. 24, 2026).

243. Yonkers had a population of 211,569 as of the 2020 census. See *Yonkers City, New York*, U.S. CENSUS BUREAU, <https://data.census.gov/all?q=Yonkers+city,+New+York> [<https://perma.cc/K9W8-Z5CH>] (last visited Sep. 24, 2026).

244. See generally Assemb. B. 6283A, 2025 Leg., Reg. Sess. (N.Y. 2025). New York City has a population of over 8 million and is the only city in New York that had a population of over 8 million as of the 2020 census with Buffalo being the second largest city at 278,349. See *New York City, New York*, U.S. CENSUS BUREAU, <https://data.census.gov/all?q=New+York+city,+New+York> [<https://perma.cc/G8VH-XZLC>] (last visited Sep. 24, 2026); *Buffalo City, New York*, U.S. CENSUS BUREAU, https://data.census.gov/profile/Bufalo_city,_New_York?g=160XX00US3611000 [<https://perma.cc/WTH8-LWFK>] (last visited Sep. 24, 2026).

245. See discussion *supra* Part I.

246. Cf. S.B. 3492A, 2025 Leg., Reg. Sess. § 2 (N.Y. 2025).

247. See *id.*

2. Practical Considerations of State-Level Legislation Creating SEQRA Exemptions

i. Implementation

A legislative bill, such as Senate Bill 3492A, would likely be effective in its scope, sturdy against legal challenge, and could contain an automatic repeal provision (i.e., a ‘sunset provision’) to protect the environment. But this potential bill would likely face challenges in its implementation, even with single-party control of the Legislature and the executive. Any automatic repeal provision included to safeguard long-term environmental health would also be inherently arbitrary regarding its sunset date.

The Senate Bill passed the State Senate in June 2025. But despite a Democratic party “trifecta”²⁴⁸—the New York State Legislature and Governorship controlled by Democrats—the State Assembly ended its Summer 2025 legislative session without advancing its companion bill, Assembly Bill 6283A (the “Assembly Bill”), out of committee²⁴⁹ where, as of this writing, it remains.²⁵⁰ Even with the capability to pass bills in other subject areas,²⁵¹ the State Legislature seems to be unable to pass a bill creating SEQRA exemptions because of opposition in the State Assembly.

248. *Party Control of New York State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_New_York_state_government [https://perma.cc/WK7X-Y2H8] (last visited Sep. 24, 2026).

249. See Michael B. Gerrard, *Annual Review of SEQRA Cases and Developments* 1, N.Y.L.J. (July 31, 2025), https://scholarship.law.columbia.edu/faculty_scholarship/4664/?utm_source=scholarship.law.columbia.edu%2Ffaculty_scholarship%2F4664&utm_medium=PDF&utm_campaign=PDFCoverPages [https://perma.cc/84EV-F5FM].

250. See Assemb. B. 6283A, 2025 Leg., Reg. Sess. (N.Y. 2025). There has also been pushback from prominent public interest groups such as the New York Civil Liberties Union who allege that the bill, while well intentioned to address the affordable housing crisis, harms neighborhoods that have suffered disproportionately from environmental conditions and make it easier for developers to gentrify such areas. See NYCLU, *OPPOSE THE SUSTAINABLE AFFORDABLE HOUSING & SPRAWL PREVENTION ACT 1*, <https://www.nyclu.org/uploads/2025/06/25-OnePager-OPPOSEsustainablehousing250519-web.pdf> [https://perma.cc/L3SN-R5V4] (last visited Sep. 15, 2026).

251. During 2025, the State Senate and Assembly passed a total of 856 bills through both houses. See *2025 Legislative Session Summary*, N.Y. STATE ASS’N OF COUNTIES (June 25, 2025), <https://www.nysac.org/news/posts/2025-legislative-session-summary/> [https://perma.cc/4NLG-RMDY]. While six of those bills were environmental- and energy-related, none pertained to housing. See N.Y. STATE ASS’N OF COUNTIES, *2025 NEW YORK STATE LEGISLATIVE SESSION SUMMARY: THE IMPACT ON NEW YORK’S COUNTIES 5–6* (Jan. 8, 2026), <https://www.nysac.org/media/4n3bre5e/nysac-2025-legislative-summary-1-8-26.pdf> [https://perma.cc/N4MX-EQH5]. Two of those bills were subsequently vetoed by the Governor. See *id.*

There is general support in the Assembly for SEQRA reform.²⁵² But it seems that the opposition in the Assembly is, in part, derived from the reluctance of its Environmental Conservation Committee to enact SEQRA reform for housing. Part of this reluctance stems from the belief that SEQRA reform is unnecessary because the crisis is caused by developers' reticence to build affordable housing, even though they have the capability to do so.²⁵³ If past is prologue, a bill that is substantially similar to the Senate Bill would likely fail to move the State Assembly, in particular the Environmental Conservation Committee, to the extent necessary to pass the bill.

ii. Legal Challenges

If a bill like this does pass, the resulting legislation would be resilient against challenges brought under the New York State Constitution's Green Amendment.²⁵⁴ The Green Amendment provides a "right to clean air and water, and a healthful environment."²⁵⁵ Due to the Green Amendment's broad language and nascency, court decisions are just beginning to address its interpretation. Some courts have established that the amendment is self-executing²⁵⁶—not requiring further legislation for its use—and that it confers

252. See Sam Mellins, *State Senate Joins Hochul in Trying to Speed Up New Housing*, N.Y. FOCUS (Mar. 10, 2026), <https://nysfocus.com/2026/03/10/new-york-budget-housing-senate-assembly-hochul> [<https://perma.cc/W8N3-UZQK>] (indicating that Assembly Housing Committee Chair, Linda Rosenthal, supports SEQRA reform).

253. See *id.* (describing Assembly Environmental Conservation Committee Chair Deborah Glick's comments in a January 2026 hearing).

254. The New York State Constitution's Green Amendment was approved by voters in November 2021 and adopted on January 1, 2022. See Katrina Fischer Kuh et al., *New York's Constitutional Guarantee of Environmental Rights*, 27 N.Y.U. J. LEGIS. & PUB. POL'Y 361, 370–71 (2025).

255. N.Y. CONST. art. I, § 19.

256. See *Fresh Air for the Eastside, Inc. v. State*, No. E2022000699, 2022 WL 18141022, at *8 (N.Y. Sup. Ct. Dec. 20, 2022) (on appeal, the Appellate Division, Fourth Department dismissed the claim, in part, because the action taken was not a state action and the relief being sought was better suited under an Article 78 proceeding but did not comment on whether the Amendment was self-executing), *modified*, 217 N.Y.S.3d 381 (N.Y. App. Div. 2024), *appeal denied*, 237 A.D.3d 1610 (N.Y. App. Div. 2025), *appeal dismissed*, 252 N.E.3d 1124 (N.Y. 2025), and *appeal denied*, 271 N.E.3d 725 (N.Y. 2025); *Friends of Fort Greene Park v. N.Y.C. Parks & Recreation Dep't*, 239 N.Y.S.3d 457, 489 (N.Y. Sup. Ct. 2025). The court in *Friends of Fort Greene Park* reasoned that the plain language of the Green Amendment, as contrasted with the Conservation Article and Education Article in the New York Constitution, provides for a self-executing right; that nothing in the language of the amendment makes it contingent on further legislative action; and that New York constitutional provisions are presumptively self-executing unless there is express language otherwise. See 239 N.Y.S.3d at 489. Thus far, only one New York state-level appellate court, the Appellate Division Third Department, has held that the Green Amendment is not self-executing. See *People v. Norlite, LLC*, 253 N.Y.S.3d 385, 387–88 (N.Y. App. Div. 2026). However, *Norlite* is distinguishable as it sought to compel DEC to take certain actions arguing that the Green Amendment requires action greater than DEC regulations. See *id.* The court

a private right of action against government conduct.²⁵⁷ In an as-applied challenge to invalidate an action taken pursuant to a statute creating a SEQRA exemption, a plaintiff would have two hurdles to overcome: establishing standing and demonstrating that the statute does not have the proper nexus to the governmental interest.

