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## Mandatory Inclusionary Housing: Are Permanency and Affordability Possible?

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## MANDATORY INCLUSIONARY HOUSING: ARE PERMANENCY AND AFFORDABILITY POSSIBLE?

*Mackenzie Lew*<sup>†</sup>

### INTRODUCTION

Affordable rental housing policy has shifted drastically since its inception in the early twentieth century.<sup>1</sup> Generally, governments on all levels have backed away from aggressive affordable housing policies. For example, public housing, run by local governments, funded through a mix of federal, state, and local monies, and established to house the poor and low-income families,<sup>2</sup> is now a scarce commodity. A near elimination of funding has resulted in not only the absence of development of new public housing but has also left localities struggling to maintain living conditions in a now aging population of public housing projects.<sup>3</sup>

Governments, however, have not been the sole providers of affordable housing. At one point, rents for privately owned apartments across New York City were regulated regardless of a building's location or a tenant's income-level.<sup>4</sup> Rent regulations applied to any and all buildings

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<sup>1</sup> See Charles L. Edson, *Affordable Housing – An Intimate History*, in THE LEGAL GUIDE TO AFFORDABLE HOUSING 3 (Tim Iglesias & Rochelle E. Lento eds., 2nd ed. 2011), for a brief overview of the history of, inter alia, public housing, non-profit and private sector programs, and tax-incentives for housing in the United States.

<sup>2</sup> See *id.* at 4-5.

<sup>3</sup> See *id.* at 6-7.

<sup>4</sup> In 1942, the federal government enacted nationwide rent restrictions. See TIMOTHY L. COLLINS, AN INTRODUCTION TO THE NEW YORK CITY RENT GUIDELINES BOARD AND THE RENT

with a certain number of units and built before a certain year.<sup>5</sup> Toward the end of the twentieth century, however, governments began to incentivize the provision of affordable housing.<sup>6</sup> Perhaps a greater shift toward promoting public-private relationships and private industry explains why affordable housing became less of a government responsibility or mandatory requirement for residential property owners, and instead became a type of housing developers could elect to provide.

In 2014, shortly after taking office, Mayor Bill de Blasio revealed his *Housing New York* plan.<sup>7</sup> Under this plan, Mayor de Blasio sought to construct or preserve 200,000 affordable units over ten years.<sup>8</sup> To preserve affordable housing, Mayor de Blasio envisioned protecting rent regulated tenants from wrongful eviction by providing counsel in Housing Court,<sup>9</sup> ensuring the long-term sustainability of city-operated public housing and “provid[ing] more standardized and efficient preservation programs.”<sup>10</sup> Also, as part of his plan, Mayor de Blasio pledged to create a Mandatory Inclusionary Housing program to “promote economic diversity and affordable housing development.”<sup>11</sup> In late 2017, Mayor de Blasio released a “new and improved” plan to build or preserve 300,000 units by 2026, up from the previous goal of 200,000 by 2022.<sup>12</sup>

This article highlights two forms of incentive-based affordable housing programs within New York City. Section I discusses the history of Mandatory Inclusionary Housing and its development through amendments to the City’s Zoning Resolution. This section also explores the details of the program’s affordability aspect and an overview of the government agencies involved. Section II of this article describes the taxed-

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STABILIZATION SYSTEM 25 (rev. ed. 2016). In response to this legislation, New York implemented what is known as Rent Control throughout the city. *Id.* at 26. Decades later, the City enacted the Rent Stabilization Laws of 1969. *Id.* at 30.

<sup>5</sup> *See id.* at 30.

<sup>6</sup> *See* Edson, *supra* note 1, at 15-17.

<sup>7</sup> CITY OF N.Y., OFFICE OF THE MAYOR, HOUSING NEW YORK: A FIVE-BOROUGH, TEN-YEAR PLAN (2014), <https://perma.cc/UYN8-5RGF> [hereinafter HOUSING NEW YORK 2014].

<sup>8</sup> *Id.* at 5-6, 8.

<sup>9</sup> After years of advocacy, the city passed legislation to ensure that tenants in certain housing court proceedings and who fell below certain income levels would be represented by counsel. *Mayor de Blasio Signs Legislation to Provide Low-Income New Yorkers with Access to Counsel for Wrongful Evictions*, NYC (Aug. 11, 2017), <https://perma.cc/2STE-KCGH>.

<sup>10</sup> HOUSING NEW YORK 2014, *supra* note 7, at 53; *see also* CITY OF N.Y., ONE NEW YORK: THE PLAN FOR A STRONG AND JUST CITY 70 (2015), <https://perma.cc/6BBX-WVWT>.

<sup>11</sup> HOUSING NEW YORK 2014, *supra* note 7, at 30.

<sup>12</sup> CITY OF N.Y., HOUSING NEW YORK 2.0 (2017), <https://perma.cc/BG7W-TJFT>; *Housing New York 2.0: Mayor de Blasio Releases New Road Map to Build and Preserve 300,000 Affordable Homes*, NYC (Nov. 15, 2017), <https://perma.cc/ZL99-EKMS>; *see also* Tanay Warerkar, *De Blasio Admin Ups Affordable Housing Goals to 300k Units by 2026*, CURBED N.Y. (Oct. 24, 2017, 12:00 PM), <https://perma.cc/VG2C-BXUH>.

based program, “421-a,” and discusses the 2016 revelation that hundreds of buildings receiving the 421-a tax benefit failed to provide affordable housing in return. Lastly, Section III of this article emphasizes that without affirmative oversight by the government, Mandatory Inclusionary Housing, like 421-a, will become an unreliable tool for providing affordable housing.

### I. HISTORY OF MANDATORY INCLUSIONARY HOUSING TO 2016

Mandatory Inclusionary Housing (MIH) is the City’s newest incentive-based affordable housing program. Approved by the City Council in March 2016 with overwhelming support,<sup>13</sup> the mayoral administration touted the program as one of the country’s “most progressive” affordable housing program.<sup>14</sup> Not only is the inclusion of affordable housing in new development mandatory under the program, but the affordable housing would be permanent.<sup>15</sup> In addition to a number of caveats to both of these progressivisms, the program has also encountered some political road blocks. For example, a number of City Councilmembers have rejected MIH developments in their districts, compelling the City Council to disapprove individual MIH applications.<sup>16</sup> Still, the mayoral administration hopes that MIH will be the City’s ultimate and most successful engine for creating new affordable housing. Mayor de Blasio hopes that MIH will create 12,000 affordable apartments by 2026.<sup>17</sup> The following is a historical description of the Zoning Resolution, its amendments, and the groundwork for MIH.

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<sup>13</sup> On March 22, 2016, the New York City Council approved the MIH program with a vote of forty-two to five. N.Y.C. Council Res. No. 1022, L.U. No. 334 (2016), <https://perma.cc/J2HH-JJZ9>.

<sup>14</sup> Sally Goldenberg & Gloria Pazmino, *Council Reaches Deal on de Blasio’s Housing Plans*, POLITICO (Mar. 14, 2016, 9:36 PM), <https://perma.cc/5SPW-NGAY>.

<sup>15</sup> *Mandatory Inclusionary Housing*, N.Y.C. PLANNING, <https://perma.cc/55GK-TWKH>. However, the affordability restrictions are not mandatory for buildings with ten or less units. See NEW YORK, N.Y., ZONING RESOLUTION § 23-154(d)(4)(i) (2018), <https://perma.cc/YRP7-ZTUZ>.

