

# **Zoning for Affordability: Using the Case of New York to Explore Whether Zoning Can Be Used to Achieve Income-Diverse Neighborhoods\***

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## **Abstract**

Harnessing the strength of the real estate market in high cost cities to support the production of affordable housing can be an important strategy to maintain economically diverse neighborhoods. A primary tool for achieving this is inclusionary zoning—regulation that incentivizes or requires market-rate developers to create affordable units. However, linking the ability to produce market-rate housing units to the provision of affordable units raises the specter of a range of legal challenges, founded in both constitutional protections of property rights and state law limits on local regulation. This article considers the legal limitations on a locality's ability to regulate land use in order to evaluate whether mandatory inclusionary zoning can withstand legal challenge. We use New York City's recently announced, ambitious mandatory inclusionary zoning proposal as our case study, and consider how the city might justify the policy in the face of both constitutional and state law challenges.

Keywords: Public Policy, Urban Development, Zoning

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# **Zoning for Affordability: Using the Case of New York to Explore Whether Zoning Can Be Used to Achieve Income-Diverse Neighborhoods\***

## **Introduction**

Inclusionary zoning's fundamental goal is to induce or require private developers to create or fund affordable residential units when they construct new market-rate residential buildings. This premise presents an alluring albeit controversial strategy in cities with robust private development markets. The value of constructing new market-rate units in high-value areas may be substantial enough to make it worth a developer's while to comply with a mandatory inclusionary zoning policy.<sup>1</sup> But, whether a legal requirement to provide affordable units as a condition of building can survive legal challenge is a complex and novel question in many jurisdictions. Among the many jurisdictions where this question remains unanswered is New York, where the City of New York has embarked upon the process of implementing the strongest mandatory inclusionary zoning policy in the country.

In *Housing New York*, Mayor Bill de Blasio's 2014 comprehensive ten-year housing plan, the City of New York identified establishing a mandatory inclusionary zoning program as one of the key policies that it will use to address the city's growing affordable housing shortage.<sup>2</sup> In September 2015, the city initiated the public land-use review process for its proposed Mandatory Inclusionary Housing program, which is currently underway (hereinafter, we will refer to the city's proposal as "MIH").<sup>3</sup> If the proposal passes, it will create a framework in the city's Zoning Resolution that will allow the city to impose a requirement that affordable units be created on site or nearby any time a developer is building new market-rate units in identified areas of the city.

New York City, like many cities, has broad powers to zone for the public welfare and, as a home-rule city, is not confined to the specific powers delegated by state zoning enabling statutes.<sup>4</sup> Courts generally follow principles of granting deference and presuming constitutionality when reviewing local government regulations, including zoning laws.<sup>5</sup> However, local government authority to impose land use regulations on private property is checked by a body of state and federal law. When zoning laws look less like they are regulating the *use* of land and more like they are extracting the land (or money) itself, or in some cases

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<sup>1</sup> JOSIAH MADAR AND MARK WILLIS, CREATING AFFORDABLE HOUSING OUT OF THIN AIR: THE ECONOMICS OF MANDATORY INCLUSIONARY ZONING IN NEW YORK CITY (NYU Furman Center 2015), available at [http://furmancenter.org/files/NYUFurmanCenter\\_CreatingAffHousing\\_March2015.pdf](http://furmancenter.org/files/NYUFurmanCenter_CreatingAffHousing_March2015.pdf).

<sup>2</sup> See CITY OF NEW YORK, OFFICE OF THE MAYOR, HOUSING NEW YORK 8, 30-31 (2014).

<sup>3</sup> N.Y.C. DEPARTMENT OF CITY PLANNING, MANDATORY INCLUSIONARY HOUSING, <http://www.nyc.gov/html/dcp/html/housing/mandatory-inclusionary-housing-summary.shtml> (lasted visited Dec. 12, 2015).

<sup>4</sup> See generally NY CLS Mun. H R § 10; NY CLS Town § 264.

