

Testimony of Vicki Been^{*}
Before the New York City Council's 2019 Charter Revision Commission
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My name is Vicki Been, and I am the Boxer Family Professor of Law at New York University School of Law, where I teach, research, and write about land use and housing policy. I also am a Faculty Director of the NYU Furman Center, which is an interdisciplinary research center dedicated to improving knowledge and public debate about housing, land use, and urban policy. I had the privilege of serving the city as Commissioner of Housing Preservation and Development (HPD) from 2014 to 2017.

I am acutely aware, given my membership on the Commission to Reform New York City's Property Tax System, of the hard work and thoughtfulness that members of the Charter Revision Commission are devoting to the critical issue of whether and how to amend the City's Charter to require changes in the City's land use processes. I am grateful for the invitation to speak with the Commission, and will focus my testimony on proposals to add a requirement to the City Charter that the City prepare a comprehensive plan, and given my background, will focus especially on the implications that proposal may have for the City's efforts.

The City engages in an enormous amount of planning and should (indeed, must) continue to do so. Since the Bloomberg Administration released PlanNYC, for example, the City has put out detailed and comprehensive plans for affordable housing (Housing NY, and Housing NY2.0); for NYCHA (NextGen NYCHA); for homelessness (Turning the Tide on Homelessness); and sustainability (Lower Manhattan Coastal Resiliency (LMCR) project), among other critical issues. The City has pulled much of that together in a plan to become the most resilient, equitable, and sustainable city in the world – OneNYC. An update of OneNYC is in the works, and other planning processes are underway – HPD is now working with many other agencies to draft what is essentially a fair housing plan in their Where We Live Initiative, for example. The City also issues a ten-year capital plan, and the City Planning Department has taken on an expanded role in integrating the capital plan with its zoning work and in ensuring that all the agencies are working together to coordinate their work with the capital plan.

So, what exactly would be required by a mandate for a comprehensive plan?

It is unclear exactly what the proposals for comprehensive planning have in mind beyond all the planning that already takes place. My first point, therefore, is that a mandate for comprehensive planning is meaningless unless the proposed amendment specifies in considerable detail what exactly is required. But that level of detail is not appropriate for a

^{*} These comments do not represent the institutional views (if any) of NYU, the NYU Furman Center, NYU's School of Law, or NYU's Wagner Graduate School of Public Service.

charter, which should be a statement of principles, a constitution, and not a statute or a rule or a regulation.

Comprehensive planning processes vary dramatically across the country – some states mandate very detailed requirements as to what plans must contain; others provide only vague guidance about what comprehensive planning actually means. California, for example, has since 1969 mandated that each local government draft a comprehensive plan that addresses seven elements: land use, transportation, conservation, noise, open space, safety, and housing.¹ California requires considerable detail in the local governments’ plan – much more detail than most comprehensive plans in place in major cities across the country, and a daunting level of detail for a city as large as New York City. Each “housing element,” for example, must contain:

(a) An assessment of housing needs and an inventory of resources and constraints . . . [which shall include the following]:

(1) An analysis of population and employment trends and . . . a quantification of the locality’s existing and projected housing needs for all income levels. These existing and projected needs shall include the locality’s share of the regional housing need . . .

(3) An inventory of land suitable and available for residential development, . . . and an analysis of the relationship of zoning and public facilities and services to these sites . . .

(5) An analysis of potential and actual governmental constraints upon the maintenance, improvement, or development of housing for all income levels . . ., and for persons with disabilities . . . including land use controls, building codes and their enforcement, site improvements, fees and other exactions required of developers, local processing and permit procedures, and any locally adopted ordinances that directly impact the cost and supply of residential development. The analysis shall also demonstrate local efforts to remove governmental constraints that hinder the locality from meeting its share of the regional housing need . . . and from meeting the need for housing for persons with disabilities, supportive housing, transitional housing, and emergency shelters

(b)(1) A statement of the community’s goals, quantified objectives, and policies relative to the maintenance, preservation, improvement, and development of housing . . .