Green Amendment challenges would face standing impediments because of the proof required and the inherent balancing of policy considerations involved in housing construction. Unlike in the context of Article 78 challenges, proof of injury to prove standing would likely require scientific evidence, such as air and/or water samples and other environmental indicators.²⁵⁸ Standing would also be difficult to establish because of the competing policy concerns in housing. So far, at least one court has distinguished actions regarding housing from actions that lack the same balancing of policy concerns.²⁵⁹ In *Fresh Air for the Eastside, Inc. v. State*, the court assumed standing for a Green Amendment challenge by residents alleging that their rights to clean air and water and a healthful environment were being violated as a result of actions regarding a landfill in an adjacent town.²⁶⁰ The court in *Marte v. City of New York* held that environmental concerns regarding landfills or toxic waste sites were different than that of the building of residential housing, and the latter did not provide a substantive basis for standing under the Green Amendment.²⁶¹ The court distinguished residential construction from actions involving landfills or toxic waste sites, noting that housing development requires balancing environmental impacts against development benefits, whereas landfills or toxic waste sites do not.²⁶² As such, plaintiffs are likely to face more stringent standing requirements, potentially limiting the availability of a Green Amendment challenge against a statute such as the Senate Bill.

If a plaintiff were able to establish standing, they would likely still need to prove that the government action fails to satisfy intermediate scrutiny.²⁶³

held that these types of suits compelling state action are not self-executing and are more appropriate under Article 78 proceedings. *See id.* at 389.

257. *See Fresh Air*, 2022 WL 18141022, at *7; *Friends of Fort Greene Park*, 239 N.Y.S.3d at 489.

258. *See Kuh et al.*, *supra* note 254, at 402.

259. *See Marte v. City of New York*, No. 159068/2022, 2023 WL 2971394, at *4 (N.Y. Sup. Ct. Apr. 17, 2023).

260. *See Fresh Air*, 2022 WL 18141022, at *7.

261. *See Marte*, 2023 WL 2971394, at *4.

262. *See id.*

263. When governmental action is challenged as unconstitutional, courts generally select one of three levels of judicial scrutiny with which to review the claim—rational basis review, intermediate scrutiny, or strict scrutiny. *See Kuh et al.*, *supra* note 254, at 398–99. Rational basis review applies to non-fundamental rights and is the least rigorous standard under which actions are generally upheld, requiring only that the government show that the challenged

Scholars argue, and at least one court has required,²⁶⁴ that an intermediate standard of review should apply to Green Amendment cases.²⁶⁵ If a court

action is rationally related to achieving a legitimate state interest. *See id.* at 399. Intermediate scrutiny requires that the government demonstrate that the action serves an important state interest, and the action is substantially related to serving said interest. *See id.* at 399. Strict scrutiny, the most rigorous standard, requires that the government action at issue serves a compelling state interest and is necessary to achieve that interest and is typically applied where protected classes are targeted or occasionally when rights are alleged as fundamental. *See id.* at 398.

264. Scholars and courts have argued that intermediate scrutiny applies to the Green Amendment because of its placement in Article I with other fundamental rights, an intent for the Amendment to effect a meaningful change, and the Amendment's legislative history. *See* Kuh et al., *supra* note 254, at 402; Scott Fein, Harrison Robbins & Patrick A. Woods, *New York State Environmental Rights Amendment: Standards of Review*, ALB. L. GOV'T L. CTR. (Feb. 5, 2024), <https://www.albanylaw.edu/government-law-center/environmental-amendment-standards-review> [<https://perma.cc/97P3-YWCB>]; Friends of Fort Greene Park v. N.Y.C. Parks & Recreation Dep't, 239 N.Y.S.3d 457, 491–93 (N.Y. Sup. Ct. 2025). Some New York courts have interpreted the placement of a right in Article I as an indication that it is a fundamental right, and the Legislature has previously chosen to place other environmental protections in Articles other than Article I. *See* Hernandez v. State, 99 N.Y.S.3d 795, 802 (N.Y. App. Div. 2019) (holding that the right to organize and collectively bargain should be afforded fundamental status because in part of its placement in the Bill of Rights); *see also* N.Y. CONST. art. XIV, § 1 (other environmental protection protecting the Adirondack and Catskill Forest Preserve located in Article XIV). However, the legislative history demonstrates a mix of opinions as to whether the Legislature as a body believed that Green Amendment rights were fundamental. *Compare* New York State Bar Association Environment and Energy Law Section, *Report and Recommendations Concerning Environmental Aspects of the New York State Constitution*, 38 PACE L. REV. 182, 188–89 n.9 (2017) (recommending the Green Amendment be incorporated into Article I because it was viewed as on par with other important rights protected in that Article), *with* Scott Fein, Harrison Robbins & Patrick A. Woods, *New York State Environmental Rights Amendment: Standards of Review*, ALB. L. GOV'T L. CTR. (Feb. 5, 2024), <https://www.albanylaw.edu/government-law-center/environmental-amendment-standards-review> [<https://perma.cc/97P3-YWCB>] (describing the conflicting views held by legislators). Courts have also sought to ensure that new enactments, including constitutional amendments, result in a meaningful change in the law. *See* Scott Fein, Harrison Robbins & Patrick A. Woods, *New York State Environmental Rights Amendment: Standards of Review*, ALB. L. GOV'T L. CTR. (Feb. 5, 2024), <https://www.albanylaw.edu/government-law-center/environmental-amendment-standards-review> [<https://perma.cc/97P3-YWCB>]. This meaningful change likely cannot occur if a rational basis standard of review is adopted because it would be similar to the existing state law standard for Article 78 challenges, which only requires a rational connection and reasonable basis for government action. *See* Kuh et al., *supra* note 254, at 400; *see also* *Fresh Air*, 2022 WL 18141022, at *4 (noting that constitutional inquiries of governmental action are more rigorous than the arbitrary and capricious standard).