<sup>5</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (landmark zoning case establishing principle that "if the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control").

regulating rents, they can be vulnerable to challenge based on a range of theories including constitutional (due process and takings) violations, *ultra vires* regulation, *ultra vires* taxation, and regulation of rents in violation of state law.<sup>6</sup>

Indeed, developers have proven to be competent plaintiffs with a lengthy record of litigating against inclusionary housing programs of every stripe—and in cases such as *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles*,<sup>7</sup> even garnering critical victories.<sup>8</sup> Assuming that development subject to inclusionary zoning requirements will often not be more profitable or convenient than straight market-rate development,<sup>9</sup> developers will often be rationally motivated to check any perceived or potential transgressions of state and federal law committed by local governments. Thus, New York City must build an MIH program that is doubly tasked with both meaningfully addressing the city's need for affordable housing in a diversity of neighborhoods and deftly maneuvering in unsettled legal terrain.

Though numerous policy studies have evaluated existing inclusionary zoning programs and produced recommendations both for local governments in general and for New York City specifically,<sup>10</sup> only a handful of comprehensive legal analyses of inclusionary zoning (primarily analyzing legal challenges brought in California, Maryland, New Jersey, Washington, and a few other states) have been published.<sup>11</sup> No paper has explored the modern legal framework governing the imposition of inclusionary zoning in New York, as we do here.<sup>12</sup> In this paper, we

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<sup>6</sup> See generally Tim Iglesias, *Framing Inclusionary Zoning: Exploring the Legality of Local Inclusionary Zoning and Its Potential to Meet Affordable Housing Needs*, 36 No. 4 Zoning & Plan. L. Report 1 (2013).

<sup>7</sup> *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles*, 175 Cal. App. 4th 1396 (Cal. App. 2d Dist. 2009).

<sup>8</sup> See Robert Hickey, *After the Downturn: New Challenges and Opportunities for Inclusionary Housing*, Center for Housing Policy (2013), 2, 6 (describing *Palmer*'s "prompt[ing] most of the state's jurisdictions to cease applying inclusionary housing policies to rental developments" as especially significant because almost half of all U.S. IH policies are Californian, and most new residential development in California is multifamily rental). See also Iglesias, *supra* note 6, at 9 (describing *Palmer* as "essentially halt[ing] rental IZ in California," except where included by development agreement). In *Palmer*, the developer challenged Los Angeles's set-aside requirement on the theory that MIZ is "rent control" preempted by state statute; ordinances in Colorado and Wisconsin were invalidated on a similar theory. *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30 (Colo. 2000); *Apartment Ass'n of South Cent. Wisconsin, Inc. v. City of Madison*, 296 Wis. 2d 173 (Wis. Ct. App. 2006).

<sup>9</sup> CAL. AFFORDABLE HOUS. LAW PROJECT OF THE PUB. INTEREST LAW PROJECT & W. CTR. ON LAW & POVERTY, *INCLUSIONARY ZONING: LEGAL ISSUES* (2002), 3 ("[R]egardless of the concessions and incentives offered, developers without experience developing affordable housing would just develop market-rate housing, notwithstanding the critical societal need for affordable housing").

<sup>10</sup> See, e.g., Madar and Willis, *supra* note 1; Seth Ullman, Michael Freedman-Schnapp and Brad Lander, *Inclusionary Zoning in New York City*, Office of Council Member Brad Lander (2013). For policy studies of inclusionary housing programs in other states, see generally, Robert Hickey, Lisa Sturtevant, and Emily Thaden, *Achieving Lasting Affordability through Inclusionary Housing*, Lincoln Institute of Land Policy (2014); Nico Calavita and Kenneth Grimes, *Inclusionary Housing in California: The Experience of Two Decades*, 64 J. Am. Plan. Ass'n 150-68 (1998).