<sup>16</sup> See, e.g., Joe Anuta, *City Council Snubs de Blasio, Nixes Inwood Affordable-Housing Rezoning*, CRAIN’S N.Y. BUS. (Aug. 16, 2016, 2:00 PM), <https://perma.cc/W83C-5C73> (reporting that the City Council rejected an MIH proposal from a for-profit developer after Council Member Ydanis Rodriguez expressed disapproval).

<sup>17</sup> Matt A.V. Chaban, *Why, in One Case, the de Blasio Administration Opposes Affordable Housing*, N.Y. TIMES (Aug. 8, 2016), <https://perma.cc/TF8L-LYF6>.

A. *The Inclusionary Housing Program*

In the second half of the twentieth century, as the City was stripped of its power to impose blanket rent regulations,<sup>18</sup> a number of federal and state tools became available to developers that imposed affordability requirements. Residential developers could offset the costs of construction by using the federal Low Income Housing Tax Credit and the City and State's 421-a and J-51 tax benefit programs, as well as a number of publicly subsidized construction loans.<sup>19</sup> The City, however, was left without a tool of its own until Inclusionary Housing came into existence.

In the late 1980's, the City harnessed what seemed like the only system of laws which would allow for the creation of a truly city-controlled affordable housing program – the City's Zoning Resolution.<sup>20</sup> The Zoning Resolution was amended in 1987 to establish the Inclusionary Housing (IH) program,<sup>21</sup> also referred to as the Voluntary Inclusionary Housing program, which is still in existence today, but is a precursor to MIH. The Inclusionary Housing program has two distinguishing features that set it apart from other well-known, incentive-based affordable housing programs. First, unlike the state's 421-a and J-51 tax benefit programs, the City does not lose valuable tax revenue by administering IH.<sup>22</sup> Second, and most important in terms of designating oversight over the program, IH is both city-created and city-administered. Lastly, IH may be one of the most legally complex affordable housing programs because of the

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<sup>18</sup> In 1983, the State Legislature passed the Omnibus Housing Act, which transferred the administration of rent regulations from the City to the State. Omnibus Housing Act, ch. 403, § 28, 1983 N.Y. Laws; COLLINS, *supra* note 4, at 15-20, 36. Earlier, in 1971, the Legislature had adopted what is known as the "Urstadt law," which prevented the City from enacting rent regulations more restrictive than those in place at the time. COLLINS, *supra* note 4, at 29.

<sup>19</sup> 26 U.S.C. § 42 (2018) (federal low-income housing credit); Treas. Reg. § 1.42-0 (2016) (Low Income Housing Tax Credit [LIHTC] program); N.Y. REAL PROP. TAX LAW § 421-a (McKinney 2018) (421-a tax benefit program, recently renamed the Affordable New York Housing Program); NEW YORK, N.Y., ADMIN. CODE §§ 11-243 to 11-244 (2018) (J-51 tax exemption and abatement program).

<sup>20</sup> See generally NEW YORK, N.Y., ZONING RESOLUTION (2018), <https://perma.cc/YL7Y-9B9T>.

<sup>21</sup> Howard Goldman, *Inclusionary Housing in New York City's Zoning Resolution*, 11 CITY L. 73, 73 (2005).

<sup>22</sup> Developers who receive 421-a or J-51 tax benefits are either exempt from, or receive an abatement for, property taxes over a period of time. As a result, the City forgoes the ability to collect property taxes from these developers. However, developers who take advantage of the IH program are merely permitted to build at greater heights and densities than generally allowed under the Zoning Resolution. See *id.*; N.Y. REAL PROP. TAX LAW § 421-a (McKinney 2017); N.Y. REAL PROP. TAX LAW § 489 (McKinney 2015) (authorizing New York City to implement a tax abatement program for rehabilitated buildings, as implemented in ADMIN. CODE § 11-243).

number of different government bodies and private players involved.<sup>23</sup> Mandatory Inclusionary Housing, a later iteration of IH, is no less complex.

### 1. New York City's Zoning Resolution

New York City's Zoning Resolution is an expansive document that determines the nature of city blocks. Originally established in 1916, the Zoning Resolution was entirely replaced in 1961.<sup>24</sup> Unlike the New York City Construction Codes which dictate the physical manner in which a developer must build,<sup>25</sup> the Zoning Resolution mandates where and what a developer may build based on a system of zoning districts.<sup>26</sup> Additionally, the Zoning Resolution mandates the height and density of buildings.<sup>27</sup> In this way, the Zoning Resolution dictates the City's skyline and cityscape from street-level.

New York City derives its power to enact its zoning ordinance from New York's General City Law.<sup>28</sup> The procedure for amending the Zoning Resolution is governed by the New York City Charter,<sup>29</sup> which is the governing statute for the city. Generally, the City Planning Commission (CPC) recommends and approves amendments to the Zoning Resolution, and the City Council reviews the amendments and gives final approval.<sup>30</sup> The CPC also has jurisdiction to approve special permits; however the City Council maintains final decision-making authority over special permits.<sup>31</sup>

The Department of Buildings (DOB) enforces and implements the Zoning Resolution in addition to the city's Construction Codes.<sup>32</sup> The

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<sup>23</sup> See discussion *infra* Sections I.A.1, I.B.2.

<sup>24</sup> Stuart Beckerman, *Zoning in New York City: An Overview*, N.Y. ZONING L. & PRAC. REP., January/February 2006 at 1 (2006).

<sup>25</sup> See generally NEW YORK, N.Y., GENERAL ADMINISTRATIVE PROVISIONS (2014); NEW YORK, N.Y., PLUMBING CODE (2014); NEW YORK, N.Y., MECHANICAL CODE (2014); NEW YORK, N.Y., FUEL GAS CODE (2014); NEW YORK, N.Y., BUILDING CODE (2014).

<sup>26</sup> See Beckerman, *supra* note 24. For example, the area surrounding Citi Field in Flushing, Queens has for decades been characteristically occupied by auto repair shops. This is because the district near Citi Field was for decades zoned for industrial purposes. In 2008, the City rezoned the area and created the "Willeys Point Special District" to create a "lively, mixed use, sustainable community and a regional retail and entertainment destination." *Special Purpose Districts: Queens*, N.Y.C. PLANNING, <https://perma.cc/HF9L-F243>; see also NEW YORK, N.Y., ZONING RESOLUTION § 124-00 (2016).

<sup>27</sup> See Beckerman, *supra* note 24.

<sup>28</sup> N.Y. GEN. CITY LAW § 20(24)–(25) (McKinney 2018).

<sup>29</sup> See NEW YORK, N.Y., CHARTER OF 1989 ch. 8, § 200.

<sup>30</sup> See *id.*

<sup>31</sup> See New York, N.Y., CHARTER OF 1989 ch. 8, § 201(b).

<sup>32</sup> See NEW YORK, N.Y., ZONING RESOLUTION § 71-00 (2016).