265. Only a federal court applying New York law in *Chan v. U.S. Department of Transportation*, has suggested that the Green Amendment should not have a more demanding standard. *See* No. 23-CV-10365 (LJL), 2024 WL 5199945, at *38 (S.D.N.Y. Dec. 23, 2024) (equating the Green Amendment to the Education Article which guarantees only a “sound basic education” and holding that the Green Amendment be read as ensuring a minimum baseline level of clean air, clean water, and a healthful environment). This is contrary to the abundant evidence that those who adopted the Amendment sought to change the status quo. *See* Kuh et al., *supra* note 254, at 400 (describing that the placement of the Green Amendment

reviews an as-applied Green Amendment challenge to legislation creating SEQRA exemptions for certain types of affordable housing construction, it is likely that the government action would survive intermediate scrutiny. The court in *Friends of Fort Greene Park v. N.Y.C. Parks & Recreation Department* was the first to formulate a standard of review for a Green Amendment claim and created a three-part test, utilizing intermediate scrutiny.²⁶⁶ The *Fort Greene* standard first requires a showing by the government that the government action complied with the applicable statute.²⁶⁷ Then the plaintiff must prove that the government action violated a person's constitutional right to clean air and water, and a healthful environment.²⁶⁸ Lastly, if the court finds there was a constitutional violation, the government can show that the action is justified by an important interest that is substantially related and proportionate to the government action.²⁶⁹ Here, the government action is the creation of a SEQRA exemption, so the action of exempting would inherently comply with SEQRA, satisfying the first part of the *Fort Greene* standard.

If a plaintiff can show that the exemption, as applied to them, violated their constitutional right to clean air and water and healthful environment, the statute would likely still be upheld because it serves an important interest and is substantially related and proportionate to that interest. First, it is probable that the government can successfully show that the building of affordable housing is an important governmental interest. In *Fort Greene*, the court found that, even if there was a constitutional violation, the government had an important interest in seeking to upgrade, modernize, and make local parks more accessible.²⁷⁰ New York courts have repeatedly recognized in the due process context that similar aims, such as preserving and ensuring the availability of affordable housing, are at least valid or legitimate governmental interests under rational basis review.²⁷¹

in Article I and the need for the Amendment to alter the status quo suggests that courts would treat Green Amendment challenges with heightened scrutiny).

266. See 239 N.Y.S.3d at 491–93.

267. See *id.* at 491–92.

268. See *id.*

269. See *id.*

270. See *id.* at 492–93.

271. See, e.g., *Sobel v. Higgins*, 590 N.Y.S.2d 883, 885 (N.Y. App. Div. 1992) (holding that preserving affordable housing and preventing dislocation of lower- and moderate-income tenants was a valid public purpose); *Kalikow 78/79 Co. v. State*, 577 N.Y.S.2d 624, 628 (N.Y. App. Div. 1992) (holding preserving affordable housing and protecting tenants is a legitimate state interest); *PJB Equities, Inc. v. Vill. of Ossining*, 209 N.Y.S.3d 548, 551–52 (N.Y. App. Div. 2024) (holding that ensuring the availability of affordable housing is a legitimate state interest). One scholar argues that whether a governmental interest is important as required by intermediate scrutiny is largely rhetorical, and the distinction between rational, important, and compelling is almost never of consequence with the United States Supreme Court generally

As for guidance from New York courts on intermediate scrutiny, they have only determined important governmental interests in challenges relating to public safety contexts that differ drastically from the interest of ensuring the availability of affordable housing.²⁷² The United States Supreme Court has, however, found that the related interests of safeguarding the physical and psychological well-being of children²⁷³ and public health and safety²⁷⁴ are at least important interests. As previously discussed, housing relates to physical and psychological well-being,²⁷⁵ and generally provides benefits to public health.²⁷⁶ Given that New York courts have demonstrated that a governmental interest in housing is at least a legitimate interest and that the Supreme Court has found important interests in laws that have similar effects on well-being and public health, it is likely that a New York court would recognize that ensuring the availability of affordable housing is an important governmental interest.

Once the government shows that ensuring the availability of affordable housing is an important governmental interest, it must establish that a statute creating an exemption from environmental law is sufficiently related to that interest.²⁷⁷ The New York Court of Appeals has required a “substantial nexus between the burdens imposed by [the government action] and the goals [of the government].”²⁷⁸ The government should be able to make such a showing of a substantial nexus between the SEQRA exemption and the availability of affordable housing, given the data demonstrating that regulation, including environmental regulation, has negative effects on the production of housing and, therefore, on the supply of affordable housing.²⁷⁹

upholding any broadly asserted interest. See Note, *Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny's Compelling- and Important-Interest Inquiries*, 129 HARV. L. REV. 1406, 1427 (2016).

272. See, e.g., *People v. Tucker*, 117 N.Y.S.3d 401, 406–08 (N.Y. App. Div. 2020) (gun safety law); *Anonymous v. Rochester*, 915 N.E.2d 593, 594–96 (N.Y. 2009) (nighttime curfew law for minors).

273. See *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (holding that safeguarding the physical and psychological well-being of minors is a compelling interest when evaluating a law making illegal the promotion of sexual performance by child under sixteen by distributing material that depicted such performance).

274. See *Craig v. Boren*, 429 U.S. 190, 199–200 (1976) (holding that protection of public health and safety were important functions of state and local governments in applying intermediate scrutiny to the regulation of alcohol).

275. See discussion *supra* Part I.B.1.

276. See discussion *supra* Part I.B.1.

277. See Kuh et al., *supra* note 254, at 399.

278. *Anonymous v. Rochester*, 915 N.E.2d 593, 599–600 (N.Y. 2009).

279. See discussion *supra* Part I.B.

iii. Ability to Repeal Exemptions to Protect Long-Term Environmental Health

The SEQRA exemption bill’s durability against legal challenges would successfully increase the amount of affordable housing, but given the amount of construction that this type of bill would lead to, it will likely need to contain a sunset provision to mitigate environmental harm. The New York Legislature has created exemptions to the Environmental Conservation Law (ECL) with sunset provisions before to achieve policy goals. In 2024, the Legislature amended the ECL to create exceptions for electric utility permitting to accelerate the transition to the State’s goal of renewable energy use.²⁸⁰ The sunset provisions created in the 2024 Amendment were made to be effective for sixteen years after the provisions were enacted.²⁸¹ The Legislature could include a similar provision in the exemption to SEQRA for certain types of affordable housing, mitigating the long-term environmental impact, by creating a finite duration for the exemption. Adding a sunset provision to limit the exemption’s lifespan may make the legislation more politically palatable than the existing Senate Bill.²⁸² But it would be difficult to judge *ex ante* the correct duration needed to sufficiently mitigate the crisis, and including a sunset provision that lasts any longer than what is required would result in unnecessary environmental harm.

C. Amending New York’s Executive Law to Add “Housing Crisis” to the Definition of a “Disaster Emergency”

A third solution that could promote affordable housing construction while maintaining long-term environmental health is to amend the New York State Executive Law²⁸³ to include a housing crisis within the definition of a “disaster emergency.”²⁸⁴ Part II.C.1 will outline the current framework of New York’s Executive Law pertaining to executive power during declared emergencies. Part II.C.2 will examine the implications of this potential amendment to the Executive Law.

280. See Clean Energy Resources Development and Incentives Program, ch. 58, §§ 1900–1902, 2024 N.Y. Laws 49–51; N.Y. ENV’T CONSERV. LAW § 8-0111(5)(b) (McKinney 2026). See generally Assemb. B. 8808C, 2024 Leg., Reg. Sess. (N.Y. 2024).