<sup>11</sup> See e.g., Robert Hickey, *After the Downturn: New Challenges and Opportunities for Inclusionary Housing*, Center for Housing Policy (2013) and Tim Iglesias, *Framing Inclusionary Zoning: Exploring the Legality of Local Inclusionary Zoning and Its Potential to Meet Affordable Housing Needs*, 36 No. 4 Zoning & Plan. L. Report 1, 9 (2013) (both discussing legal challenges nationwide). The body of legal analysis on inclusionary zoning is particularly robust in California, where developers and building associations have brought numerous challenges against municipalities. See CAL. AFFORDABLE HOUS. LAW PROJECT OF THE PUB. INTEREST LAW PROJECT & W. CTR. ON LAW & POVERTY, *INCLUSIONARY ZONING: LEGAL ISSUES* (2002).

<sup>12</sup> For a contemporaneous legal analysis of a mandatory inclusionary zoning proposal put forth by New York City in the early 1980s (given legal framework at that time), see Carl J. Rossi, *Zoning New York City to Provide Low and Moderate Income Housing - Can Commercial Developers Be Made to Help?*, 12 FORDHAM URB. L.J. 3, 491 (1983).

outline the legal challenges that inclusionary zoning policies have faced, and then consider how the city might defend its policy. While we consider the case of New York, the types of legal claims we consider here are likely to be faced by other jurisdictions seeking to implement inclusionary zoning policies.<sup>13</sup> While the local context and state legal frameworks will be different, many of the legal principles we discuss will be instructive even outside of the New York context.

In the first section, we describe the city's existing voluntary inclusionary housing program, and the purpose and parameters of its proposed MIH program. In the next section, we consider the application of the constitutional protections of property rights found in the Due Process Clause and the Takings Clause to the case of the city's proposed MIH policy. After that, we explore the state law limits on the city's regulatory power, and consider whether the city can justify its actions within those limits given its proposed MIH design. Ultimately, we conclude that the city's proposal is likely to withstand legal challenge. However, it does face complex and somewhat unsettled legal terrain that does potentially complicate policy design and implementation.

### **Inclusionary Zoning in NYC—Voluntary and Mandatory**

Inclusionary zoning programs attempt to harness activity and demand in the residential real estate market to generate new units of affordable housing by either requiring (in a mandatory program) or incentivizing (in a voluntary program) that developers create affordable units when they create new market-rate units. Various jurisdictions in the U.S. have taken different approaches to whether the policy should incentivize or mandate affordable housing.<sup>14</sup> To date, New York City's foray into inclusionary zoning has included only a voluntary program. But, the city is now attempting to institute a mandatory inclusionary zoning program, which would shift this paradigm in the city. We describe the current voluntary program and the proposed mandatory program below.

#### **Voluntary Inclusionary Housing in New York City**

In 1987, New York City adopted the Inclusionary Housing Program into its Zoning Resolution.<sup>15</sup> The justification for the program at that time was the same justification the city puts forth for its current MIH proposal: its interest in fostering economically diverse communities.<sup>16</sup> Stated most simply, the program provides a zoning bonus in exchange for provision of affordable housing

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<sup>13</sup> There are, of course, additional legal claims that might arise, including claims unique to specific states. This paper does not address the entire universe of possible claims, but rather limits its analysis to some of the more common or likely legal claims brought in this context.

<sup>14</sup> Compare, e.g., SAN JOSE, CAL. MUN. CODE § § 5.08.010-5.08.730 (mandatory inclusionary housing ordinance), and MONTGOMERY, MAR. COUNTY CODE, §25A, Moderately Priced Housing Law (mandatory county directive for towns to adopt and implement inclusionary zoning ordinance), with AUSTIN, TEX. MUN. CODE § 2.5.2 (providing density bonuses for affordable housing payments or construction), and SEATTLE, WASH. MUN. CODE. § 23.58A.014 ("Bonus residential floor area for affordable housing").