(c) A program which sets forth a schedule of actions during the planning period, each with a timeline for implementation . . . that the local government is undertaking or intends to undertake to implement the policies and achieve the goals and objectives of the housing element through the administration of land use and development controls, the provision

¹ Cal. Gov’t Code § 65300 (West 2019) (requiring local governments to “adopt a comprehensive, long-term general plan for the physical development of the county or city”).

of regulatory concessions and incentives, the utilization of appropriate federal and state financing and subsidy programs when available . . . [T]he program shall do all of the following:

(1) Identify actions that will be taken to make sites available during the planning period with appropriate zoning and development standards and with services and facilities to accommodate that portion of the city's or county's share of the regional housing need for each income level that could not be accommodated on sites identified in the inventory completed pursuant to paragraph (3) of subdivision (a) without rezoning . . . ²

(A) Where the inventory of sites . . . does not identify adequate sites to accommodate the need for groups of all household income levels . . . rezoning of those sites, including adoption of minimum density and development standards, . . . shall be completed no later than three years after [the earlier of certain specified actions] . . .

(3) Address and, where appropriate and legally possible, remove governmental and nongovernmental constraints to the maintenance, improvement, and development of housing . . . ³

California's comprehensive planning requirement is reinforced by a mandate in the state's zoning enabling act that local governments consider the effect of their zoning ordinances and other regulatory activities on the housing needs of the region,⁴ and also is reinforced by California's least-cost zoning law, which requires local governments to "zone sufficient vacant land for residential use with appropriate standards . . . to meet housing needs for all income categories as identified in the housing element of the general plan."⁵ Compliance is also either a requirement for participation in various funding programs or results in extra points in the competition for funding.⁶

At the other end of the spectrum, where many, if not most, comprehensive plans can be found, is Charlottesville's comprehensive plan. It states goals and strategies with far more generality than New York City already provides in the various plans I mentioned earlier. For example, it lists as one of its housing goals: "Grow the city's housing stock for residents of all income levels." The strategies it lists for accomplishing that goal are:

- Continue to work toward the City's goal of 15% supported affordable housing by 2025.

² The regional need to which the planning requirement refers is established by the California Department of Housing and Community Development, which determines the state's need for housing for households of various income levels and allocates that need among the various regions within the state; the Council of Governments for each region then allocates the region's share to municipalities within the region. *Id.* at § 65584.

³ *Id.* at § 65583.

⁴ *See, e.g., id.* at § 66412.3.

⁵ *Id.* at § 65913.1.

⁶ Cal. Dep't of Hous. and Cmty. Dev., *Incentives for Housing Element Compliance* (2009), http://hcd.ca.gov/community-development/housing-element/docs/loan_grant_hecompl011708.pdf.

- Incorporate affordable units throughout the City, recognizing that locating affordable units throughout the community benefits the whole City.
- Achieve a mixture of incomes and uses in as many areas of the City as possible.
- Encourage creation of new, on-site affordable housing as part of rezoning or residential special use permit applications.
- Consider the range of affordability proposed in rezoning and special use permit applications, with emphasis on provision of affordable housing for those with the greatest need.
- Promote housing options to accommodate both renters and owners at all price points, including workforce housing.⁷

Those goals and strategies are so vague and general that it is hard to imagine how they inform, guide, or constrain future housing, land use, or capital budgeting actions in any way. None of the strategies is measurable today. Each of them is subject to multiple interpretations. All but one are not time-limited, and none specifies who is responsible and should be held accountable for their implementation.