281. See N.Y. ENV’T CONSERV. LAW § 8-0111(5)(b).

282. See discussion *supra* Part II.B.2.i.

283. New York State governors’ emergency powers are derived solely from statute, unlike presidents’ emergency powers in the federal scheme which derive from both statute and the Constitution. Compare U.S. CONST. art. II, §§ 2, 3 (containing the Take Care Clause and Commander in Chief Clause), with N.Y. CONST. art. III, § 25 (granting the Legislature the power to adopt measures as are necessary and proper for ensuring continuity of governmental operations during times of emergency).

284. See N.Y. EXEC. LAW § 29-a (McKinney 2026).

1. The Potential Substance of an Amendment to New York State Executive Law

The Governor's existing statutory powers are not broad enough to address the housing crisis on a state-wide scale. It is unlikely that under the current Executive Law, the Governor could use her statutorily enumerated disaster emergency power to alleviate the housing crisis. In 1978, the New York Legislature amended the Executive Law to better prepare the state for future disasters.²⁸⁵ The Legislature sought to provide the Governor the ability to better "prevent, meet, defend against and recover from, dangers and problems arising from [] emergencies."²⁸⁶ After the Governor declares a "disaster emergency," Executive Law § 29-a grants her the power (subject to the state and federal constitutions and federal statutes and regulations) to temporarily suspend, alter, or modify specific provisions of any statute or agency rules or regulations during the emergency²⁸⁷ if compliance would prevent, hinder, or delay action necessary to cope with the disaster.²⁸⁸ The Governor declares a state disaster emergency and invokes this § 29-a power through issuing executive orders.²⁸⁹

Any suspensions, alterations, or modifications undertaken by the Governor, however, are subject to certain limitations. The Governor's orders under Executive Law § 29-a remain effective for only thirty days after they are issued,²⁹⁰ and the Governor can only extend such an order for an additional thirty-day period after demonstrating that she has "reconsider[ed] . . . all of the relevant facts and circumstances."²⁹¹ The action must safeguard the health and welfare of the public²⁹² and must be reasonably necessary to the disaster effort.²⁹³ The Governor's invocation also must "specify the statute, local law, ordinance, order, rule or regulation . . . to be suspended and the terms and conditions of the suspension"²⁹⁴ and shall only seek the "minimum deviation from the

285. See Act of July 25, 1978, ch. 640, § 1, 1978 N.Y. Laws.

286. *Id.*; see also SEN. B. C. SMITH, MEMORANDUM FOR S.B. 7625-B, 201st Leg. Sess., at 4 (N.Y. 1978) (discussing as a justification for its enactment that current law had "often le[d] to unnecessary suffering and damage and unwise recovery and reconstruction following disaster").

287. See N.Y. EXEC. LAW § 29-a (2)(d).

288. See *id.* § 29-a (1).

289. See, e.g., *Money Source, Inc. v. Mevs*, 129 N.Y.S.3d 643, 645 (N.Y. Sup. Ct. 2020) (Governor Cuomo declared a state of emergency and suspended statutes of limitations by two separate executive orders).

290. See N.Y. EXEC. LAW § 29-a (2)(a).

291. *Id.*

292. See *id.* § 29-a (2)(b).

293. See *id.*

294. *Id.* § 29-a (2)(c).

requirements of the . . . [provision] suspended consistent with the disaster action deemed necessary.”²⁹⁵ The Legislature retains a check on this executive power via its bicameral veto, which it can exercise “at any time.”²⁹⁶

When amending the statute to broaden executive power in 1978, the Legislature defined a “disaster” under Executive Law § 20(2)(a) as an “occurrence or imminent threat of wide spread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause[.]”²⁹⁷ The Legislature provided a non-comprehensive list of disasters in the definition: “fire, flood, earthquake, hurricane, tornado, high water, landslide, mudslide, wind, storm, wave action, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, radiological accident or water contamination.”²⁹⁸

In the statute’s current form, the affordable housing crisis likely does not fall within the statutory definition of a disaster based on the original meaning and using the interpretive canon of *noscitur a sociis*. For one, the housing crisis is likely not an “imminent threat” or “occurrence.” At the time of this amendment’s drafting, Merriam-Webster defined “imminent” as “ready to take place”²⁹⁹ and “occurrence” as “something that takes place usu[ally] unexpectedly and without design.”³⁰⁰ The housing crisis is not something ready to take place, but has long been underway³⁰¹ and has occurred due to a failure of policy, which was purposefully designed and whose repercussions should have been expected.³⁰² Analyzing the statute according to the interpretive canon of *noscitur a sociis*³⁰³ similarly reveals that housing likely does not fit into the existing definition, as it is unlike the other enumerated man-made disasters. The other potential man-made causes detailed in the definition of disaster—blight, drought, radiological accident,

295. *Id.* § 29-a (2)(e).

296. *Id.* § 29-a (4).

297. Act of July 25, 1978, ch. 640, § 3, 1978 N.Y. Laws.

298. *Id.*

299. MERRIAM-WEBSTER, WEBSTER’S NEW COLLEGIATE DICTIONARY 573 (8th ed. 1977).

300. *Id.* at 794.

301. See discussion *supra* Part I.

302. However, in May 2023, Governor Hochul issued Executive Order No. 28, suspending sections of state finance, general municipal, and real property law to temporarily prevent the creation of landlord-tenant relationships for temporary housing to deal with the large influx of migrants into New York City. These relationships were suspended as they were “expected to exacerbate an already large-scale humanitarian crisis and create a disaster emergency to which local governments are unable to adequately respond, creating a threat to health and safety, which could result in the loss of life or property.” N.Y. Exec. Order No. 28 (May 9, 2023). It is thus possible that a quick worsening of the housing crisis could fall under this existing framework.

303. See *Noscitur a sociis*, BLACK’S LAW DICTIONARY (12th ed. 2024).

water contamination, air contamination³⁰⁴—are all occurrences that directly affect the necessities of life (i.e., food, air, water). While housing is integral to health,³⁰⁵ it is not situated at the same level of immediacy as food, air, or water. The plain meaning of the statute and this interpretive canon demonstrate it is unlikely that the Governor can invoke the current Executive Law to deal with the housing crisis.

Adding “housing crisis” to the disaster definition under § 20(2)(a) would allow the Governor to invoke Executive Law § 29-a through executive order to modify, suspend, or alter sections of SEQRA and Part 617. The Governor could then suspend ECL § 8-0109(4) and Part 617.1(c), eliminating the requirement for the preparation of an EIS³⁰⁶ for certain types of affordable housing. In practice, suspension under Executive Law § 29-a has been limited by an “extent necessary” condition.³⁰⁷ Past executive orders that used broad language to suspend sections of existing statutes and did not face challenges or nullification when they suspended statutory provisions have suspended law “to facilitate an efficient and effective . . . emergency disaster response”³⁰⁸ and “to the extent necessary for health care providers to perform tasks as may be necessary to respond to [] COVID-19.”³⁰⁹ The Governor could accordingly issue an executive order suspending ECL § 8-0109(4) and Part 617.1(c)’s requirements for the preparation of EISs ‘to facilitate efficient affordable housing construction’ or ‘to the extent necessary for housing authorities to respond to the housing crisis.’

