



**NEW YORK  
CITY BAR**

February 9, 2016

Council Member Donovan Richards, Jr., Chairperson, Subcommittee on Zoning and Franchises  
Council Member David G. Greenfield, Chairperson, Committee on Land Use  
New York City Council  
250 Broadway, 17th Floor  
New York, New York 10007

**Re: Mandatory Inclusionary Housing**

Dear Council Members Richards and Greenfield:

The New York City Bar Association (the “City Bar”), through the Committees on Housing & Urban Development (the “HUD Committee”), Land Use Planning & Zoning (the “LUPZ Committee”), and Cooperative & Condominium Law (the “Co-Op/Condo Committee” and collectively, the “Committees”), is writing to express its views on the proposed Mandatory Inclusionary Housing (“MIH”) text amendment currently pending before the City Council (the “Council”).

The City Bar supports the concept of MIH as a method for creating permanently affordable housing where a rezoning by the City or a private property owner significantly increases the capacity for residential development and the value of land. However, certain aspects of the proposed amendment are or may become problematic, particularly in light of the recent expiration of the 421-a property tax exemption (“421-a”). This letter provides an overview of the City Bar’s comments, questions, and concerns regarding the proposed amendment. Finally, the letter provides suggestions for possible revisions that, we believe, may make MIH more effective and better advance the City’s policy goal of generating affordable housing while fostering economically diverse communities.

**I. General Policy Comments:**

- A. In neighborhoods with strong demand for market-rate housing, MIH would be a vital method for ensuring the availability of apartments for individuals and families who could otherwise not afford to live in such neighborhoods.
- B. In mixed-income neighborhoods, MIH would require new development to preserve the existing mixed-income character, adding new affordable housing for individuals and families on the lower end of the neighborhood’s income spectrum.

- C. In lower-income neighborhoods, the addition of MIH adds to the many tools in the City's affordable housing toolbox, giving private developers and the City more ways to generate affordable housing that is aimed at a wider range of income levels.

**II. Suggestions to Strengthen and Clarify the MIH Proposal:**

- A. **421-a:** The City Bar recommends that the Council consider modifying the MIH text amendment and individual rezonings to reflect the absence of 421-a or clarify as to the nature of any possible future tax exemptions. Such modification should support affordable housing production by permitting more flexibility through changes to certain elements of MIH, such as the application of the workforce option, the proportion of market-rate floor area and unit percentage of market-rate units, the distribution, stacking, and/or proportionality requirements applicable to affordable units, and other relief from MIH and individual rezonings to be proposed by an applicants and/or by HPD.
- B. **Existing Floor Area, Enlargements, and Casualty:**
  - 1. The definition of "enlargement" under proposed Section 23-154(d)(3) of the Zoning Resolution of the City of New York ("ZR") should be clarified and looked at in the context of the definition of "enlargement" in ZR Section 23-90. For purposes of MIH, "enlargement" is currently defined as "#residential floor area# that is reconstructed, or #residential floor area# that is located within a #dwelling unit# where the layout has been changed."
  - 2. As currently drafted, the text applies to renovations or alterations of existing residential units that are not increased or decreased in size, but are only reconfigured for better efficiency of space. This is most troublesome as many property owners may avoid making renovations and alterations to existing residential buildings, including renovations and alterations that may otherwise be beneficial to the public, to avoid the burden of meeting MIH requirements. While MIH requirements may be readily absorbable in areas that have been substantially upzoned for residential development, the cost basis of existing development rights may sometimes be unable to support MIH. Accordingly, applying MIH to reconfigurations of existing floor area could reduce investment in property.
  - 3. The Council should ensure that the Department of City Planning evaluates the potential number of affordable units that could reasonably be produced pursuant to these enlargement provisions and the degree to which MIH could disincentivize renovations and alterations to existing buildings.
  - 4. Additionally, as currently drafted, the MIH text would apply following a casualty to a building where the building is destroyed beyond 75% of floor

area, other than by voluntary demolition, and may only be reconstructed in accordance with currently applicable regulations. In such situations, would existing tenants or unit owners be displaced to accommodate rent-regulated tenants or unit owners? If a building is damaged or destroyed by any means, including demolition, the MIH requirements should not apply to the pre-existing amount of residential floor area or to the amount of floor area that was legally permitted to be converted to residential under rules in place prior to the adoption of MIH.

- C. **Unit Threshold:** As proposed, small developments, enlargements, and conversions of less than 10 units or 12,500 square feet of residential floor area are exempt from MIH. However, applying MIH to more than 10 units or 12,500 square feet of residential floor area is impractical. Start-up developers may find it difficult to meet the requirements of MIH, discouraging the production of smaller buildings and the redevelopment of smaller sites. Additionally, it would be inefficient for the Department of Housing Preservation and Development (“HPD”) to administer the program, as small numbers of units would be scattered across multiple buildings. Accordingly, the Council should consider modifications that increase the threshold above which MIH applies.
- D. **Protection of Existing Tenants:** City investment and upzonings in connection with MIH may increase property values, which could impact existing residents in the affected neighborhoods. Accordingly, in MIH areas, existing anti-harassment laws such as Local Law 7 should be enforced, and if necessary, new measures implemented to limit displacement of rent-regulated tenants.
- E. **Discretionary Approvals Unrelated to MIH:** MIH should not be applied to private applications seeking discretionary approvals of bulk modifications that advance other policy objectives, such as landmarks preservation, theater and other cultural uses, and transportation improvements. For City-sponsored projects, MIH-like requirements could be applied through the RFP process.
- F. **City Planning Commission Authorizations:** MIH should not apply to City Planning Commission (“CPC”) authorizations.
- G. **Payment-in-Lieu and the Affordable Housing Fund:**
  - 1. The payment-in-lieu provisions of MIH proposed under ZR Section 23-154(d)(3)(iv) should apply to projects larger than 25 new dwelling units and 25,000 square feet of new residential floor area, which would provide more flexibility for private developers, thereby increasing the production of affordable housing. Of course, expanding the payment-in-lieu option could result in the concentration of affordable housing in separate buildings, reducing the ability of MIH to foster economically diverse communities. Accordingly, the Council should carefully consider this trade-off.