Where on the continuum from specificity to vagueness should a comprehensive plan mandated by a revision to the Charter fall? Without further detail about what exactly is being required, it is hard to have an intelligent discussion about the requirement. A myriad of questions need to be answered before the Commission, policy experts, or any citizen can evaluate a proposal to add a comprehensive plan requirement to the Charter. What exactly is required? At what level of detail? By what date? On what budget? What happens in the interim – do agencies go on with their work as before, or are certain things going to be delayed until the plan is finalized? Who will draft the plan? What role will borough presidents, community boards, and local residents each play in the planning process? Will the plan be 59 neighborhood plans merged in the same document? 59 neighborhood plans plus a citywide plan? Only one citywide plan? Who must approve the proposed plan – the City Council’s proposal envisions that it will approve the plan, but must there be some form of cross-acceptance process between the neighborhoods and the City as a whole, for example? Must the plan be approved by, for example, the MTA, given the relationship between its transit strategies and the City’s plans? Must the plan go through environmental impact review? ULURP? As the City Council considers the plan, can it amend the proposed plan before adopting it, or will the plan have to be sent back to the City Planning Commission (or borough presidents, community boards, or others) before amendments can be introduced? Will council members defer to objections from an individual council member that the plan is not consistent with what the council member or his or her constituents want, allowing the so-called councilmatic veto that is the rule and not the exception in the City Council? What happens if the plan isn’t approved? If approved, can the plan be amended, and if so, how and under what circumstances? If it can be amended relatively easily, what real force will it have? Must agencies prove that each of their decisions is consistent with the plan? If so, what does

⁷ Charlottesville 2013 Comprehensive Plan, Ch. 5, available at <http://www.charlottesville.org/departments-and-services/departments-h-z/neighborhood-development-services/comprehensive-plan/comprehensive-plan-2013>.

“consistent with the plan” mean? Can people who don’t like an agency’s action sue claiming that the action is not consistent with the plan? What kind of review will courts give in such actions? What are the remedies that courts might impose?

A survey of everyone in this room would reveal an enormous range of views about what a mandate for a comprehensive plan means. To some, it means that each neighborhood will be required to allow enough affordable housing to meet some minimum that the City as a whole determines. To others, it means that each neighborhood will get to determine how much housing it will allow. To others, it means that each neighborhood will get to determine what preconditions must be met before any additional housing capacity is authorized. Still others may think it means that neighborhoods and the city as a whole will engage in a cross-acceptance process whereby they negotiate to a compromise. Yet others will view comprehensive planning as a threat to the power of homeowners, preservationists, and other interest groups that now dominate community board processes, because it may widen the scope of those who have input into the process. We’d likely have 20 more versions of what it means as well. That’s dangerous.

Indeed, it’s irresponsible to submit such an ambiguous concept to a vote. It just means that we’ve avoided the tough political choices involved by using “weasel words” – words that sound specific and indisputable, but that are in fact evading a direct and transparent statement or position. Comprehensive planning can mean more or less neighborhood control, depending on how it’s interpreted. It can mean longer land use processes as we debate whether the proposal is consistent with the plan, or it can mean that once a proponent shows that the project is consistent with the plan, the project should be subject to less scrutiny. It can be a ceiling imposing an upper limit on what is developed in a neighborhood, or a floor below which the neighborhood loses control or suffers penalties. It can be a broad vision, or it can be a series of very specific, measurable, accountability-focused, and time-limited goals.

To evaluate the requirements of a comprehensive plan, we need to know the answers to the questions I’ve raised and no doubt many more. We need to understand what we are talking about. But that’s not a job the Charter Revision Commission can realistically take on in the time allotted. The Charter Revision Commission is working extremely hard, but is addressing a wide range of complex issues under a tight deadline, and is unlikely to be able tackle this issue with the level of specificity required.

Nor should the Commission: a charter is not meant to be legislation; it is supposed to be guiding principles. A charter should articulate the City’s values, allocate power and responsibility among government actors, and establish the processes and checks and balances required to ensure that power and responsibility are used to achieve the stated values. It should not detail how exactly the City ought to formulate its goals and strategies, in part because that detail will need to change based upon experience and in response to evolving challenges.