2. Practical Considerations of an Amendment to New York State Executive Law

i. Implementation

The New York Legislature may be able to pass an amendment to the Executive Law to include a housing crisis in the definition of “disaster” because it has previously amended the Executive Law §§ 20(2)(a) and 29-a in a time of crisis. In 2020, the Legislature amended the Executive Law to ensure that the state was protected from COVID-19, “a substantial threat to

304. See N.Y. EXEC. LAW § 20 (2)(a) (McKinney 2026).

305. See discussion *supra* Part I.B.1.

306. See N.Y. ENV’T CONSERV. LAW § 8-0109(4) (McKinney 2026) (requiring an agency to make a determination whether an EIS is required for an action); N.Y. COMP. CODES R. & REGS. tit. 6, § 617.1(c) (2026) (requiring all agencies to prepare an EIS if they make a significance determination).

307. See, e.g., N.Y. Exec. Order No. 28 (May 9, 2023).

308. N.Y. Exec. Order No. 202.6 (Mar. 18, 2020).

309. N.Y. Exec. Order No. 202.10 (Mar. 23, 2020); see also N.Y. Exec. Order No. 202.28 (May 7, 2020) (lifting the suspension in the March 23, 2020, executive order).

the public health,”³¹⁰ providing the Governor greater power and flexibility to deal with the pandemic.³¹¹ The 2020 amendment revised the definition of disaster to include “impending or urgent” threats and added “disease outbreak” to the list of enumerated disasters.³¹² The bill’s sponsors argued that these changes would give the Governor the “necessary legal authority to confront [this] emergenc[y]” and were necessary to protect public health and welfare.³¹³ In 2021, the Legislature, however, stripped the Governor of this expanded disaster authority by repealing the amendments it had enacted a year earlier, arguing that the expanded power was no longer necessary as the State was now better equipped to deal with the pandemic.³¹⁴

This past legislative enactment and repeal demonstrate the Legislature’s ability and willingness to effectively expand the Executive Law’s disaster definition during a time of crisis, but then later rescind the grant of additional power after the crisis was sufficiently abated. This same legislative amendment and repeal process could be used to add a housing crisis to the § 20(2)(a) list of disasters to give the Governor the power to suspend SEQRA’s EIS requirements for affordable housing construction and maintain the right to repeal this power when the Legislature has determined the housing crisis has been sufficiently addressed.

While the Legislature has shown a willingness and capability to pass this type of amendment before, it may view the housing crisis as not factually analogous to the threat of the then-novel COVID-19 virus. The COVID-19 pandemic’s novelty and unpredictable consequences required a unique response as both the state and federal governments were unsure of its potential scope or impact.³¹⁵ The Legislature passed the 2020 Amendment to the Executive Law on March 3, 2020,³¹⁶ two days after the first reported COVID-19 case in New York State and in a time of uncertainty about the disease and its effects.³¹⁷ This was a proactive amendment to an unknown disease and statutorily defined “imminent threat.”³¹⁸ The addition of

310. SEN. STEWART-COUSINS, INTRODUCER’S MEMORANDUM OF SUPPORT FOR S7919, 243rd Leg. Sess., Reg. Sess., at 1 (N.Y. 2020).

311. *See id.*

312. Act of Mar. 3, 2020, ch. 23, 2020 N.Y. Laws.

313. SEN. STEWART-COUSINS, INTRODUCER’S MEMORANDUM OF SUPPORT FOR S7919, 243rd Leg. Sess., Reg. Sess., at 10 (N.Y. 2020).

314. *See* Act of Mar. 7, 2021, ch. 71, 2021 N.Y. Laws.; SEN. STEWART-COUSINS, SPONSOR MEMORANDUM IN SUPPORT OF S.B. 5357, 244th Leg. Sess., Reg. Sess., at 2 (N.Y. 2021) (citing, in part, the progress in the fight against COVID-19 as the impetus for repeal).

315. *See* Taro Kariya, *Rapid Spread of COVID-19 in New York and the Response of the Community*, 2 GLOB. HEALTH MED. 123, 123 (2020), <https://pmc.ncbi.nlm.nih.gov/articles/PMC7731099/> [<https://perma.cc/L78Q-B36M>].

316. *See* Act of Mar. 3, 2020, ch. 23, 2020 N.Y. Laws.

317. *See* Kariya, *supra* note 315, at 123.

318. *See* discussion *supra* Part II.C.1.

“disease outbreak” to Executive Law § 20 appeared to be a logical extension of the already existing statutory language.³¹⁹ In contrast, the housing crisis is neither novel nor abrupt,³²⁰ so the Legislature may be more hesitant to add a housing crisis to the Executive Law § 20 “disaster” definition. Nevertheless, with the current state and national political focus on the housing crisis,³²¹ there may be an opportunity for the Legislature to meaningfully consider this amendment.

The Legislature may also be willing to provide for this expanded executive power because there is at least some precedent for the Governor’s prolonged use of Executive Law § 29-a to suspend laws for crisis relief. During COVID-19, Governor Cuomo issued Executive Order 202, which, in part, suspended Article 7 of the Public Officers Law requiring governmental bodies to conduct meetings in person.³²² The initial suspension on March 7, 2020, was followed by twenty-six executive orders,³²³ extending the suspension until it lapsed on July 5, 2021—a period of almost sixteen months.³²⁴ Given the severity of the housing crisis,³²⁵ it is likely that the Governor will have to suspend SEQRA for a lengthy term. This precedent, while dealing with a substantively smaller legal requirement than EIS preparation,³²⁶ demonstrates the Governor’s ability to suspend law for an

319. See discussion *supra* Part II.C.1.

320. See discussion *supra* Part II.C.1.

321. See discussion *supra* Part I.A.2.

322. See N.Y. Exec. Order No. 202 (Mar. 7, 2020) (March 7th executive order declaring COVID-19 as a disaster emergency and suspending multiple state laws).

323. Although the suspension can last up to thirty days, Governor Cuomo occasionally issued blanket extensions that reset the thirty-day period for suspension before their lapse, resulting in more than sixteen executive orders over the sixteen-month suspension period. See, e.g., N.Y. Exec. Order No. 202.6 (Mar. 18, 2020).

324. See N.Y. Exec. Order No. 202.1 (Mar. 12, 2020); N.Y. Exec. Order No. 202.14 (Apr. 7, 2020); N.Y. Exec. Order No. 202.28 (May 7, 2020); N.Y. Exec. Order No. 202.32 (May 21, 2020); N.Y. Exec. Order No. 202.38 (June 6, 2020); N.Y. Exec. Order No. 202.48 (July 6, 2020); N.Y. Exec. Order No. 202.55 (Aug. 5, 2020); N.Y. Exec. Order No. 202.60 (Sep. 4, 2020); N.Y. Exec. Order No. 202.67 (Oct. 4, 2020); N.Y. Exec. Order No. 202.72 (Nov. 3, 2020); N.Y. Exec. Order No. 202.79 (Dec. 2, 2020); N.Y. Exec. Order No. 202.87 (Dec. 30, 2020); N.Y. Exec. Order No. 202.89 (Jan. 7, 2021); N.Y. Exec. Order No. 202.91 (Jan. 23, 2021); N.Y. Exec. Order No. 202.92 (Jan. 27, 2021); N.Y. Exec. Order No. 202.93 (Feb. 11, 2021); N.Y. Exec. Order No. 202.94 (Feb. 14, 2021); N.Y. Exec. Order No. 202.96 (Feb. 22, 2021); N.Y. Exec. Order No. 202.99 (Mar. 26, 2021); N.Y. Exec. Order No. 202.100 (Mar. 31, 2021); N.Y. Exec. Order No. 202.101 (Apr. 6, 2021); N.Y. Exec. Order No. 202.103 (Apr. 25, 2021); N.Y. Exec. Order No. 202.106 (May 6, 2021); N.Y. Exec. Order No. 202.107 (May 10, 2021); N.Y. Exec. Order No. 202.109 (May 25, 2021); N.Y. Exec. Order No. 202.110 (June 5, 2021) (executive orders extending suspension of Article 7 of the Public Officers Law from its first extension on March 12, 2020, to its last extension on June 5, 2021, expiring July 5, 2021).