<sup>15</sup> N.Y.C. DEP'T OF CITY PLANNING, INCLUSIONARY HOUSING TEXT AMENDMENT, [http://www.nyc.gov/html/dcp/html/inclusionary\\_housing/index.shtml](http://www.nyc.gov/html/dcp/html/inclusionary_housing/index.shtml) (last visited Dec. 12, 2015).

<sup>16</sup> *Id.*

units. But, as the Department of City Planning explains, the requirement can be met in a number of ways: “[t]o provide flexibility, address a range of needs and opportunities, and encourage broad participation in the Inclusionary Housing program, a range of options are permitted for the affordable housing: it may be located on-site or off-site, and may be provided through new construction, rehabilitation, or preservation of existing affordable housing.”<sup>17</sup>

The program was first applied in R10 zoning districts (the city’s highest density residential zoning districts), and then, in 2005, began to expand to additional areas in specified rezonings (known as “Designated Areas”).<sup>18</sup> Under the program, with limited exception, the affordable units produced must be affordable to households earning 80 percent or less of the area median income (AMI).<sup>19</sup> Affordable units must remain affordable for as long as the project using the zoning bonus relies on the continued existence of the affordable units to comply with zoning.<sup>20</sup>

The city’s current MIH proposal makes no changes to the city’s existing Inclusionary Housing Program; rather, it is intended to apply in newly designated MIH areas. However, in negotiations with public officials as part of the public review process for MIH, the city has committed to considering some reforms to the voluntary program.<sup>21</sup>

## **Proposed Mandatory Inclusionary Housing in New York City**

### Purpose of the Policy

New York City published an extensive report of policy and data analysis in support of its Mandatory Inclusionary Zoning policy.<sup>22</sup> In it, the city describes the existing housing market, the history of affordable housing subsidy programs and their prevalence in New York City, the importance and challenge of maintaining economically diverse neighborhoods and neighborhoods in which lower-income New Yorkers can access high-quality services and opportunities, and why MIH is an appropriate tool to help the city further its goal of fostering economically diverse neighborhoods.

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> In 2015, AMI in the New York City area, which varies by household size, was \$69,100 for two-person households; 80 percent of AMI was \$55,250 for a two-person household. U.S. Department of Housing and Urban Development, FY 2015 Income Limits Summary, <https://www.huduser.gov/portal/datasets/il/il2015/2015summary.odn>

<sup>20</sup> New York City Zoning Resolution § 23-961(b)(1) (“the regulatory agreement shall provide that each affordable housing unit shall be registered...at the initial monthly rent established by HPD... and shall thereafter remain subject to rent stabilization for the entire regulatory period”); § 23-911 (defining “regulatory period”).

<sup>21</sup> Press Release, Gail A. Brewer Manhattan Borough President, B.P. Brewer recommends ‘yes’ on mayor’s Mandatory Inclusionary Housing plan, ‘no’ on Zoning for Quality & Affordability (Dec. 11, 2015), available at <https://madmimi.com/p/f51907> (last visited Dec. 21, 2015); Letter from Vicki Been and Carl Weisbrod to Honorable Gale A. Brewer (Dec. 10, 2015), available at <http://manhattanbp.nyc.gov/downloads/pdf/ZQA%20MIH%20Commitment%20Letter.pdf> (last visited Dec. 21, 2015).

<sup>22</sup> See generally DEP’T OF CITY PLANNING, NEW YORK CITY MANDATORY INCLUSIONARY HOUSING – PROMOTING ECONOMICALLY DIVERSE NEIGHBORHOODS (September 2015), [http://www1.nyc.gov/assets/planning/download/pdf/plans-studies/mih/mih\\_report.pdf](http://www1.nyc.gov/assets/planning/download/pdf/plans-studies/mih/mih_report.pdf).