But without a more detailed proposal, voters cannot give the issue the level of attention

required for a change that could have major consequences for every neighborhood and for every issue that would be affected (from how much affordable housing is built, to how the city would address the need for homeless shelters, schools, and fire stations, to name a few, to how the city will provide room for job growth). November 2019 is an off-year election; the only other issue likely to draw much attention is the public advocate's race. Only about 400,000 people turned out to vote in the special election for public advocate earlier this year, less than 10 percent of the 5.2 million people registered to vote (which unfortunately is not all those eligible to vote).⁸ The decision to adopt a charter revision to mandate comprehensive planning thus is likely to be made by a very small number of people, yet could affect the future of the city and its residents in profound ways. And unless we have a much more specific proposal, those voters will have no idea what they are voting for, except that comprehensiveness, and planning, sound reasonable – like apple pie and teddy bears.

The Dangers of a Comprehensive Planning Mandate

Why should we worry about what a mandate for comprehensive planning really means? Why not just pass such a requirement and figure the details out later? Because comprehensive planning can foster and empower NIMBYism and can be an exclusionary tool. Depending upon the specifics of the comprehensive planning process, each neighborhood in New York City can seek a plan that protects that neighborhood's special character, its density, open space, student/teacher ratios, historic buildings, and so on. But if every neighborhood does so, it will become even harder than it is now to build the housing, infrastructure, and other projects that the city needs to ensure that people can afford to live here. The 1975 charter revision commission adopted ULURP, which has no requirement that the process include a comprehensive plan, to "give local communities a say in shaping important land use policies without granting them veto power over public welfare: in other words . . . to strengthen, not balkanize, the City's neighborhoods and communities." But comprehensive planning, again depending upon the specifics, can lead to precisely that kind of balkanization.

One of the city's most pressing issues is how to make housing more affordable for the 1.1 million households who are rent-burdened—paying 30% or more of their income for housing, so that they don't have enough left over for adequate food, health care and medicine, quality childcare, and other essentials--or for the nearly 600,000 households who are paying more than half of their income on housing. That requires multi-pronged strategies – to improve people's employment prospects and wages; to increase the supply of housing, especially the "missing middle" of unsubsidized housing affordable to moderate- and middle- income households; to provide and preserve subsidized affordable housing, improve and preserve NYCHA housing, and provide low-income tenants with rental assistance; and to provide protections against displacement for tenants such as rent regulation, limits on eviction, and legal assistance for tenants facing evictions.

⁸ Savannah Jacobson, *How Many Voters Will Turn Out for the Public Advocate Special Election?*, GOTHAM GAZETTE, Feb. 14, 2019; Jeffery C. Mays, *Pubic Advocate: Jumaane Williams Wins Special Election*, N.Y. TIMES, Feb. 26, 2019.

But neighborhood residents, and their elected officials, consistently do not want their neighborhoods to change significantly. They reject proposals that might affect their property values or their rents. They support affordable housing in theory, but the particular housing proposed is never just right – it’s too tall, badly designed, targeted at the wrong incomes, on a site that would be better for something else, built by non-union workers, staffed by the wrong employees, operated by the wrong entity, etc., etc. That risk aversion, the rational desire to maximize the value of one’s largest investment or to minimize one’s own expenses, and the myriad of concerns that people express about specific proposals may all be well-meaning or understandable. But they too often add up to no new housing, even affordable housing; no housing for people with special needs; no homeless shelters; and no essential infrastructure to support the city’s needs, such as sanitation, garages or police stations.⁹ I wish I could believe the arguments that if only we had a comprehensive plan, people would come forward with great ideas about how to design and site such facilities and would see that they were only being asked to do what every other neighborhood is also doing and therefore take the burden of accommodating the city’s needs on willfully. But those arguments defy decades of experience, reams of research, and, unfortunately, at least some of human nature.¹⁰

What does the evidence about comprehensive planning show? The evidence that comprehensive planning leads to equitable growth, and especially more affordable housing and better housing affordability in general is scant, and to put it charitably, even the two studies that are most favorable are quite weak. Let’s go back to California, which not only has a state mandate that each local government have a comprehensive plan, but also has very detailed requirements each plan show how the locality will achieve the level of affordable housing the state and regional governments have mandated as the local government’s share of the statewide need, and a system of sticks and carrots if the local government does not achieve those goals.