325. See discussion *supra* Part I.A.

326. Compare N.Y. Exec. Order No. 202.1 (Mar. 12, 2020) (suspending an in-person meeting requirement), with N.Y. ENV’T CONSERV. LAW § 8-0109(4) (McKinney 2026), and

extended period of time but then subsequently reinstate it. If the executive attempts to abuse this power, the Legislature retains its veto.³²⁷

ii. Legal Challenges

If the Legislature expands the Executive Law to include a housing crisis in the definition of disaster, the suspension of SEQRA made through executive order would be subject to Article 78 challenges.³²⁸ These Article 78 challenges to an executive order implementing powers under Executive Law § 29-a would seek to invalidate the order as arbitrary and capricious³²⁹ or in violation of lawful procedure.³³⁰ There also could be Green Amendment challenges, but they would be unlikely to succeed.

Any petitioner would, again, need to first establish standing.³³¹ As the suspension of SEQRA involves broad executive action, petitioners would have to establish a particular harm, facing a more difficult standing requirement akin to the legislative exemption proposal³³² and Green Amendment challenges.³³³ If a petitioner could establish standing, the government would likely be able to provide data to support the suspension of SEQRA's EIS requirement to mitigate the housing crisis.³³⁴

N.Y. COMP. CODES R. & REGS. tit. 6, § 617.1(c) (2026) (requiring the preparation of an EIS for actions including housing construction).

327. See N.Y. EXEC. LAW § 29-a (4) (McKinney 2026).

328. See N.Y. C.P.L.R. § 7803(3) (McKinney 2026) (allowing for suits as to whether a “determination” was made in violation of a lawful procedure).

329. See, e.g., *Gallivan v. Cuomo*, 71 Misc. 3d 589, 597 (N.Y. Sup. Ct. 2021) (reviewing two executive orders pursuant to a CPLR Article 78 challenge and determining that the orders were arbitrary and capricious).

330. See, e.g., *Money Source, Inc. v. Mevs*, 129 N.Y.S.3d 643, 644 (N.Y. Sup. Ct. 2020) (challenging executive orders alleging that they were not the “minimum deviation” as required by Executive Law); *Quinn v. Cuomo*, 125 N.Y.S.3d 120, 121 (N.Y. App. Div. 2020) (raising the same challenge); *Nevins v. Brann*, 122 N.Y.S.3d 874, 875 (N.Y. Sup. Ct. 2020) (challenging an executive order for lacking the requisite specificity under the Executive Law); *People v. Williams*, 85 Misc. 3d 1255(A), 1, 2 (N.Y. Sup. Ct. 2024) (challenging the executive order on grounds that compliance with the suspended statute would not have prevented, hindered, or delayed action necessary for the disaster response), *aff'd*, 236 A.D.3d 1381 (N.Y. App. Div. 2025), *leave to appeal denied*, 261 N.E.3d 930 (N.Y. 2025). The executive orders would likely not be subjected to Article 78 challenges that they are errors of law or abuses of discretion as the statutorily enumerated powers are clear, and an abuse of discretion challenge would be too substantively similar to an arbitrary and capricious challenge. See *supra* note 197 and accompanying text.

331. See *Save the Pine Bush, Inc. v. Common Council*, 918 N.E.2d 917, 922 (N.Y. 2009).

332. See discussion *supra* Part II.B.2.ii.

333. See discussion *supra* Part II.B.2.ii.

334. See discussion *supra* Parts I.A–B.

Petitioners in past Article 78 challenges to executive orders have argued that such orders are violations of lawful procedure³³⁵ or fail to follow the requirements of Executive Law § 29-a because the suspensions were not a “minimum deviation from the requirements of the statute.”³³⁶ In *Money Source, Inc. v. Mevs*, the court evaluated whether five COVID-19 executive orders suspending foreclosure enforcement demonstrated compliance with Executive Law § 29-a.³³⁷ The *Money Source* court held that the executive orders were in compliance with the Executive Law because, as time passed, the orders were repeatedly modified to provide for the minimum deviation from the foreclosure enforcement requirements consistent with the disaster action necessary.³³⁸ At least one New York appellate court, however, has shown a willingness to give deference to the executive. In *Quinn v. Cuomo*, the Appellate Division, Second Department reversed the lower court and held that the Governor’s executive order canceling a special election during the COVID-19 pandemic was the minimum deviation necessary, even if other protective social distancing measures could have been taken instead.³³⁹ Given this appellate court deference, it is possible that the executive will continue to have latitude in the scope of their suspension of state laws and regulations after declaring a disaster emergency, and challenges on this ground would be unsuccessful.³⁴⁰

Another potential challenge to an executive order is that it violates the Green Amendment because the suspension interfered with a person’s right to clean air and water and a healthful environment.³⁴¹ For Green

335. It may also be possible to challenge the executive order as being an error of law under the same CPLR § 7803(3) provision, but a violation of lawful procedure may be the better fit. To show violation of a lawful procedure, reference must be made to statutes, rules, and regulation and courts seldom single out “error of law” as a question for consideration in Article 78 proceedings. Vincent C. Alexander, Practice Commentaries, N.Y. C.P.L.R. 7803 (McKinney 2026).

336. *Money Source, Inc. v. Mevs*, 129 N.Y.S.3d 643, 644 (N.Y. Sup. Ct. 2020); *Quinn v. Cuomo*, 125 N.Y.S.3d 120, 121–22 (N.Y. App. Div. 2020).

337. *See* 129 N.Y.S.3d at 644.

338. *See id.*

339. *See* 125 N.Y.S.3d at 121–22.

340. Executive Law § 29-a also requires that the Governor “specify the statute, local law, ordinance, order, rule or regulation or part thereof to be suspended and the terms and conditions of the suspension.” N.Y. EXEC. LAW § 29-a (2)(c) (McKinney 2026). Therefore, it is possible that a petitioner challenges an executive order invoking the Executive Law § 29-a power as failing to follow a lawful procedure on these grounds. While a petitioner previously challenged an executive order as being in violation of this specificity requirement, *see Nevins v. Brann*, 122 N.Y.S.3d 874, 875 (N.Y. Sup. Ct. 2020), this case occurred when the Legislature had amended the Executive Law as to not require the Governor to specify the provision being suspended during COVID-19 and so does not provide clarity as to this type of challenge.

