May 17, 2016

Hon. Andrew M. Cuomo
Governor
State Capitol
Executive Chamber
Albany, New York 12224

Hon. John Flanagan
Majority Leader
New York State Senate
Room 330, State Capitol Building
Albany, NY 12247

Hon. Carl Heastie
Speaker
New York State Assembly
Legislative Office Building 932
Albany, NY 12248

Hon. Jeffrey Klein
Independent Democratic Conference Leader
New York State Senate
Legislative Office Building 913
Albany, NY 12247

RE: Revised 421-a Law and Private Activity Bond Allocation Act of 2014

Dear Governor Cuomo, Senate Majority Leader Flanagan, Speaker Heastie, and Senator Klein:

The New York City Bar Association ("City Bar"), through the Committees on Housing & Urban Development, Land Use Planning & Zoning, and Real Property Law (collectively the "Committees") strongly urge the State Legislature and Executive to:

I. Re-enact the expired real-estate tax exemption in Section 421-a, sub-division 16 of the New York Real Property Tax Law as revised in 2015 (the "Revised 421-a Law"); and

II. Renew, modify, and permanently extend the Private Activity Bond Allocation Act of 2014 (the "Bond Allocation Act"). Specifically, the Bond Allocation Act should: (i) not subject "local" Bonds to review and approval by the Public Authorities Control Board ("PACB") or Empire State Development ("ESD"); (ii) advance the recapture date by one month; and (iii) mandate uniform reporting requirements

Unless the Revised 421-a Law or its functional equivalent is re-enacted by the end of this legislative session, the construction of mixed-income rental buildings will virtually cease, as anticipated by the drastic decline in the commencement of construction of mixed-income developments since January 2016.[1] Reenacting the Revised 421-a Law alone, however, is not

[1] See Will Parker, *Arrested Development: Residential construction permits dropped 94% in January*, The Real Deal (Feb. 19, 2016), available at http://therealdeal.com/2016/02/19/arrested-development-residential-construction-permits-dropped-94-percent-in-january/.

sufficient; the Bond Allocation Act must also be renewed to ensure that New York City and other municipalities have the necessary tools to effectively address the widely acknowledged housing crisis.

I. RE-ENACTMENT OF SECTION 421-A

A. Background

Section 421-a of the New York Real Property Tax Law ("Section 421-a") has long been a pillar of affordable housing in New York City. Over the years, the Legislature has amended Section 421-a to more effectively incentivize the construction of affordable units, and in June of 2015, Section 421-a was significantly revised to increase the percentage of affordable units required for a building to receive the tax exemption, and restructured the income restrictions to provide units with deeper affordability. The Revised 421-a Law was to become effective in January of 2016 and was widely supported.

Unfortunately, the Revised 421-a Law did not come into effect, and this vital tax exemption expired. The Revised 421-a Law was conditioned on the Real Estate Board of New York ("REBNY") and the Building and Construction Trades Council of Greater New York ("Construction Trades") reaching an agreement regarding the minimum wages to be paid to construction workers.[2] Practically speaking, however, this condition precedent created uncertainty in the real estate development community and ultimately led to the Revised 421-a Law not taking effect.

B. The Impact of an Expired Section 421-a on Affordable Housing

The effects from the expiration of the Revised 421-a Law are already being felt. It has been reported that the NYC Department of Buildings issued new construction permits for only 453 units in January of 2016, a 94% drop from the prior month.[3] For those permits that were issued in January, most of the units are one and two family homes in Staten Island and an all-affordable building in the Bronx. Even considering the increase in permit applications in the last quarter of 2015 due to the uncertainty about the renewal of the Revised 421-a Law, this is a significant decrease in construction.

Such a low level in the issuance of new construction permits has not been seen since the recession in 2008. Further, the number of new applications filed, since January of 2016, for mixed-income buildings under the voluntary Inclusionary Housing Program has dropped to zero. This is in stark contrast to 2015, which saw a record number of applications. The expiration of the Revised 421-a Law also impacts the supply of market-rate rental housing, which further exacerbates the affordable housing shortage. Under New York City's new Mandatory Inclusionary Housing program ("MIH") most residential developments, enlargements, or conversions in newly rezoned areas must set aside 20% to 30% of the units as permanently

[2] This letter does not address questions some have raised concerning the delegation of legislating construction wages to private parties, such as REBNY and the Construction Trades.