Nevertheless, almost three decades after the planning requirement was imposed, in

⁹ See Vicki Been, *City NIMBYs*, 33 J. LAND USE & ENVTL. L. 217 (2018); John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL’Y REV. 91, 91 (2014); Roderick M. Hills, Jr. & David Schleicher, *Balancing the “Zoning Budget”*, 62 CASE W. RES. L. REV. 81, 85 (2011); Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 93 (2015); Wendell Pritchett & Shitong Qiao, *Exclusionary Megacities*, 91 S. CAL. L. REV. (2018); David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1675 (2013); Charles Joshua Gabbe, *Do Land Use Regulations Matter? Why and How?* (Jan. 1, 2016) (unpublished Ph.D. dissertation, University of California at Los Angeles) <https://escholarship.org/uc/item/6db0k1k5>. For classic studies of parochial opposition to new housing development, see WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT, TAXATION, SCHOOL FINANCE AND LAND-USE POLITICS* 18(2001); Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 3 (1990); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 405–07 (1977).

¹⁰ For evidence specific to New York City, see Vicki Been, Josiah Madar, & Simon McDonnell, *Urban Land Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEG. STUD. 227, 238–40 (2014); Edward L. Glaeser, *Houston, New York Has a Problem*, CITY J., Summer 2008, at 62, 67; Edward L. Glaeser, Joseph Gyourko, & Raven Saks, *Why is Manhattan So Expensive: Regulation and the Rise in Housing Prices*, 48 J. L. & ECON. 331 (2005); see also Paul Krugman, *Opinion, That Hissing Sound*, N.Y. TIMES, Aug. 8, 2005, <http://www.nytimes.com/2005/08/08/opinion/that-hissing-sound.html>.

1996, only 58 percent of the local governments required to adopt the required housing element of a comprehensive plan had done so.¹¹ By 2018, nearly 50 years after the requirement was imposed, the share of local governments subject to the housing plan requirements that were in compliance had risen to 88%.¹² Nevertheless, almost 98 percent of the jurisdictions were failing to approve the housing the state had determined was needed.¹³ The reasons for that failure are many, but one clear lesson from California's experience with comprehensive planning is that it does not overcome local resistance to the steps cities must take to achieve housing affordability.¹⁴

The evidence about whether comprehensive planning processes in areas outside California are associated with more housing affordability is mixed but very weak. In the words of a recent scholarly review of the evidence, "little is known about the outcomes of most plans, let alone the affordable housing component of local comprehensive plans [or about] the impact of various elements of plan quality on community outcomes or housing affordability"¹⁵ The most recent study looked at 58 local comprehensive plans in the Atlanta and Detroit metropolitan areas, and evaluated whether the strength of those plans' housing elements was associated with reductions in the share of low-income households who were rent burdened (paying more than 30% of their income for housing). The research concluded that the number and mandatory nature of housing policies discussed in comprehensive plans was associated with improved housing affordability in the Atlanta metro, but not in the Detroit metro.¹⁶ Of the three earlier studies looking at whether comprehensive plans in Florida were associated with more housing affordability, two concluded that they were not; the third study found that the

¹¹ Nico Calavita et al., *Exclusionary Housing in California and New Jersey: A Comparative Analysis*, 8 HOUSING POL'Y DEBATE 109, 118 (1997). Although at least one court took tough measures against a recalcitrant community, enjoining it from approving any subdivision maps or rezonings until it had complied with the requirements, *Camp v. Bd. of Supervisors*, 176 Cal. Rptr. 620 (Ct. App. 1981), compliance still lagged. See Ben Field, *Why Our Fair Share Housing Laws Fail*, 34 SANTA CLARA L. REV. 35 (1993) (blaming failure on obstacles to litigation, limits of judicial expertise, and a judicial reluctance to intervene in local land use matters).