2. The MIH text is unclear as to whether the “cost of construction” includes land costs and soft costs. Accordingly, the Council should ask for a modification that would clarify how the cost of construction is determined, and, specifically, whether the cost of construction will be discounted for the value of low income tax credits, real estate tax exemptions, bond financing, mortgage tax exemptions, grants, and other subsidies that might otherwise have been available to a developer had it chosen to build affordable units rather than pay into the affordable housing fund.
3. The payment-in-lieu section should provide either an objective appraisal standard or reference a specific third party’s arbitration role to resolve disputes between developers and HPD over whether a payment-in-lieu reasonably reflects market construction costs.
4. The Council should clarify how and where the affordable housing fund would be utilized by the City to produce affordable housing. Developers and communities would appreciate clarification as to what MIH affordability options (and income bands) will be available in which locations.

H. **Hardship Waivers:** With respect to relief from hardship that may be granted by the Board of Standards and Appeals (“BSA”) pursuant to the proposed ZR Section 73-624 special permit, we have several questions, comments, and concerns. As the special permit is essential to the administration of MIH, the final version of the text should be clarified to better guide administration of the special permit while recognizing that certain points should be left to regulation, as follows:

1. It is unclear how the special permit will work in practice. Will developers have to go to HPD first to ascertain whether sufficient subsidies will be made available to their project to avoid a hardship before they are permitted to seek relief from the BSA?
2. HPD is expected to advise BSA in determining whether to grant the special permit. If a developer and HPD disagree as to the strength of the market or sufficiency of subsidies to avoid a hardship, to what extent should, or could, BSA legally rely upon the expertise of HPD in such matters, as the developer would essentially be appealing a denial of subsidy by HPD? Clarification as to the extent of HPD’s advisory role would assist in the administration of MIH.
3. How would developers and property owners establish that the findings and criteria necessary for the special permit have been met? What sort of financial modeling will be required? Will the analysis required in the variance context apply? As the issues and questions presented will likely

need to be analyzed quantitatively, an independent expert in affordable housing and construction finance will need to be employed by BSA to evaluate the merits of financial feasibility studies and reports submitted by applicants seeking relief pursuant to the special permit.

4. The Council should clarify that the proposed ZR Section 73-624 special permit does not preclude the issuance of a variance to MIH projects pursuant to ZR Section 72-21.

**I. Changing Market Conditions and Expiration of Subsidies:** The Council should consider adding a mechanism, such as a CPC certification or authorization or a BSA special permit, to alleviate financial hardship for building owners who have complied with MIH and may experience hardship due to changed market conditions or the expiration of temporary subsidy programs and/or tax exemptions or abatements.

1. The proposed BSA special permit, as drafted, applies only to new projects, and not to ones that were built in compliance with MIH, but falter later on.
2. There should be a mechanism to re-evaluate the financial health of a building over time to ensure that the number and affordability levels of affordable units, in combination with the market-rate units, produce enough funds for the building to be maintained in good repair.
3. These issues may be further exacerbated when temporary subsidies expire while units remain permanently affordable.

**J. Effective Date:** As various City agencies may need to enact rules and policies to fully implement MIH (and any corresponding tax exemptions programs), it may be beneficial to delay the effective date of MIH to allow for the agencies to clarify issues such as those surrounding the proposed ZR Section 73-624 special permit and the recently expired 421-a property tax exemption which, if extended, would need to be coordinated with the MIH program.

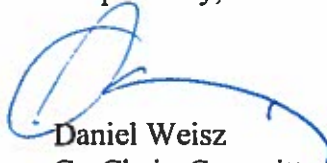
### **III. Conclusion:**

In conclusion, we reiterate our support of using MIH to increase affordable housing production. As discussed in this letter, we believe that clarification of certain items, and revisions to the MIH text where appropriate, would increase the effectiveness and desirability of MIH, making MIH more successful in generating affordable housing and fostering economically diverse neighborhoods. Additionally, providing clear guidance as to MIH's criteria and procedures will make MIH easier to implement and administer, thereby allowing the program to operate more efficiently. While this letter is directed towards MIH, these comments are also applicable to the proposed East New York rezoning.

We note that the undersigned Committees and the City Bar take no position on, nor have extensively explored, the constitutional basis, or limitations under the New York State Urstadt law, of mandating affordable housing units as a condition of development under the Zoning Resolution, and the comments herein are limited to policies and technical requirements surrounding the proposed MIH program.

On behalf of the Committees, we thank you for your consideration of our comments.

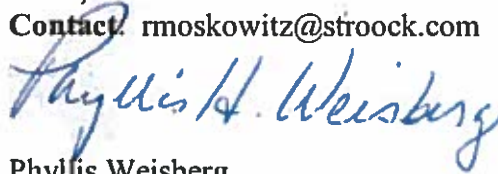
Respectfully,



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