DOB is also responsible for issuing construction permits and certificates of occupancy, which officially permit buildings to be occupied.<sup>33</sup>

While the DOB and CPC deal primarily with development, another city agency's delegated mission is to construct and preserve affordable housing. This agency, the Department of N.Y.C. and Development (HPD),<sup>34</sup> plays an important role in the IH/MIH programs because neither DOB nor the CPC, but rather HPD, administers the IH/MIH programs.<sup>35</sup>

## 2. A Zoning Amendment to Promote the Development of Affordable Housing

In 1987, the Zoning Resolution was amended to include IH as a “bonus.”<sup>36</sup> IH was not the first “incentive zoning,” meaning the granting of discretionary bonuses to increase the allowable density for a development. The 1961 Zoning Resolution favored “green oases” – public plazas and open spaces in exchange for increased density.<sup>37</sup> Many of these “green oases” exist today and are most noticeably present in Midtown Manhattan. In contrast to “green oases,” IH substitutes green spaces with residential units by permitting density increases in exchange for the provision of “low income” housing.<sup>38</sup>

Under the most recent form of IH, a developer may elect to use the bonus, hence the oft-used name, “Voluntary Inclusionary Housing.”<sup>39</sup> Additionally, the IH bonus is only available in certain high density residential districts, primarily located in Manhattan, IH Designated Areas, and Special Districts.<sup>40</sup> IH was amended in 2005;<sup>41</sup> however the current program is generally as it was in 1987. After 2005, “incentive zoning” was not significantly overhauled until the induction of MIH in 2016.

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<sup>33</sup> See NEW YORK, N.Y. ADMIN CODE § 28-103.11 (2018).

<sup>34</sup> *About HPD*, N.Y.C. DEP'T OF HOUS. PRES. & DEV., <https://perma.cc/4NL8-HJXZ>.

<sup>35</sup> See ZONING RESOLUTION § 23-92.

<sup>36</sup> See Goldman, *supra* note 21, at 73.

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*; see also *Voluntary Inclusionary Housing*, N.Y.C. DEP'T OF HOUS. PRES. & DEV., <https://perma.cc/W7XB-GQY2>.

<sup>40</sup> See ZONING RESOLUTION §§ 23-932 to 23-933; Goldman, *supra* note 21, at 73.

<sup>41</sup> See Goldman, *supra* note 21, at 73 (explaining that changes to the IH program were made applicable to certain rezoned communities, such as Hudson Yards and Greenpoint-Williamsburg).

*B. Mandatory Inclusionary Housing: Developing Affordable Housing After 2016*

Mayor de Blasio proposed MIH as part of his ambitious Housing New York plan.<sup>42</sup> Unable to propose new blanket rent regulations or amend tax incentive programs, the Mayor turned to the Zoning Resolution. In addition to being within the city's control, the Zoning Resolution was already home to an incentive based affordable housing program, Inclusionary Housing.<sup>43</sup> MIH is merely a variation of an earlier affordable housing scheme, Inclusionary Housing.

MIH's two key components are that developers are mandated to provide affordable units,<sup>44</sup> and the units are permanently rent restricted.<sup>45</sup> However, MIH only applies to districts that have been rezoned on CPC or City Council initiative, or to buildings that have been rezoned as a result of private application.<sup>46</sup> As of March 2018, over two years after MIH was adopted, roughly fifty discreet districts have been rezoned as MIH Designated Areas,<sup>47</sup> and a number of private applications for rezoning have been withdrawn or denied by City Councilmembers.<sup>48</sup>

1. AMI-Based Rent Restrictions

Under MIH, rents are restricted according to a combination of four affordability levels (two "base" options, in addition to two supplemental

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<sup>42</sup> HOUSING NEW YORK 2014, *supra* note 7, at 30-31.

<sup>43</sup> See discussion *infra* Section I.A.1-2.

<sup>44</sup> See ZONING RESOLUTION § 23-933. Moreover, many tenants and advocacy organizations have rightfully pointed out that while the units developed under most programs are labelled as "affordable," they are not in fact affordable to most low-income New Yorkers. See, e.g., Jonathan Sizemore, *One Year Under Mandatory Rules Produces 4,700 Affordable Units*, CITYLAND (Mar. 28, 2017), <https://perma.cc/PCT8-9CKJ> (reporting that community board and borough president in Sunnyside, Queens expressed concern that the income-restricted units would not be affordable to current Sunnyside residents).

<sup>45</sup> See ZONING RESOLUTION § 23-96.

<sup>46</sup> See *Mandatory Inclusionary Housing*, N.Y.C. PLANNING, <https://perma.cc/55GK-TWKH>.

<sup>47</sup> See ZONING RESOLUTION app. F (2018), <https://perma.cc/K3TC-HQSZ> (indicating the maps of Mandatory Inclusionary Housing areas).

<sup>48</sup> Sizemore, *supra* note 44 (reporting that a non-profit developer rescinded its proposal for an MIH development in Sunnyside, Queens, after the community board and borough president expressed concern that the income-restricted units would not be affordable to current Sunnyside residents); see, e.g., Anuta, *supra* note 16. As of April 25, 2017 the City Council's Zoning Subcommittee approved two private applications for MIH developments – one in Flatbush-Ditmas Park (Caton Market) and another in Bedford Stuyvesant (Rose Castle). The projects were approved despite vocal disapproval. *Three Affordable Housing Projects Approved by Land Use Committee with Measured Disapproval*, CITYLAND (Apr. 25, 2017), <https://perma.cc/YL6D-9AQM>.

options, discussed below).<sup>49</sup> Additionally, a developer may receive an MIH bonus and contribute to an Affordable Housing Fund in lieu of providing affordable units.<sup>50</sup> Each affordability level is defined by a certain percentage of the Area Median Income (AMI).<sup>51</sup> The AMI for New York City is calculated by the Department of Housing & Urban Development (HUD), the federal housing and urban development agency.<sup>52</sup>

To promote financial feasibility and flexibility, the City Council and the CPC can impose one of two varying affordability options in an MIH development:

1. “Base” Option 1: 25% of the floor area is set aside for units affordable for households earning an average of 60% of the AMI. As a result, rents may be set for varying income bands (i.e., low income, moderate income, middle income), but there may be no more than three income bands. Lastly, at least 10% of the floor area must be provided at 40% of the income index, and no income band may exceed 130%.<sup>53</sup>
2. “Base” Option 2: 30% of the floor area is set aside for units affordable for households earning an average of 80% of the AMI. The building may not have more than three income bands, and no income band may exceed 130% of the income index.<sup>54</sup>

In addition to Option 1 and Option 2, the CPC and City Council can impose one or both of the following supplemental affordability requirements:

1. Deep Affordability Option: 20% of the floor area is set aside for households earning 40% of the AMI. With this option, the developer is not permitted to receive public funding or subsidies; unless HPD determines that public funding is necessary to support a significant amount of affordable housing in addition to the housing required by this option.<sup>55</sup>

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<sup>49</sup> See ZONING RESOLUTION § 23-154(d).

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> Affordability levels are based on what the Zoning Resolution refers to as the “income index” which is 200 percent of the Very Low-Income Limit established by HUD for Multi-family Tax Subsidy Projects, as adjusted for household size. See ZONING RESOLUTION § 23-911. Additionally, because the AMI used within New York City includes surrounding counties with relatively higher income levels, the AMI does not accurately represent the AMI within the five boroughs. See Jarret Murphy, *The Secret History of AMI*, CITYLIMITS (Feb. 17, 2016), <https://perma.cc/5JEN-79XU>.

<sup>53</sup> ZONING RESOLUTION § 23-154(d)(3)(i).

<sup>54</sup> ZONING RESOLUTION § 23-154(d)(3)(ii).

<sup>55</sup> ZONING RESOLUTION § 23-154(d)(3)(iii).