[3] See *supra* fn. 1.

affordable housing. The feasibility of this set aside is largely dependent on the availability of a tax exemption comparable to the Revised 421-a Law. If such a tax exemption is not made available, property owners will simply not develop their lots, as it will not be economically viable to do so.

Carl Weisbrod, the Chairman of the New York City Planning Commission has recently gone on record to say that without the Revised 421-a Law "developers will continue to build luxury condominiums, rather than much-needed rental housing."[4] Due to the high costs of land and construction in the City, as well as the significant real estate taxes imposed on rental properties, the Revised 421-a Law is a necessary inducement for the construction of new multi-family buildings.

The Hallets Point project in Queens is a concrete example of how the uncertainty about Section 421-a is paralyzing the development of mixed-income rental housing.[5] This project was supposed to deliver over 2,000 new units, including 483 affordable units, but the project has been halted due to the uncertainty about the Revised 421-a Law.

On a regular basis, members of the Committees are approached by real estate developers who are interested in building affordable, mixed-income rental projects, but who note that such projects, without a 421-a tax exemption, cannot absorb a full property tax burden of up to 30% of gross rents and still obtain sufficient financing. The bottom line is that financial institutions are requiring that projects have returns that can be achieved only with a tax exemption.

The Revised 421-a Law achieved a difficult balance between increasing the production of affordable housing, effectively targeting the exemption, and enabling private developers to obtain sufficient financing as well as make a reasonable return on their investment. The consensus achieved was the product of hundreds of comments by a wide-variety of stakeholders and extensive negotiations with legislators. As a result, the Revised 421-a Law should not be discarded. Designing and implementing a replacement program from scratch will lead to new disagreement, further delay, and additional uncertainty.

Lastly, Section 421-a is a tax deferral program, not a subsidy program. It should be clear that there is no "loss of taxes" for properties that are never built, which is what is likely to happen if the Revised 421-a Law is not reinstituted.

C. Recommendation

City Bar recommends that the Revised 421-a Law be reinstated and that the prevailing wage requirement in subdivision 16-a of Section 421-a be removed.

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[4] See *Weisbrod: Expiration of 421a means more luxury condos are on the way*, The Real Deal (Mar. 30, 2016), available at http://therealdeal.com/2016/03/30/weisbrod-expiration-of-421a-means-more-luxury-condos-are-on-the-way/.

[5] See Zoe Rosenberg, *Astoria's Hallets Point Megaproject Halted Due to Lapsed 421-a*, Curbed New York (Feb. 19, 2016), available at http://ny.curbed.com/2016/2/19/11080008/astorias-hallets-point-megaproject-halted-due-to-lapsed-421-a.

II. RENEWAL OF THE BOND ALLOCATION ACT

The Bond Allocation Act of 2014, which controls the allocation, oversight, and management of tax-exempt, private activity bonds ("Bonds"), will expire on July 1, 2016.[6] Bonds are an indispensable source of financing for affordable housing. Bonds are allocated annually by the federal government to each state and then distributed by the states to municipalities.[7] The City Bar strongly encourages the State Legislature and Executive to renew the Bond Allocation Act and consider the following three recommendations.

A. Do Not Subject "Local" Bonds to Review and Approval by the Public Authorities Control Board or Empire State Development Corporation

The 2016-2017 New York State Executive Budget proposed expanding the powers of the PACB to include review and approval of bond issuances made by local industrial development agencies ("IDAs") and local development corporations, including the New York City Housing Development Corporation ("HDC").[8] The proposal would have further subjected the re-allocations of Bonds by local IDAs to additional review by ESD. In March 2016, the Legislature removed both proposals from the budget. We agree with the Legislature's decision to remove these proposals and recommend that such provisions <u>not be</u> included in the renewal legislation of the Bond Allocation Act.

The PACB was created in 1976 to perform credit reviews of State entities that issue bonds. The PACB is composed of five members appointed by the governor, only three of whom have the power to vote and must do so unanimously. Currently, the PACB is charged with the "duty to receive applications for approval of the financing and construction of any project proposed by" more than eleven (11) statewide public benefit corporations and their subsidiary entities. The Executive Department's proposal would effectively "eliminate the principle of local control provided in the current statute, which has operated effectively for 29 years."[9]

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[6] Section 18 of New York Bill No. A9033.