341. *See* N.Y. CONST. art. I, § 19. This is assuming that the Green Amendment is self-executing. *See supra* note 256 and accompanying text.

Amendment purposes, this executive action by the Governor is akin to the exemption of SEQRA through legislation as previously discussed in Part II.B.2, and accordingly, these Green Amendment challenges are likely to fail as well.³⁴²

Lastly, an executive order suspending SEQRA pursuant to Executive Law § 29-a could be subject to a nondelegation challenge. The New York State Constitution, like the Federal Constitution, vests the legislative power in the Legislature, and it cannot delegate its law-making functions to other branches.³⁴³ The Legislature may constitutionally confer discretion upon the executive if it limits the “field in which that discretion is to operate and provides standards to govern its exercise,”³⁴⁴ often referred to as an “intelligible principle.”³⁴⁵ Justice Cardozo described this requirement as a legislature dictating a clear “necessity, time, and occasion” when granting such power.³⁴⁶ It is of no consequence that here the Legislature delegates powers to the Governor as opposed to an administrative body.³⁴⁷

In evaluating statutes that authorize the Governor to act through the use of executive orders, the New York Court of Appeals has upheld as intelligible principles “the legitimate interests of consumers”³⁴⁸ and “the

342. Additionally, courts may be even more skeptical of a Green Amendment challenge here, as the parties would have recourse through Article 78 proceedings as outlined above. In *Marte v. City of New York*, the plaintiffs brought a Green Amendment challenge after two previous unsuccessful SEQRA challenges. See No. 159068/2022, 2023 WL 2971394, at *3 (N.Y. Sup. Ct. Apr. 17, 2023). In dismissing the action, the court voiced its concern that the Green Amendment would give parties “another ‘bite at the apple’” when there were not any new circumstances, especially because litigants opposing housing construction have little problem acquiring standing to challenge the action under SEQRA. *Id.*; cf. *People v. Norlite LLC*, 253 N.Y.S.3d 385, 388–89 (N.Y. App. Div. 2026) (holding that injunctive relief compelling DEC to take actions is appropriate under Article 78 and not the Green Amendment); accord *Fresh Air for the Eastside, Inc. v. State*, 217 N.Y.S.3d 381, 385–86 (N.Y. App. Div. 2024). Here too exists the concern that unsuccessful SEQRA litigants would turn to the Green Amendment, and so courts may be likely to dismiss a Green Amendment challenge to an executive order invoking Executive Law § 29-a.

343. See *Levine v. Whalen*, 349 N.E.2d 820, 822–23 (N.Y. 1976); accord *Delgado v. State*, 206 N.E.3d 598, 606 (N.Y. 2022).

344. *Delgado*, 206 N.E.3d at 606–07.

345. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

346. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring).

347. See *Dorst v. Pataki*, 687 N.E.2d 1348, 1350 (N.Y. 1997). Nondelegation challenges under agency actions in New York State typically apply the factors established in *Boreali v. Axelrod*, 517 N.E.2d 1350, 1354–57 (N.Y. 1987). However, as the Governor is acting here and not an executive agency, this analysis draws from distinct case law on the Governor acting through executive order pursuant to statutory authority.

348. *Bourquin v. Cuomo*, 652 N.E.2d 171, 173–74 (N.Y. 1995).

safety of the community and the welfare of the inmate.”³⁴⁹ Here, Executive Law § 29-a’s limiting principles are far more restrictive than those previously upheld by the New York Court of Appeals. Not only is Executive Law § 29-a(2)’s limiting principle that a suspension must “safeguard the health and welfare of the public”³⁵⁰ in line with these previously ratified principles, but Executive Law § 29-a further limits the Governor’s power to suspend laws. The power to suspend is only allowed for an initial thirty-day period.³⁵¹ Any extension to this initial thirty-day period is limited to an additional thirty days and requires a “reconsideration of all of the relevant facts and circumstances.”³⁵² The suspension must also be “reasonably necessary to the disaster effort” and must be the “minimum deviation” from the requirements of the law.³⁵³ The totality of these limiting factors dictates a clear “necessity, time, and occasion”³⁵⁴ for the Governor to exercise her power, and therefore, would likely not violate the nondelegation principle.

iii. Ability to Nullify or Repeal the Amendment to Protect Long-Term Environmental Health

This policy solution would allow for a swift nullification of the suspension of SEQRA to safeguard the environment. The suspension of SEQRA could be reversed at any time by executive order³⁵⁵ or by the failure to extend the suspension for another thirty-day period.³⁵⁶ However, given the economic benefits of increased housing construction, this is an unlikely political move. More likely, the Legislature, in opposition to the Governor, would decide that the housing crisis has been effectively dealt with and can “at any time” end the suspension.³⁵⁷ This is an efficient means to protect long-term environmental health by reinstating the EIS process. The Legislature can also repeal this statutory expansion of executive power,³⁵⁸ ceasing the Governor’s ability to suspend SEQRA in the future and ensuring that its environmental safeguards remain in place.

349. *Dorst*, 687 N.E.2d at 1349–50.

350. N.Y. EXEC. LAW § 29-a (2)(b) (McKinney 2026).

351. *See id.* § 29-a (2)(a).

352. *Id.*

353. *Id.* § 29-a (2).

354. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring).

355. *See, e.g.*, N.Y. Exec. Order No. 56.2 (Jan. 24, 2026) (rescinding the declaration of a disaster emergency and ending the suspension made by a previous executive order).

356. *See* N.Y. EXEC. LAW § 29-a (2)(a) (McKinney 2026).

357. *Id.* § 29-a (4).

358. *See* discussion *supra* Part II.C.2.i.

III. MEASURED EXECUTIVE POWER EXPANSION AS A SOLUTION TO THE CRISIS

SEQRA, while intended to account for social and economic factors in protecting New York State's environment,³⁵⁹ has become an impediment to affordable housing construction.³⁶⁰ Part III evaluates the policy solutions detailed in Part II and argues that amending the Executive Law is the best solution to balance the need for greater housing in the short-term while protecting long-term environmental health. Part III.A establishes evaluation criteria and analyzes the policy solutions of agency rulemaking and legislative exemptions, detailing their strengths and weaknesses as policy mechanisms to achieve this goal. Part III.B follows by assessing the policy solution of amending the Executive Law according to these criteria and argues that this solution would be the most effective way to address New York State's housing crisis.

A. Evaluating Agency Rulemaking and SEQRA Exemptions as Solutions

State-level rulemaking and legislative exemptions to SEQRA are possible policy solutions to provide necessary housing to New York State, but both are deficient in important ways. A meaningful policy solution must: (1) provide for an adequate amount of affordable housing construction, (2) be implemented quickly given the severity of the crisis,³⁶¹ (3) survive legal challenges, and (4) include the ability for policymakers to nullify the change to prevent long-term environmental harm.³⁶²

While a state-level rulemaking could be implemented quickly, it is potentially unstable and its possible inability to be rescinded would lead to unnecessary environmental damage. As DEC rulemaking would only require a minimum sixty-day notice and comment period,³⁶³ it could be executed swiftly, especially compared to the other legislative policy proposals.³⁶⁴ This speed comes, however, with litigation risk and long-term environmental cost if the rule cannot be rescinded in the future to protect the environment.³⁶⁵ Its rescission, while having the capacity to be executed as

359. See N.Y. ENV'T CONSERV. LAW § 8-0101 (McKinney 2026).

360. See discussion *supra* Part I.B.1.

361. See discussion *supra* Part I.A.

362. See Tafesse, Girma & Dessalegn, *supra* note 96, at 8; see also discussion *supra* Part I.B.1.

363. See N.Y. A.P.A. LAW § 202(1)(a) (McKinney 2026).

364. See discussion *supra* Parts II.B.2.i, II.C.2.i (discussing challenges of passing legislation creating SEQRA exemptions and of passing legislation amending Executive Law respectively).