2. Workforce Option: 30% of the floor area is set aside for households earning 115% of the AMI. This option cannot be used in conjunction with public funding or subsidies.<sup>56</sup>

## 2. Application Process & Other Program Requirements

While MIH is administered by HPD, a number of other city and state agencies, including the DOB and the New York State Division of Housing and Community Renewal (DHCR), become involved at various points during the application process. A developer wishing to build a residential building within an MIH Designated Area must submit an application to HPD.<sup>57</sup> HPD approves an application once it is shown how the developer will provide affordable units and that the project is financially feasible.<sup>58</sup> Once approved, HPD will issue a Permit Notice, which allows the DOB to issue a construction permit.<sup>59</sup>

MIH imposes a number of features that promote compliance. At the time of approval, HPD and the developer enter into a Regulatory Agreement.<sup>60</sup> The Regulatory Agreement sets forth the affordability requirements of the building and mandates the owner's compliance with the MIH program and the terms of the Regulatory Agreement.<sup>61</sup> Additionally, the Regulatory Agreement is recorded against the building lot, and so acts as a restrictive covenant that survives subsequent sales.<sup>62</sup>

MIH also requires that the developer choose an HPD-approved non-profit organization to manage the leasing of units within the building.<sup>63</sup> The non-profit does not manage the building in terms of repairs, but is responsible for calculating monthly rents at initial leasing, lease renewal, and subsequent rentals after a vacancy.<sup>64</sup> Lastly, the non-profit is responsible maintaining all records concerning compliance with MIH, and for submitting an affidavit to HPD annually.<sup>65</sup> The affidavit must affirm that the rent levels in affordable units comply with MIH and that at initial occupancy the tenants of the units earned the appropriate income levels.<sup>66</sup> As an additional measure, MIH requires that the non-profit manager

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<sup>56</sup> ZONING RESOLUTION § 23-154(d)(3)(iv).

<sup>57</sup> See ZONING RESOLUTION § 23-961(d)(1)-(2).

<sup>58</sup> See *id.*

<sup>59</sup> See ZONING RESOLUTION § 23-953(a).

<sup>60</sup> See *id.*

<sup>61</sup> See ZONING RESOLUTION § 23-96(f); ZONING RESOLUTION, 23-154(d).

<sup>62</sup> See ZONING RESOLUTION § 23-96(f).

<sup>63</sup> See ZONING RESOLUTION § 23-96(e).

<sup>64</sup> See ZONING RESOLUTION § 23-911.

<sup>65</sup> See ZONING RESOLUTION § 23-96(e)(4); ZONING RESOLUTION, 23-961(b)(4).

<sup>66</sup> See ZONING RESOLUTION § 23-961(b)(4).

maintain records concerning each affordable unit and the records must be made available to HPD if requested.<sup>67</sup>

After the development is constructed, HPD will issue a Completion Notice to DOB.<sup>68</sup> Once HPD issues a Completion Notice, DOB can issue a Certificate of Occupancy.<sup>69</sup> At this point, the units can be occupied, however leasing generally begins at some point during the construction period.

Under the MIH program, all rent restricted units are subject to rent stabilization.<sup>70</sup> However, pursuant to MIH requirements, no rent restricted unit may be deregulated for any reason including high-rent or high-income deregulation.<sup>71</sup> In order to effectuate this component, developers must register each rent restricted unit with the DHCR.<sup>72</sup> The DHCR oversees rent stabilization throughout the state,<sup>73</sup> however the majority of rent stabilized apartments are located within New York City.

### 3. Calculating Monthly Rent at Initial Rental and Subsequent Rentals After Vacancy

Generally, owners of rent stabilized units may only increase monthly rents according to percentages set by the Rent Guidelines Board (RGB).<sup>74</sup> Although MIH rent restricted units are subject to rent stabilization, the RGB's permitted increases are not dispositive of how monthly rents are calculated for these units.

At the very first occupancy of a unit, the initial monthly rent should be calculated according to the affordability option imposed by MIH.<sup>75</sup> This monthly rent is also registered with DHCR.<sup>76</sup> At lease renewal, the

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<sup>67</sup> See ZONING RESOLUTION § 23-96(e)(4).

<sup>68</sup> See ZONING RESOLUTION § 23-953(b).

<sup>69</sup> See *id.*

<sup>70</sup> See ZONING RESOLUTION § 23-961(b)(1). Rent Stabilization is a form of rent regulation that applies to buildings with six or more units built before 1974 and also to units built or rehabilitated with various tax benefit programs, including 421-a and J-51. See N.Y. UNCONSOL. LAWS § 26-504 (McKinney 2018). Rent stabilization imposes various tenant protections, including regulated rental increases and limited grounds for eviction (in addition to greater notice predicates in the context of eviction proceedings). See N.Y. COMP. CODES R. & REGS. tit. 9, §§ 2524.1-.4, 2522.1-.10 (2018).

<sup>71</sup> See ZONING RESOLUTION § 23-961(b)(5).

<sup>72</sup> See ZONING RESOLUTION § 23-961(b)(1).

<sup>73</sup> UNCONSOL. § 26-510.

<sup>74</sup> UNCONSOL. § 26-510(b).

<sup>75</sup> See ZONING RESOLUTION § 23-961(b)(2) (stating that the Regulatory Agreement must provide that the monthly rent charged at initial occupancy and at each subsequent lease renewal cannot be greater than the lesser of the maximum monthly rent [based on income band] or the legal regulated rent [registered at initial leasing]).

<sup>76</sup> See ZONING RESOLUTION § 23-961(b)(1).

monthly rent must be the lesser of (1) the monthly rent calculated according to the affordability option imposed by MIH (as adjusted for any change in AMI) or (2) the legal rent registered with DHCR.<sup>77</sup> In a plain-read of the Zoning Resolution, it is unclear whether the owner is further permitted to increase the rent according to the RGB's rent adjustments and so charge the lesser of (1) the income-restricted rent or (2) the legal regulated rent after imposing a renewal increase.

The same uncertainty applies to leases after a vacancy. According to the Zoning Resolution, the monthly rent at initial occupancy after a vacancy must be the lesser of (1) the monthly rent calculated according to the affordability option imposed by MIH (as adjusted for any change in AMI) or (2) the legal rent registered with DHCR.<sup>78</sup> However, again, it is unclear whether the owner is permitted to take advantage of the "vacancy bonus" allowed by the Rent Stabilization Laws.<sup>79</sup> If an owner is so permitted, the administering agent would have to calculate (1) the monthly rent calculated according to the affordability option imposed by MIH (as adjusted for any change in AMI) and (2) the rent after imposing the vacancy bonus increase. The monthly rent charged would be the lesser of the two. However, if the owner is not permitted to increase the rent by applying a vacancy bonus, then the monthly rent charged at initial occupancy after a vacancy should be the amount permitted according to the affordability option imposed by MIH.

In MIH developments, not only is the rent restricted, but at each initial occupancy, the tenant's income cannot exceed the relevant income level imposed by MIH.<sup>80</sup> Further, if an MIH development is subject to multiple affordability levels (i.e., the MIH development is subject to Option 1 and/or Option 2), the administering agent will be required to calculate rents at lease renewal and at subsequent occupancies according to multiple AMI levels.