[7] By way of background, Bonds are a critical financial tool to create temporary and permanent jobs, develop affordable housing, and to secure investment in economic development projects. A 2014 study by the Citizens Housing and Planning Council ("CHPC") reported that <u>between 2005 and 2013 housing agencies issued approximately 87% of the State's annual statewide bond volume cap</u>, with New York State Housing Finance Agency ("HFA") and the New York City Housing Development Corporation ("HDC") accounting for 75%. <u>See</u> "Pump Up The Volume: Recommendations to Improve the Allocation of Private Activity Bonds to Better Support Housing in New York State," CHPC, December 2014, available at http://chpcny.org/assets/2_19-Pump-up-the-Volume-FINAL.pdf (the "CHPC Report"). Affordable housing projects are the most efficient use for Bonds because they leverage additional federal subsidies, such as the Low Income Housing Tax Credits (deleted because clause describes the Bonds and not how affordable housing projects are the most efficient use of the Bonds).

[8] Section 4(b) of Part R of Article VII of the Executive Department's proposed budget, available at https://www.budget.ny.gov/pubs/executive/eBudget1617/fy1617artVIIbills/TEDArticleVII.pdf.

[9] Resolution #2, 2016 NYSAC Legislative Conference, New York State Association of Counties, available at http://www.nysac.org/files/BoardofDirectorsResos.pdf.

First, it is important to note that the State's credit is not at issue when HDC or IDAs issue Bonds to finance projects. Second, PACB review of each HDC bond-financed project would extend an already lengthy approval process and have considerable negative downstream effects on lenders, developers, contractors, and local government agencies that must carefully coordinate their various interests in order to close their projects. The PACB is not equipped to review the number of applications it would receive under the Executive's proposal. Moreover, just a single vote by a PACB member would significantly postpone a project, jeopardizing that project's financing, derailing years of planning, and increasing considerably predevelopment expenses. To the extent that PACB review was recommended to increase the transparency of how HDC issues Bonds, there are other more effective means to achieve this transparency. A recommended alternative is described below in Section C.

Accordingly, the City Bar, along with the near unanimous opinion of experts in the real estate and affordable housing industry,[10] opposes extending PACB's or ESD's power to review state bond issuances by IDAs and local development corporations, including HDC.

B. Advance the Recapture Date by One Month

The Bond Allocation Act currently provides for two bond allocation phases. An initial allocation of Bonds is distributed at the start of the calendar year—1/3 of the volume cap to IDAs, 1/3 to the New York State Division of the Budget, and 1/3 to the Statewide Bond Reserve, which can reallocate Bonds as requested. The second allocation phase begins on October 15th of the same calendar year, when Bonds not committed to projects are "recaptured" by the Statewide Bond Reserve (the "Recapture Date"). After the Recapture Date, State and local agencies submit requests for allocations from the Statewide Bond Reserve to fund additional projects, predominantly housing projects that did not receive an issuance of Bonds under the initial allocations.[11] The demand for Bond financing typically exceeds supply, particularly for HDC, which has a pipeline of projects that is substantially greater than its bond allocation. Because of the short reallocation window between October 15th and the end of the year, State and local entities, such as HDC, are required to plan and manage project issuances "on the fly," which in turn creates a great deal of uncertainty around planning year-end closings.

An earlier recapture date would help housing agencies better plan and manage their project pipeline, while still providing ample time for IDAs to allocate their Bonds to non-housing,

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[10] See Sally Goldenberg, *State insists change to housing bonds will not impact city's deals*, Politico New York (Feb. 3, 2016), available at http://www.capitalnewyork.com/article/city-hall/2016/02/8589987/state-insists-change-housing-bonds-will-not-impact-citys-deals; see also, Mireya Navaro, *Cuomo's plan for financing affordable housing worries city officials*, The New York Times (Jan. 29, 2016), available at http://www.nytimes.com/2016/01/30/nyregion/cuomos-plan-for-financing-affordable-housing-worries-city-officials.html?_r=0