The city reports recent trends that “indicate that overall, a diminishing share of the city’s housing stock is affordable to low- and moderate-income households even as the demand for housing by households with low and moderate incomes is rising because of employment growth.”<sup>23</sup> “If current trends continue,” it warns, “it is likely that, over time, some neighborhoods that are more economically diverse today will have fewer low- and moderate-income households in the future and the number of very low-income households will rise in the areas that already have high concentrations of poverty. In short, the city’s neighborhoods will become even less economically diverse as the population sorts by socioeconomic status.” As a result, lower-income households are likely to end up living in sub-optimal housing situations (rent burdened and/or overcrowded conditions) that can have negative effects on children, other household members, and ultimately neighborhoods.<sup>24</sup>

MIH will benefit residents by developing affordable units in “more desirable, higher opportunity”<sup>25</sup> neighborhoods that traditionally tend not to produce housing for lower income New Yorkers. At the same time, however, the policy will ensure some residents stay in their current neighborhoods by acting “as a cushion against potential gentrification” and protecting “lower-income families from displacement” as their own neighborhood changes.<sup>26</sup> In both instances, the policy will further the city’s interest in fostering income diversity across its neighborhoods:

Creating more housing opportunities for households at a range of incomes can enhance the city’s overall economic diversity, alleviating the effects of rent burden, overcrowding, and illegal housing and providing opportunities to attract and maintain a diverse workforce. At the same time, increasing economic diversity at the neighborhood level is important for improving households’ access to the “package” of services and amenities that a neighborhood provides and for creating options for families outside of areas of highly concentrated poverty.<sup>27</sup>

By requiring a link between affordable and market-rate units in neighborhoods that have traditionally failed to produce affordable units, MIH will ensure that “residents with a range of incomes” can access a “package” of services and amenities.<sup>28</sup> These services include better schools, healthcare, transportation networks that reduce commute times, public amenities and decreased “exposure to crime or pollution.”<sup>29</sup>

For households that benefit from the program, “[a]ll of these factors affect well-being and quality of life in profound ways, according to the growing consensus within a large body of economic, sociological, medical and public policy research conducted over the course of several decades.”<sup>30</sup>

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<sup>23</sup> *Id.* at 63.

<sup>24</sup> *Id.* at 64-67.

<sup>25</sup> *Id.* at 42.

<sup>26</sup> Press Release, City Planning Commission Chairman Carl Weisbrod Made the Following Remarks at Today’s CPC Vote to Approve the City’s Mandatory Inclusionary Housing (Feb. 3, 2016), available at <http://www1.nyc.gov/site/planning/about/press-releases/pr-20160203.page> (last visited Feb. 4, 2016);

<sup>27</sup> *Id.* at 75.

<sup>28</sup> *Id.* at 41.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 41.

And, the city as a whole also benefits from these moves. The city explains, and documents, “a rich body of research explores the neighborhood conditions that determine the success of households and benefit to communities, regardless of whether they were directly affected by these housing programs, providing important insight into how cities benefit from economic diversity.”<sup>31</sup>

Thus, in this lengthy exposition of its justification for the policy, the city establishes that creating income-diverse neighborhoods is its objective and it documents how this objective is linked to the city’s interest in assisting low and moderate income households and the city as a whole.

### Design of the Policy

The city’s Proposed Mandatory Inclusionary Housing Zoning Text (“the proposal”) states that for zoning lots in MIH areas, “no residential development, enlargement, or conversion from non-residential to residential use shall be permitted unless affordable housing ... is provided or a contribution is made to the affordable housing fund.”<sup>32</sup> There are two exceptions to this requirement: where the city’s Board of Standards and Appeals grants a reduction or modification of MIH requirements<sup>33</sup> or where the zoning lot that existed when the MIH area was established has no more than 10 dwelling units and no more than 12,500 square feet of residential floor area, or the property houses only “affordable independent residences for seniors.”<sup>34</sup> The areas of New York City where MIH will apply have not yet officially been designated by the city. However, the city has indicated that it will impose the requirement in certain designated areas and where a special permit allows “a significant increase in residential floor area.”<sup>35</sup> In other words, the city intends to apply the policy when it amends the zoning for an area either by way of newly allowing for residential use (e.g., a rezoning from a manufacturing to a residential zoning district designation) or increasing the previously allowed residential density.