365. See discussion *supra* Part II.A.2.

fast as its promulgation,³⁶⁶ would face strong arbitrary-and-capricious challenges.³⁶⁷ As discussed in Part II.A, declaring this type of construction as having no significant environmental impact would likely foreclose evidence that the agency could rely on to ward off an arbitrary and capricious challenge.³⁶⁸ This outcome would risk unnecessary environmental damage and lack an appropriate balance between economic, public health, and environmental consequences.

As for legislation creating a SEQRA exemption, it could be sufficient in scope and would be well-positioned to defend against a Green Amendment challenge.³⁶⁹ However, the Assembly Bill has stalled in the Legislature,³⁷⁰ even with a unified Democratic government, indicating it would be difficult to enact.³⁷¹ A sunset provision could be integrated in this type of bill to safeguard long-term environmental health,³⁷² but this built-in repeal would be set for an arbitrary duration, as policymakers cannot accurately predict *ex ante* the appropriate amount of time needed to mitigate the housing crisis.³⁷³ This would make the sunset provision either an unnecessary restriction on the needed amount of housing or permit too much construction, leading to unnecessary environmental damage.³⁷⁴

B. The Goldilocks Solution: Amending the Executive Law

Amending the Executive Law is the most promising means to achieve the need for quick implementation, sufficient scope, legal fortitude, and ability to repeal. The New York Legislature has shown its willingness to expand the Executive Law, including the definition of disaster, in a time of crisis during the COVID-19 pandemic.³⁷⁵ While the COVID-19 pandemic was an acute and fast-moving disaster, and the housing crisis has been a chronic, long-term issue,³⁷⁶ the current economic and political landscapes³⁷⁷ may provide the necessary legislative support to statutorily categorize the housing crisis as a disaster.

366. See N.Y. A.P.A. LAW § 102(2)(a).

367. See discussion *supra* Part II.A.2.iii.

368. See discussion *supra* Part II.A.2.iii.

369. See discussion *supra* Part II.B.

370. See discussion *supra* Part II.B.2.i.

371. See discussion *supra* Part II.B.2.

372. See Tafesse, Girma & Dessalegn, *supra* note 96, at 8; see also discussion *supra* Part II.B.2.iii.

373. See discussion *supra* Part II.B.2.iii.

374. See discussion *supra* Part II.B.2.iii.

375. See generally Act of Mar. 3, 2020, ch. 23, 2020 N.Y. Laws; discussion *supra* Part II.C.

376. See discussion *supra* Part II.C.1.

377. See discussion *supra* Part I.A.2.

Hostility towards New York from the federal government³⁷⁸ may convince lawmakers that the housing crisis has entered an unprecedented stage in which exogenous actors could worsen the crisis in a rapid manner. The Trump Administration's threats to cut off funding³⁷⁹ could plunge New York State's housing supply deeper into crisis with little warning. The current political climate also appears ripe for this type of legislation, with national bipartisan pro-housing support for reform that cuts red tape.³⁸⁰

This would be especially true for a bill amending the Executive Law that allows the New York Legislature to immediately address the crisis but maintain the ability to reinstate the application of SEQRA as it receives actual data regarding housing conditions, rather than a legislative exemption with an arbitrary sunset provision.³⁸¹ This aspect of control over the duration of the suspension and its environmental consequences makes this policy solution distinct from the most recent enactment in the 2026 budget³⁸² or past legislative efforts that the New York State Assembly has yet to support.³⁸³ Assemblymembers, such as Environmental Conservation Committee Chair Glick, who are reluctant to pass SEQRA reform for affordable housing,³⁸⁴ may be more willing to pass legislation that is better able to safeguard long-term environmental health, especially with SEQRA reform already receiving the general support of other committees.³⁸⁵ The prolonged suspension of law during COVID-19 should give the Legislature confidence in the executive's ability to suspend SEQRA for the duration needed to mitigate the housing crisis, and its retained veto ensures it will have the last word.

If it can pass through the Legislature, this policy solution satisfies the criteria identified above because it can be implemented quickly, allows for broad action, is capable of withstanding legal challenges, and can be rescinded quickly to protect environmental health. This solution will afford the executive a sufficiently broad grant of power to combat the current housing crisis through the suspension of SEQRA for affordable housing construction.³⁸⁶ Such a grant of power would withstand Article 78, Green Amendment, and nondelegation challenges,³⁸⁷ allowing it to achieve the

378. See discussion *supra* Part I.A.2.

379. See Johnson, *supra* note 18.

380. See discussion *supra* Part I.A.2.

381. See discussion *supra* Part II.C.2.

382. See Lisa & Lewis, *supra* note 78.

383. See discussion *supra* Part II.B.

384. See Mellins, *supra* note 252.

385. See Mellins, *supra* note 252.

386. See discussion *supra* Part II.C.

387. See discussion *supra* Part II.C.2.

desired effectiveness. The suspension is limited to thirty-day periods,³⁸⁸ allowing quick reinstatement of the EIS requirement once the Governor determines the suspension is no longer necessary. If the executive attempts to prolong the suspension past the point necessary, the Legislature can use its legislative veto to prevent the executive from abusing its power.³⁸⁹ This allows policymakers to quickly reinstate SEQRA requirements when they determine that the housing crisis has been sufficiently mitigated, limiting the harmful effects of housing construction on the environment. The Legislature can also choose to repeal the expanded grant of executive power once it has determined the crisis has been sufficiently mitigated, an option which was exercised in the COVID-19 context when the crisis had been adequately managed.³⁹⁰

CONCLUSION

New York households need more affordable housing, and fast. The costs that SEQRA imposes on the construction of affordable housing, exacerbated by lawsuits brought by NIMBY groups, are further deepening the housing crisis and increasing costs for already burdened New York households. A policy solution needs to be implemented quickly that provides enough housing and can withstand legal challenges so that affordable housing can be built. This solution must also be revocable so that the social and economic goals of improving the housing crisis do not overshadow SEQRA's environmental protection mandate.

Amending the Executive Law to include a housing crisis in the definition of "disaster emergency" is the best solution to address this crisis. It satisfies the relevant criteria in that it can be implemented quickly, allows for broad action, is capable of standing up against legal challenge, and can be rescinded to protect long-term environmental health when the Executive and/or the Legislature determine the housing crisis has been sufficiently addressed. As executive power and what constitutes an emergency have grown in the modern legal discourse, the housing policy disaster that has led New York to crisis deserves a measured increase to state executive power.

388. See N.Y. EXEC. LAW § 29-a(2)(a) (McKinney 2026).

389. See discussion *supra* Part II.C.2.

390. See discussion *supra* Part II.C.2.