[11] From 2005 to 2013, local IDAs issued, each year, approximately 10% of total statewide bond volume, even though they were initially awarded at least 33% of the State allocation as required by the Bond Allocation Act. Presumably, the Statewide Bond Reserve recaptures roughly 23% of unissued Bonds from IDAs; the Bonds are then reallocated to State and local entities that have additional demand for bond financing. See the CHPC Report.

economic-development projects. Therefore, the City Bar recommends moving up the recapture date one month to September 15th of each calendar year.[12]

C. Enact Mandatory, Uniform Reporting Requirements

To the extent that the State is seeking to increase the transparency regarding the issuance of Bonds, the City Bar believes easily accessible data and information are critical components of good governance. The State Division of Budget is already required to produce an annual report under the current Bond Allocation Act.[13] However, as CHPC experienced when preparing its thorough report on Bonds allocated,[14] obtaining information about the bond allocations and issuances requires considerable time, resources, and collaboration because much of the data is either not publicly available or is available only in inconvenient formats.[15]

Information on bond allocation, issuance, and recapture should be current and readily accessible. For example, California's tax-exempt, private activity bond legislation authorizes the California Debt Limit Allocation Committee to request information from recipient agencies.[16] Accordingly, the State Division of Budget should:

1. Amend the Bond Allocation Act such that the Division of Budget is required to produce an annual report that is made easily accessible and available on its website.

2. Such report should contain a directory of all public entities that issue Bonds and provide a narrative summary of key data (e.g. value of Bonds allocated, value of Bonds recaptured)[17] from each such entity that illustrates the quantity, use, and purpose of the bond issuances.

3. Publish the data points in a raw data format (e.g. .csv or .xls files), which enables non-partisan research organizations, such as CHPHC and the Furman Center for Real

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[12] HDC also noted that under this scenario, the reporting date by public entities receiving bond allocations would also move up one month from October 1st to September 1st.

[13] See Bond Allocation Act §14, ¶8.

[14] See *supra* fn. 7.

[15] CHPC scoured Official Statements and also secured collaboration and data sharing from the State Division of Budget, HDC and HFA.

[16] Cal. Gov't Code §8869.87 (2015).

[17] The following is a non-exclusive list of information that the Division of Budget should consider collecting from each entity that receives and/or issues Bonds: (i) the value of Bonds initially allocated to entity; (ii) the value of Bonds issued to projects by an entity prior to the Recapture Date; (iii) the number of projects that were issued Bonds prior to the Recapture Date by an entity; (iv) the actual value of Bonds issued to each project; (v) project locations for recipients of Bonds; (vi) type of project for each project that received Bonds (housing, economic, industrial) and its possible subtypes (mixed-income, 100% affordable preservation, 100% affordable new construction, permanent supportive housing, etc.); (vii) quantity of residential units per income restricted band (e.g. less than 30% AMI, less than 50% AMI, less than 60% AMI, market etc.); and (viii) whether project received multi-year allocations, and if so the value of the multi-year allocations.

Estate and Urban Policy at New York University, to propose evidence-based policy solutions.

III. CONCLUSION

The continued development of affordable housing is at a critical juncture. Without the re-enactment of a tax exemption that is comparable to the Revised 421-a Law, mixed-income rental buildings will not be developed, causing a loss of both affordable and market-rate units. Given the well-documented housing crisis, the City Bar urges the State Legislature and the Executive to act. Much of the hard work forging a consensus was already done in the process of drafting the Revised 421-a Law. The Legislature and the Executive should capitalize on this consensus by re-enacting the Revised 421-a Law and not condition the tax exemption on REBNY and the Construction Trades reaching an agreement on wages—an issue that is distinct from the financing of affordable housing and should be addressed in a separate bill.

The Bond Allocation Act is equally critical in ensuring the continuing production of affordable housing, and the issuance of Bonds through HDC, which has efficiently produced hundreds of thousands of affordable units, should not be bogged down in red tape. Therefore, the Legislature and the Executive should not mandate PACB or ESD review over local authorities, should move-up the Recapture Date by one-month to facilitate efficient project planning, and promote transparency by requiring the reporting of easily accessible data.

On the behalf of the Committees, we thank you for considering our recommendations.

Respectfully,

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Cc: James S. Rubin, Commissioner, NYS Homes & Community Renewal