The proposal then offers up to four compliance method options (depending on the type and location of the development) from which developers could choose in order to fulfill their obligations under the proposed MIH policy.<sup>36</sup>

Option 1 requires the provision of a square footage of affordable housing equaling “at least 25 percent of the #residential floor area#<sup>37</sup> within such #development#, #enlargement#, or #conversion# from non-#residential# to #residential use#. The weighted average of all #income

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<sup>31</sup> *Id.* at 48.

<sup>32</sup> New York City Department of City Planning Proposed Mandatory Inclusionary Housing Zoning Text (9-23-15) § 23-154(d)(1), available at [http://www.nyc.gov/html/dcp/pdf/housing/proposed\\_zoning\\_text.pdf?r=1](http://www.nyc.gov/html/dcp/pdf/housing/proposed_zoning_text.pdf?r=1) p. 6 [hereinafter Proposed MIH Text]. Many of the terms used in the proposal are defined either in the proposal itself (s 23-91) or in the Zoning Resolution’s existing definitions section (ZR § 12-10).

<sup>33</sup> Proposed MIH Text § 23-154(d)(1) at 6; § 73-624 at 55.

<sup>34</sup> Proposed MIH Text §§ 23-154(d)(1), 23-154(d)(4) at 6-8.

<sup>35</sup> See also New York City Department of City Planning *Proposed Mandatory Inclusionary Housing Zoning Text* (9-23-15) §§ 23-933, 23-934 available at [http://www.nyc.gov/html/dcp/pdf/housing/proposed\\_zoning\\_text.pdf?r=1](http://www.nyc.gov/html/dcp/pdf/housing/proposed_zoning_text.pdf?r=1) pp. 27-28.

<sup>36</sup> Proposed MIH Text § 23-154(d)(3) at 6.

<sup>37</sup> The hash marks in the proposed zoning text indicate words that are defined in the Zoning Resolution.

bands# for #affordable housing units# shall not exceed 60 percent of the #income index#, <sup>38</sup> and no #income band# shall exceed 130 percent of the #income index#.”<sup>39</sup>

Option 2 requires the provision of a square footage of affordable housing equaling “at least 30 percent of the #residential floor area# within such #development#, #enlargement#, or #conversion# from non-#residential# to #residential use#. The weighted average of all #income bands# for #affordable housing units# shall not exceed 80 percent of the #income index#, and no #income band# shall exceed 130 percent of the #income index#.”<sup>40</sup>

The third option is called “the Workforce Option.” It requires the provision of a square footage of affordable housing equaling “at least 30 percent of the #residential floor area# within such #development#, #enlargement#, or #conversion# from non-#residential# to #residential use#. The weighted average of all #income bands# for #affordable housing units# shall not exceed 120 percent of the #income index#, and no #income band# shall exceed 130 percent of the #income index#.” Owners using this option are not eligible for city subsidy to support the creation of these units and the option is not available for developments located in the central part of Manhattan (“the Manhattan Core”).<sup>41</sup>

Within any of the above zones, the proposed law provides an additional option for compliance for construction activity that adds relatively little residential capacity to a zoning lot. It provides that “a #development#, #enlargement#, or #conversion# from non-#residential# to #residential use# that increases the number of #dwelling units# by no more than 25, and increases #residential floor area# on the #zoning lot# by less than 25,000 square feet, may satisfy the requirements of this Section by making a contribution to the #affordable housing fund#.”<sup>42</sup>

As the city creates MIH zoning areas, it will determine which compliance method options will be available to developments in each area.<sup>43</sup> The city currently proposes that in any MIH zoning area, Options 1 and 2 “may be applied . . . singly or in combination,”<sup>44</sup> while the Workforce Option “shall be applied . . . only in combination with Options 1 or 2.”<sup>45</sup>

The proposal also further specifies the differing affordability requirements for rental and homeownership units—both of which would be subject to the city’s MIH regulations.<sup>46</sup> For an affordable rental unit, the rent may not exceed “30 percent of the income band applicable to that unit, divided by 12, minus any applicable utility allowance.”<sup>47</sup> For ownership units, the proposal states that the price will be “based on the incomes of qualifying households in accordance with

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<sup>38</sup> Area median income (AMI) is referred to as “income index” in the city’s proposal.