## II. THE 421-A PROGRAM: A TAX BENEFIT TO PROMOTE DEVELOPMENT AND AFFORDABLE HOUSING

Mandatory Inclusionary Housing is one of many incentive-based programs within New York City. Another, called the "421-a program" after the Real Property and Tax Law of the same name, incentivizes the development of affordable housing in exchange for tax abatements.<sup>81</sup>

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<sup>77</sup> See ZONING RESOLUTION § 23-961(b)(2).

<sup>78</sup> See *id.*

<sup>79</sup> Currently, the allowable vacancy increase is 20 percent. UNCONSOL. § 2522.8.

<sup>80</sup> See ZONING RESOLUTION § 23-961(a)(1).

<sup>81</sup> See *generally* N.Y. REAL PROP. TAX LAW § 421-a (McKinney 2018).

The State Legislature originally created 421-a in 1971 to promote development. At the time, mass numbers of New Yorkers were fleeing the city as it experienced a financial crisis.<sup>82</sup> The goal was to kick-start development in the hopes that economic vitality would follow.<sup>83</sup> To do this, the state offered tax abatements which would ultimately offset the cost of development, even though the city lost potential tax revenue.<sup>84</sup> Developers throughout the city were entitled to 421-a tax benefits “as-of-right,”<sup>85</sup> meaning as long as the developer maintained the right to build a residential property, he maintained a right to receive 421-a benefits. Under the program in its original form, developers were required to rent apartments at 85% of the market rate and subject the units to rent stabilization – but for only so long as the tax abatements were in place.<sup>86</sup>

In 1985, the State amended the program to reflect the view that the 421-a program could be used as an engine to create affordable housing.<sup>87</sup> Most importantly, buildings wishing to receive the tax abatement within the newly formed Geographic Exclusion Area,<sup>88</sup> an area encompassing most of Manhattan below Harlem, would be subject to somewhat restrictive affordability requirements.<sup>89</sup>

Regardless of whether a building was within the Geographic Exclusion Area, the tax abatement was applied almost uniformly: a developer who purchased a lot worth \$1 million before development and \$10 million afterward, would, by receiving the 421-a tax abatement, pay property taxes as if the property was valued at \$1 million instead of \$10 million.<sup>90</sup> The tax abatement would last for a set number of years, and then would slowly phase out.<sup>91</sup> The 421-a program has been wildly successful for developers. In 2015, for example, developers received tax abatements for at least 88,000 rental units.<sup>92</sup> During the same year, the program produced 5,468 rent stabilized units.<sup>93</sup>

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<sup>82</sup> Seth B. Cohen, Note, *Teaching an Old Policy New Tricks: The 421-A Tax Program and the Flaws of Trickle-Down Housing*, 16 J. L. & POL’Y 757, 764-65 (2008).

<sup>83</sup> *See id.* at 766.

<sup>84</sup> *See id.*

<sup>85</sup> *See id.* at 771.

<sup>86</sup> *See id.* at 765.

<sup>87</sup> *See id.* at 767-68, 70.

<sup>88</sup> *See discussion infra* Section II.A.

<sup>89</sup> Cohen, *supra* note 82, at 770-74.

<sup>90</sup> *See* N.Y. REAL PROP. TAX LAW § 421-a(2)(b)(i) (McKinney 2017) (providing that the property is taxed at the value during the tax year before construction begins).

<sup>91</sup> Cohen, *supra* note 82, at 766-67. *See generally* REAL PROP. TAX § 421-a.

<sup>92</sup> N.Y.C. RENT GUIDELINES BD., 2016 HOUSING SUPPLY REPORT 8 (2016), <https://perma.cc/82D9-47T5>.

<sup>93</sup> *Id.* This reflects the number of units which received certificates of occupancy under 421-a; this number does not reflect the number of units which were registered with DHCR and which were actually charged rents permitted according to the Rent Stabilization Laws.

### A. Geographic Exclusion Area

When criticism of 421-a began to rise in the early 1980's, opponents of the program argued that 421-a spurred gentrification within Manhattan by promoting luxury development.<sup>94</sup> Elected officials responded by creating the Geographic Exclusion Area (GEA), an area that included Manhattan below 96th Street and above Houston Street.<sup>95</sup> Developments within the Geographic Exclusion Area would be required to provide 20% of the floor area at rental amounts affordable to tenants earning a certain percentage of the AMI.<sup>96</sup> This AMI component reflected the most significant effort to impose affordability in new developments, since the units would not only be subject to rent stabilization, but to income-restrictions as well.

Although the 421-a program is a product of the State Legislature,<sup>97</sup> New York City's Housing Preservation and Development is directed to administer the program.<sup>98</sup> As a result, the City is responsible for administering 421-a through both HPD and the Department of Finance, the city's agency responsible for calculating the tax abatements and collecting property taxes. Despite this, the State still maintains ultimate control over the program's core components while directing HPD to implement procedures to ensure that developers are complying with the program's requirements.<sup>99</sup>

#### 1. Registration Component

The first overlap between 421-a and MIH is the role played by rent stabilization. Units created under both 421-a and MIH are subject to rent stabilization.<sup>100</sup> With rent stabilization comes a number of important and coveted protections afforded to the units' tenants. For example, rent stabilized tenants are entitled to lease renewals and can only be evicted on limited grounds.<sup>101</sup> The State Legislature sought to ensure that all 421-a

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<sup>94</sup> Cohen, *supra* note 82, at 767; Kim Velsey, *A Taxing Matter: Looking Back on the History of 421-a*, OBSERVER (May 28, 2015, 11:14 AM), <https://perma.cc/W7KY-QGRT>.

<sup>95</sup> Cohen, *supra* note 82, at 771. Under the most recent version of 421-a, the GEA has expanded to include all of Manhattan and select areas in the other four boroughs. *See* REAL PROP. TAX §§ 421-a(7)(ii), (11); NEW YORK, N.Y. ADMIN. CODE § 11-245 (2018).

<sup>96</sup> Cohen, *supra* note 82, at 772.

<sup>97</sup> *Id.* at 764; *see also* REAL PROP. TAX § 421-a.

<sup>98</sup> *See* REAL PROP. TAX § 421-a(3)(a).

<sup>99</sup> *See* REAL PROP. TAX § 421-a(10)(a)(ii).

<sup>100</sup> NEW YORK, N.Y., ZONING RESOLUTION § 23-961(b)(1) (2016); *see* REAL PROP. TAX § 421-a(2)(f).

<sup>101</sup> *See* N.Y. COMP. CODES R. & REGS. tit. 9, §§ 2524.3, 2524.4 (2018). In contrast to non-regulated units, rent stabilized tenants may not have their leases terminated at-will. In fact, a rent stabilized tenant is habitually entitled to a lease renewal. *Id.* at § 2524.1.

units would receive the benefits of rent stabilization by requiring developers to register units with the DHCR at some point after initial leasing and continue to do so on an annual basis.<sup>102</sup>

Determining whether an owner has failed to register apartments with DHCR is a somewhat simple task. First, the Department of Finance lists online detailed information regarding a building's tax benefits, including not only whether the building receives 421-a, but the time span of the abatement and how many years remain.<sup>103</sup> This information is public and can be accessed by any interested party.<sup>104</sup> A building, by nature of receiving 421-a, should be registered with DHCR. At this point, a tenant may inquire with the Office of Rent Administration,<sup>105</sup> a sub-agency of DHCR, whether their apartment is registered as rent stabilized.