¹² Cal. Dep't of Hous. and Cmty. Dev., Housing Element Implementation Status Tracker (Dec. 4, 2018), http://hcd.ca.gov/community-development/housing-element/docs/Housing_Element_Implementation_Tracker.xlsx.

¹³ Cal. Dep't of Hous. and Cmty. Dev., S.B. 35 Statewide Determination Summary (2018), http://www.hcd.ca.gov/community-development/housing-element/docs/SB35_StatewideDeterminationSummary01312018.pdf.

¹⁴ For further analysis of California's planning approach, see Victoria Basolo & Corianne P. Scally, *State Innovations in Affordable Housing Policy: Lessons from California and New Jersey*, 19 HOUS. POL'Y DEBATE 741 (2008); Tej Kumar Karki, *Mandatory Versus Incentive-Based State Zoning Reform Policies for Affordable Housing in the United States: A Comparative Assessment*, 25 HOUS. POL'Y DEBATE 234 (2015); Paul G. Lewis, *Can State Review of Local Planning Increase Housing Production?*, 16 HOUS. POL'Y DEBATE 173 (2005); Matthew Palm & Deb Niemeier, *Achieving Regional Housing Planning Objectives: Directing Affordable Housing to Job-Rich Neighborhoods in the San Francisco Bay Area*, 83 J. AM. PLAN. ASS'N 377 (2017); Ngai Pindell, *Planning for Affordable Housing Requirements*, in LEGAL GUIDE TO AFFORDABLE HOUSING 3 (Tim Iglesias & Rochelle Lento, eds., 2011); Darrel Ramsey-Musolf, *Evaluating California's Housing Element Law, Housing Equity, and Housing Production (1990-2007)*, 26 HOUS. POL'Y DEBATE 488 (2016).

¹⁵ Hee-Yung Jun, *The Link Between Local Comprehensive Plans and Housing Affordability*, 83 J. AM. PLAN. ASSN. 249, 254 (2017).

¹⁶ *Id.*, at 258-259.

number of housing policies in a comprehensive plan was associated with great housing affordability in subsequent years, although the number of housing policies in a plan may bear little relationship to the number or quality of policies actually implemented.¹⁷

In short, then, the evidence suggests that mandating a comprehensive plan may, at best, do little to help New York achieve a more just and affordable city. At worst, depending upon how comprehensive planning is structured, implemented, and enforced, it may make it even harder for the City to achieve those and other goals. There is a growing consensus across land use and urban policy experts in academic institutions; public policy think tanks; and federal, state and local governments that land use regulation, including planning is limiting growth in productive cities like New York in ways that have very negative consequences both for those cities and for their states and the nation as a whole.¹⁸ A mandate for a comprehensive plan could make an already lengthy, unpredictable, and costly land use process even more onerous by providing yet another veto point or opportunity for holdup to NIMBY interests. This would come at the expense of more equitable development for those who have been shut out of many neighborhoods and housing opportunities because of their income, race, or ethnicity.

New York is a city of neighborhoods, but it is one city, and we stand or fall as a whole. The balance between giving neighborhoods appropriate control over what happens to their neighborhoods and getting the things built that we need if we are going to thrive as a city is difficult to strike. Something that could upend that balance, which a comprehensive planning mandate would do, should not be undertaken lightly. I therefore urge the Commission to reject the calls to revise the Charter to mandate a comprehensive plan.

¹⁷ Compare J. Anthony, *The Effects of Florida's Growth Management Act on Housing Affordability*, 69 J. AM. PLAN. ASSN. 282 (2003); A. Aurand, *Florida's Planning Requirements and Affordability for Low-Income Households*, 29 HOUSING STUD. 677 (2014); R.C. Feiock, *The Political Economy of Growth Management*, 22 AM. POL. Q. 208 (1994).

¹⁸ See Vicki Been, Ingrid Gould Ellen and Katherine O'Regan, *Supply Skepticism*, 29 HOUS. POL'Y DEBATE 25 (2018) (surveying literature); Been, *supra* n. 9.