<sup>39</sup> Proposed MIH Text § 23-154(d)(3)(i) at 7.

<sup>40</sup> Proposed MIH Text § 23-154(d)(3)(ii) at 7.

<sup>41</sup> Proposed MIH Text § 23-154(d)(3)(iii) at 7.

<sup>42</sup> Proposed MIH Text § 23-154(d)(3)(iv) at 7.

<sup>43</sup> Proposed MIH Text § 23-154(d)(3) at 6.

<sup>44</sup> Proposed MIH Text § 23-154(d)(3) at 6.

<sup>45</sup> Proposed MIH Text § 23-154(d)(3) at 6.

<sup>46</sup> Proposed MIH Text § 23-961 (“Additional requirements for rental affordable housing”) at 42-48; § 23-962 (“Additional requirements for homeownership affordable housing”) at 48-54.

<sup>47</sup> Proposed MIH Text § 23-912 (“Maximum monthly rent”) at 19.

the guidelines”<sup>48</sup>—which have yet to be established. Under the existing Voluntary Inclusionary Housing Program, ownership unit prices are restricted such that the “combined cost of monthly fees, mortgage payments, utilities and property taxes to be paid directly by the homeowner will not exceed 30 percent of [AMI].”<sup>49</sup>

Affordable units can be provided on-site or on a separate site within the same community district or in “adjacent community districts and within one-half mile” of the “MIH zoning lot,” the lot on which the MIH requirement is applied.<sup>50</sup>

The proposal requires that the MIH zoning policy’s requirements be recorded for each development in a regulatory agreement between the landowner and the city.<sup>51</sup> The regulatory agreement is to remain in effect for as long as the site satisfies the MIH requirements, retains a permit, temporary certificate of occupancy, permanent certificate of occupancy, or is otherwise under construction or in use.<sup>52</sup>

In addition to requiring the provision of affordable housing in compliance with the regulations described above, the proposal also subjects affordable housing units in MIH developments to be subject to rent stabilization for so long as the regulatory agreement remains in effect, unless an alternative agreement is reached with the city for a particular project.<sup>53</sup>

Besides requiring owners to register units with the state agency that regulates rent-stabilized units (thus subjecting them to the state’s rent stabilization laws), the proposed MIH policy additionally calls for all regulatory agreements and leases governing MIH units to expressly guarantee the rights that are guaranteed to tenants under rent stabilization. The replication of rent stabilization guarantees in lease contracts provides an additional level of protection to tenants in the event that “any court declares that rent stabilization is statutorily inapplicable to” the units created under the city’s MIH program.<sup>54</sup> The city retains the discretion to modify this requirement.<sup>55</sup>

#### **Summary of Proposed Mandatory Inclusionary Housing Compliance Options<sup>56</sup>**

<b>Compliance Options</b>	<b>Affordable Unit Requirement</b>	<b>Affordability Level</b>	<b>Eligibility Criteria</b>
Option 1	25%	Average AMI: 60% Max AMI: 130%	N.A.
Option 2	30%	Average AMI: 80% Max AMI: 130%	N.A.

<sup>48</sup> Proposed MIH Text § 23-962(b)(2) at 49.

<sup>49</sup> Proposed MIH Text § 23-962(b)(2) at 49.

<sup>50</sup> Proposed MIH Text § 23-96 at p. 35

<sup>51</sup> Proposed MIH Text § 23-96(f) at 39-41.