However, rent stabilization is not merely a statutory scheme that provides tenant protections. From its inception, the primary purpose of rent stabilization was to regulate annual rent increases available to owners of rent stabilized units.<sup>106</sup> Rent regulation was, and is, a mechanism to stem rapidly inflating rental markets.

## 2. Affordability Component

By enjoining 421-a with rent stabilization, the State Legislature effectively connected two affordability programs. How the programs work in conjunction can be simple: owners of 421-a units outside of the GEA – units not subject to AMI restrictions – may only increase rents by (1) a percentage set by the RGB at lease renewal, and (2) the vacancy bonus percentage set by the rent stabilization laws at subsequent occupancies after a vacancy.<sup>107</sup> However, the story is not so simple when it comes to AMI restricted units within the GEA.

As discussed, a building within the GEA may only receive 421-a tax benefits if the building provides at least 20% of its units at rents that are affordable to a certain percentage of individuals or families with incomes

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<sup>102</sup> See REAL PROP. TAX § 421-a(10)(a)(i).

<sup>103</sup> See *About*, N.Y.C. DEP'T OF FIN., <https://perma.cc/HVJ4-9DCC>; *Property Portal*, N.Y.C. DEP'T OF FIN., <https://perma.cc/7FY2-K7BC>.

<sup>104</sup> To search properties by building block and lot number, see *Property Portal*, N.Y.C. DEP'T OF FIN., <https://perma.cc/7FY2-K7BC>.

<sup>105</sup> See *Tenant Protection Rent Regulated Units*, N.Y.S HOMES & CMTY. RENEWAL, <https://perma.cc/HR4A-D5J5>.

<sup>106</sup> N.Y.C. DEP'T OF HOUS. PRES. & DEV., *THE ABC'S OF HOUSING 1* (2015), <https://perma.cc/2RZC-9G2G>.

<sup>107</sup> See REAL PROP. TAX § 421-a (17)(i); N.Y. UNCONSOL. LAW §§ 26-510(b), 2522.8 (McKinney 2018).

that do not exceed the AMI, at both the initial occupancy and at subsequent occupancies after vacancy.<sup>108</sup> All the units in such a building, AMI restricted or not, are also subject to rent stabilization.<sup>109</sup> This is the second overlap between 421-a and MIH: initial rents and subsequent rents are calculated in an almost identical manner.

For example, the initial rent at first occupancy of a 421-a unit built in 2016 within the GEA – restricted to an affordability level of 60% of the AMI – should be rented at \$933 a month to a household of four. This number reflects 30% of 60% of the AMI for a household of four, divided by twelve (reflecting the months of a year). At each lease renewal, the owner can increase the rent by whatever percentage the RGB allows. After a vacancy, an owner of an AMI restricted unit is allowed a vacancy bonus, or a percentage increase set by the rent stabilization laws, currently set at 20%.<sup>110</sup> However, the unit must be affordable to households earning 60% of AMI at each subsequent occupancy, as well.<sup>111</sup> In effect, the monthly rent at a subsequent occupancy is the lesser of: the legal regulated rent after a vacancy bonus or the monthly rent affordable to a household earning 60% of the AMI. Calculating the monthly rent at subsequent occupancy is likely where owners are non-compliant.

For tenants of 421-a buildings within the GEA, there exists no known tools, other than filing a Freedom of Information Law (FOIL) request, to determine whether the unit is AMI restricted. Upon registering an apartment with the DHCR, an owner is obligated to indicate that the unit is a “421-a unit,”<sup>112</sup> a designation that is documented in DHCR’s registration system. However, because the system is self-reporting and neither HPD nor DHCR confirm that 421-a units are, in fact, designated as such, there is no guarantee that this component is followed. Even if an apartment is designated as 421-a within DHCR’s system, the designation does little to inform the agency whether the unit is within the GEA or whether the unit is AMI restricted. As a result, the agency has little ability to determine whether the monthly rent charged to the tenant is correct under the 421-a program.<sup>113</sup>

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<sup>108</sup> See REAL PROP. TAX § 421-a (7)(c)(i).

<sup>109</sup> See REAL PROP. TAX § 421-a (2)(f).

<sup>110</sup> See UNCONSOL. § 2522.8.

<sup>111</sup> See REAL PROP. TAX § 421-a (7)(c)(i).

<sup>112</sup> See REAL PROP. TAX LAW § 421-a (10)(a)(i).

<sup>113</sup> Generally, tenants may file complaints with the Office of Rent Administration (ORA), a sub-agency within DHCR. *Rent Stabilization/Control Forms*, N.Y.S. HOMES & CMTY. RENEWAL, <https://perma.cc/2QUN-SWMY>. Complaints can be filed for: rent overcharges (when the landlord is charging a monthly rent greater than legally permitted); failure to offer lease renewals (when the landlord fails to offer the tenant the option to renew the lease); harassment, and rent reductions based on decrease in services (when the landlord fails to make basic repairs or eliminates essential services and is therefore required to reduce the monthly

B. *Controversy Sparked: Hundreds of Buildings Improperly Receiving Benefits*

Throughout 2015 and 2016, ProPublica published a series of articles that revealed a debilitating flaw in the 421-a program.<sup>114</sup> Around 3,000 buildings receiving the tax abatement had failed to register units as rent stabilized with DHCR.<sup>115</sup> The failure to register meant two things: first, it was almost certain that units meant to be affordable were not subject to rent stabilization and were instead being rented at market rates; second, either the City, the State, or both government entities, were improperly administering the program.

What was readily apparent was also a lack of communication between HPD and DHCR. The City, which administers the program through HPD and the Department of Finance, has records of all the developments which applied for and were approved to receive the 421-a tax abatement. However, the State statutes and City regulations left it up to developers to register affordable units with DHCR without a system of checking if the developer had, in fact, done so. DHCR, however, only becomes aware of rent stabilized units once owners register with the agency. Since there is no communication between HPD, the Department of Finance, and DHCR, HPD or DHCR would have to sua sponte research whether a building was receiving 421-a benefits, and then confirm that the units were registered

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rent), among others. *Id.* The ORA investigates the complaint, notifies the landlord who has an opportunity to respond, and then grants or denies the tenant's complaint. *See* UNCONSOL. § 2526.2(a). This process can take months to complete. Additionally, the Tenant Protection Unit (TPU) is a sub-agency within the DHCR that affirmatively enforces the RSL/RSC. *TPU Timeline*, N.Y.S. HOMES & COMMUNITY RENEWAL, <https://perma.cc/TAS2-RFQZ>. Under its enabling statute, the TPU is empowered to investigate landlords who may be violating the RSL/RSC, to issue subpoenas, and to bring lawsuits to remedy widespread violations. *See* UNCONSOL. § 2520.5(o). Along with the New York State Office of the Attorney General (OAG), HPD, and the DOB, the TPU is a member of the Tenant Harassment Prevention Task Force (THPTF). *See Tenant Harassment Prevention Task Force*, N.Y.C. DEP'T OF HOUS. PRES. & DEV., <https://perma.cc/5MZX-VJZT>. The THPTF focuses on investigating landlords who use various forms of harassment to compel rent stabilized tenants to vacate apartments. *See id.* The task force enables the TPU to join forces with the OAG who can bring criminal charges against landlords for fraud or harassment. *See id.*

<sup>114</sup> Cezary Podkul, *Thousands of N.Y.C. Landlords Who Ignored Rent Caps Got Tax Breaks They Didn't Qualify For*, PROPUBLICA (Oct. 20, 2016, 12:16 PM), <https://perma.cc/XDU4-GTL4> [hereinafter Podkul, *Thousands of N.Y.C. Landlords*]; Cezary Podkul & Marcelo Rochabrun, *Landlords Fail to List 50,000 N.Y.C. Apartments for Rent Limits*, PROPUBLICA (Nov. 5, 2015, 3:14 PM), <https://perma.cc/C9DR-JMRG>; Cezary Podkul & Marcelo Rochabrun, *N.Y.C. Landlords Flout Rent Limits – But Still Rake in Lucrative Tax Breaks*, PROPUBLICA (Nov. 4, 2015, 12:00 AM), <https://perma.cc/YEK3-FGZQ>; Marcelo Rochabrun & Cezary Podkul, *Tenants Take the Hit as New York Fails to Police Huge Housing Tax Break*, PROPUBLICA (Dec. 4, 2015, 11:51 AM), <https://perma.cc/6C2H-TQPF>.

<sup>115</sup> *See* Podkul, *Thousands of N.Y.C. Landlords*, *supra* note 114.

– a step that both HPD and DHCR either do not have the capacity to do, or choose not to do. Because no agency affirmatively confirms that 421-a units are registered with the DHCR, it is likely that owners can fail to register without provoking interest from either HPD or DHCR. Furthermore, an owner who fails to register with the DHCR may also fail to provide units at the rent restricted levels to which they are statutorily mandated.

Due to the lack of oversight, it is possible that any of the 88,000 units receiving the tax abatement are not offered at affordable monthly rents,<sup>116</sup> and additionally, do not receive the statutory and regulatory protections afforded to rent stabilized tenants.

### C. Proposed Legislation

The media attention around the lack of oversight of the 421-a program prompted legislation in the City Council. In late 2017, two bills were enacted to amend the sections of the Administrative Code relevant to administration of the 421-a program. The first, proposed by Councilmember Stephen T. Levin, requires HPD to conduct an annual audit of at least 20% of buildings receiving 421-a to ensure compliance with the affordability requirements.<sup>117</sup> The second measure, proposed by Councilmember Jumaane D. Williams, would require HPD to annually audit at least 20% of buildings receiving 421-a to ensure compliance with 421-a's registration requirement.<sup>118</sup> Similar mechanisms would likely prove useful in securing compliance with the City's Mandatory Inclusionary Housing program.

## III. LEARNING FROM 421-A: MANDATORY INCLUSIONARY HOUSING AS A FAILED TOOL FOR DEVELOPING *PERMANENT* AFFORDABLE HOUSING

The exposé surrounding the lack of oversight of the 421-a program triggered a number of alarms. For elected officials, the lack of oversight was especially egregious because the City forwent millions of dollars in tax revenue to administer 421-a – tax dollars that could have been used to directly fund the production of affordable housing or used for subsidies to house shelter residents.<sup>119</sup> While City officials shared a similar sentiment, tenant groups and affordable housing advocates focused on what developers had promised to deliver in exchange for the tax breaks totaling

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<sup>116</sup> See discussion *supra* Section II; N.Y.C. RENT GUIDELINES BD., *supra* note 106, at 8.

<sup>117</sup> NEW YORK, N.Y., Local Law No. 193 (2017).

<sup>118</sup> NEW YORK, N.Y., Local Law No. 194 (2017).

<sup>119</sup> See Press Release, N.Y.C. Dep't of Hous. Pres. & Dev., *Mayor de Blasio, DOF and HPD Announce Suspension Notices Sent to Owners of 3,000 Rental Buildings Out of Compliance With 421-a* (Dec. 6, 2016), <https://perma.cc/8HBJ-R3YF>.

millions of dollars – a promise that was not kept: rent regulated apartments and income-restricted apartments to help address the ever intensifying affordability crisis in the City.<sup>120</sup>

Tenant and affordable housing advocacy groups also related the lack of oversight to the big-picture affordable housing crisis in the City; with no agency affirmatively taking the reins over 421-a, what other incentive-based affordability programs were falling by the wayside? The question must be asked of every affordability scheme in the City. With the deepening affordability crisis, no affordable unit can be spared.

In the context of MIH, is it productive to wait until developers have already failed to provide affordable units, and attempt to implement oversight as an after-the-fact (as is the case with 421-a)? Or rather, would the pre-emptive creation of an oversight program prevent malfeasance? If government is tasked with enforcing MIH, where no single agency takes responsibility, is delegating oversight to various state and city agencies a good choice? The answer to these questions must be informed by the 421-a program and how it is currently administered.

*A. Housing Preservation and Development: One Agency to Oversee MIH Program in Its Entirety*

HPD should be tasked with enforcing the MIH program. Unlike 421-a, a program created by the State yet administered by the City, MIH is both created by the City and administered by the City.<sup>121</sup> Although DHCR, a state agency, has some involvement in both programs – where it comes to rent regulation – subjecting MIH apartments to rent regulation and requiring landlords to register with DHCR acts more like a tool to provide tenant protections rather than regulate compliance. Further, although the DOB is delegated with the task of enforcing the zoning ordinance,<sup>122</sup> the agency's primary concern is the City's construction codes and regulations. As the program stands, HPD's matter-of-fact involvement with MIH is greater than all other agencies involved – MIH applications are submitted to and approved by HPD and HPD and developers enter into a regulatory agreement.<sup>123</sup> As a result, the agency is in the greatest position to enforce MIH's affordability provisions.

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<sup>120</sup> See Cezary Podkul, *NYC Lawmakers Push for Audits of Landlords Who Pocket \$1.4 Billion Tax Break*, PROPUBLICA (Nov. 16, 2016, 4:36 PM), <https://perma.cc/K7EH-64UG>.

<sup>121</sup> See discussion *supra* Section I.B.

<sup>122</sup> See NEW YORK, N.Y., ZONING RESOLUTION § 71-00 (2018).

<sup>123</sup> See discussion *supra* Section I.B.2.

1. Certificate of Occupancy: The City's Leverage for Non-Compliance

Logically, HPD's leverage for preventing non-compliance should be the ability to revoke the benefit given to the developers. In the context of 421-a, for example, HPD can request that the Department of Finance revoke a non-complying property owner's tax benefits and even request that any benefits received while in non-compliance be forfeited.<sup>124</sup> However, in the context of MIH, it is impracticable, if not impossible, for HPD to revoke the zoning variances received by developers.

When a developer or its administering agent fails to comply with MIH's affordability requirements, HPD may have the option to request that the DOB revoke the non-complying building's Certificate of Occupancy. However, this remedy would require tenants, even tenants of the non-affordable apartments, to vacate their apartments.<sup>125</sup>

Since it is unlikely that HPD would chose to revoke a building's Certificate of Occupancy, and further, HPD cannot revoke the benefit received by developers, HPD is currently left with one option: to enforce the regulatory agreement between the agency and the developer.<sup>126</sup>

2. HPD: A Single System to Affirmatively Enforce

Further, HPD can create a sub-agency that is entirely devoted to the enforcement of all City-administered, incentive-based affordability programs, such as MIH and 421-a. The sub-agency could develop expertise on each program's nuances, and the various ways to both assess non-compliance and compel compliance. While maintaining such a sub-agency would require recurring funding from the City, HPD already has a number of offices that handle applications for affordable housing programs, as well as offices that oversee enforcement of other laws, regulations, and

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<sup>124</sup> See N.Y. REAL PROP. TAX LAW § 421-a (10)(b) (McKinney 2018).

<sup>125</sup> The DOB may issue a vacate order to any occupied residential building without a Certificate of Occupancy. See NEW YORK, N.Y., ADMIN. CODE §§ 28-201.2.1, 28-207.4 (2018).

<sup>126</sup> Currently, the DOB has the explicit authority to enforce the Zoning Resolution. See ZONING RESOLUTION § 71-00. While HPD may "exercise . . . all functions of the city relating to the rehabilitation, maintenance, alteration and improvement of residential buildings and privately owned housing," HPD may not have the authority to litigate for the enforcement of Regulatory Agreements. NEW YORK, N.Y., CHARTER OF 2002 ch. 12, § 1802 (2018). To make HPD's authority explicit, the City Council can amend the City Charter or the Zoning Resolution to explicitly permit HPD to enforce the agreements. Further, the Zoning Resolution grants HPD the ability to establish and enforce "Guidelines" – regulations found within the Rules of the City of N.Y. See NEW YORK, N.Y., R.C.N.Y. § 41-01-25 (N.Y. 2017); ZONING RESOLUTION § 23-96(k). As a result, HPD could promulgate regulations detailing the enforcement of MIH.

codes.<sup>127</sup> HPD would merely need to consolidate a few of these offices and promote the affirmative enforcement of MIH and other affordability programs. Lastly, the City could implement a system for tenants to submit administrative complaints. Tenants could then assist HPD by notifying the agency of any possible violations.

*B. Proposals: Legal Remedies to Enforce the Mandatory Inclusionary Housing Program*

Should City agencies decide that it is not within their duty to affirmatively enforce MIH's affordability provisions, the burden of enforcement falls on third parties. These third parties include tenant and legal organizations.

If and when an owner is non-compliant, a tenant would generally be unaware that their apartment is income-restricted. A tenant would only gain this knowledge if they accessed the regulatory agreement that is recorded with the building's tax lot. Even so, the tenant must then differentiate between whether rent was properly calculated at the time of initial occupancy and whether rent was properly calculated at lease renewal, a task that involves knowledge of RGB increases and requires various mathematical calculations (a task that is so potentially erroneous that HPD has entrusted only approved non-profit managers).

First, a centralized, public resource listing all MIH properties would assist tenants and various legal organizations in determining whether MIH's affordability provisions have been violated. A public list would allow tenants and legal organizations to identify buildings within the MIH program and determine what affordability levels, or options, the owner agreed to comply with in exchange for participation in the MIH program.

City officials can also implement a number of legal mechanisms to assist tenants in compelling compliance with MIH. For example, the City Council could amend the Administrative Code to create a cause of action for tenants of MIH buildings. Additionally, an amendment to the Zoning Resolution could require all MIH Regulatory Agreements to include a provision explicitly granting tenants third party beneficiary status.<sup>128</sup> As

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<sup>127</sup> See *Office Descriptions*, N.Y.C. HOUS. PRES. & DEV., <https://perma.cc/5RH5-TV5Q>.

<sup>128</sup> Under current case law, a third party (i.e. a party who is not a signatory to the regulatory agreement), may sue to enforce a regulatory agreement only when the covenantee intended to "create a servitude or right which should inure to the benefit of the land . . . and should be annexed to it as an appurtenance." KRISTINA E. MUSIC BIRO ET AL., 43A N.Y. JUR. 2D DEEDS § 167 (2018). There must be a clear intent to establish the restriction for the third party's benefit, and this intention must be shown by the "entire context, and, where the meaning is doubtful, by the consideration of such surrounding circumstances which the parties are presumed to have considered when their minds met." *Id.* It is believed that no tenant has attempted to en-

a result, tenants could seek an injunction to enforce the Regulatory Agreements between HPD and owners.

Moreover, should tenant advocates consider suing landlords directly for violations of the Zoning Resolution itself, under current case law, tenants must first exhaust administrative remedies for violations of the Zoning Resolution before bringing suit in civil or supreme court.<sup>129</sup> Advocates may encourage tenants to file complaints with the DOB claiming violations of the Zoning Resolution.<sup>130</sup> However, this tool has never been used, since the DOB typically processes complaints for violations of the Building Code.

#### CONCLUSION

In a moment where Bill de Blasio's mayoral term is defined by an increasing homeless population,<sup>131</sup> by extremely low vacancy rates in homeless shelters,<sup>132</sup> and by public pushback to a shelter system expansion,<sup>133</sup> the necessity for a properly maintained affordable housing stock is apparent. While ensuring that affordable housing programs are properly administered may be a large task, the City is capable of handling the responsibility.

The City can mitigate violations of the MIH program, first, by creating a single sub-agency within HPD to oversee all incentive-based, affordable housing programs administered by the City. Additionally, the City could implement legal mechanisms that would allow tenants to more easily bring litigation against non-compliant owners. The City Council can create a cause of action within the Administrative Code, and Regulatory Agreements between HPD and developers can include a provision

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force a regulatory agreement under the IH program, and until MIH developments are underway, this legal remedy remains a speculative option. *See also* Mendel v. Henry Phipps Plaza West, Inc., 6 N.Y.3d 783 (2006) (setting forth the requisites to establish third party beneficiary status); LaSalle Nat'l Bank v. Ernst & Young, 285 A.D.2d 101 (1st Dep't 2001) ("A non-party may sue for breach of contract only if it is an intended, and not a mere incidental, beneficiary, and then only if the intent to benefit the third party is apparent from the face of the contract.").

<sup>129</sup> *See* Crystal Pond Homes, Inc. v. Prior, 267 A.D.2d 383 (2d Dep't 1999); Delafield 246 Corp. v. Dep't of Bldgs., City of N.Y., 218 A.D.2d 613 (1st Dep't 1995).

<sup>130</sup> *See* Beckerman, *supra* note 24.

<sup>131</sup> *See generally* Homelessness in New York City, COALITION FOR THE HOMELESS (2018), <https://perma.cc/WUN3-DA7E>.

<sup>132</sup> Based on the author's conversations with attorneys at The Legal Aid Society's Homeless Rights Project. No public data on vacancy rates exist. However, the continual trend to use commercial hotels as temporary emergency shelters is a clear sign that standard shelter facilities have reached capacity. *See, e.g.*, Nicholas Rizzi, *Neighbors Angry After Sunset Park Hotel Becomes Homeless Center*, PATCH (Dec. 21 2017, 4:14 PM), <https://perma.cc/4MAW-TF2T>.

<sup>133</sup> *See* Nikita Stewart, *De Blasio Quietly Seeks Allies in Battle Over Homeless Shelters*, N.Y. TIMES (May 17, 2017), <https://perma.cc/8E3G-B83D>.

explicitly granting tenants third party beneficiary status. Creating these legal mechanisms not only shifts the burden from the City to properly administer the program but would require minimal involvement from city officials.

Tenants, however, should not bear the burden of oversight over MIH. As evidenced by the extensive lack of oversight over the 421-a program, incentive-based affordable housing programs – usually couched within complex tax laws or zoning ordinances – are not easily enforced by tenants. Perhaps across-the-board rent restrictions, applicable to all privately-owned units, would prove less complicated for city officials and tenants alike.