<sup>52</sup> Proposed MIH Text §23-911 at 18 (“General definitions: Regulatory period”).

<sup>53</sup> Proposed MIH Text § 23-961(b)(i) at 43

<sup>54</sup> Proposed MIH Text § 23-961(b)(6) at 44.

<sup>55</sup> Proposed MIH Text § 23-961(b)(6) at 44.

<sup>56</sup> Proposed MIH Text § 23-154(d)(3) at 6.

<b>Compliance Options</b>	<b>Affordable Unit Requirement</b>	<b>Affordability Level</b>	<b>Eligibility Criteria</b>
Workforce Option	30%	Average AMI: 120% Max AMI: 130%	Not available in the Manhattan Core; No other subsidy permitted
Small Redevelopment Projects Only (applies to small projects in any of the above zones)	Contribution to Fund	Contribution to Fund	Building activity adds no more than 25 units and increases floor area by less than 25,000 square feet to the zoning lot

### **Constitutional Limits on the Regulation of Property**

The federal constitution protects the property rights of individual citizens from undue government interference through the Due Process Clause and the Takings Clause, applied to the federal government through the Fifth Amendment and to state governments through the Fourteenth Amendment.<sup>57</sup> The Due Process Clause guarantees that the state may not deprive a person of property without due process of law.<sup>58</sup> The Takings Clause guarantees that the state may not take private property for public use without just compensation.<sup>59</sup> Like many other states, the New York State Constitution contains identical protections.<sup>60</sup> Because state governments delegate the police power to regulate (including the power to zone) to local governments, local government actions are bound by the same limitations that apply to state government actions.

The Due Process Clause is a protection against illegitimate government infringements on property.<sup>61</sup> A regulation of property that exceeds the government's authority to regulate (the

<sup>57</sup> Both the Fifth and Fourteenth Amendments contain Due Process Clauses. The Takings Clause only appears in the Fifth Amendment, but is applied to the states through the Fourteenth Amendment. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; *Kelo v. City of New London*, 545 U.S. 469, 472 n.1 (2005).

<sup>58</sup> U.S. CONST. Amend. XIV (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law”).

<sup>59</sup> U.S. CONST. Amend V (“[N]or shall private property be taken for public use, without just compensation”).

<sup>60</sup> NY CONST. art. I, § 7. The due process and takings clauses of the New York State constitution are typically interpreted as being coterminous with their federal constitution counterparts. *See Wantanabe Realty Corp. v. City of New York*, 315 F. Supp. 2d 375, 401 (S.D.N.Y. 2003) (addressing due process, equal protection, and takings clauses); *Uhlfelder v. Weinshall*, 810 N.Y.S.2d 275, 289 at n. 12 (Sup. Ct. 2005) aff’d, 47 A.D.3d 169, 845 N.Y.S.2d 41 (2007) (addressing the takings clause); *Gangemi v. City of New York*, 827 N.Y.S.2d 498, 507 at n. 3 (Sup. Ct. 2006) (addressing the takings clause).

<sup>61</sup> *See Lutheran Church In Am. v. City of New York*, 316 N.E.2d 305 (N.Y. 1974) (“Such government interference as just described is based on one of two concepts -- either the government is acting in its enterprise capacity, where it takes unto itself private resources in use for the common good, or in its arbitral capacity, where it intervenes to straighten out situations in which the citizenry is in conflict over land use or where one person's use of his land is injurious to others. Where government acts in its enterprise capacity, as where it takes land to widen a road, there is a compensable taking. Where government acts in its arbitral capacity, as where it legislates zoning or provides the machinery to enjoin noxious use, there is simply noncompensable regulation”) (citations omitted).

standard for which will be discussed below) is impermissible and must be struck down.<sup>62</sup> Unlike a taking, the government cannot save such a regulation by compensating the property owner. A valid regulation that affects a taking of private property for public use (the standard for which we will discuss below) is justified as long as it provides just compensation to affected property owners. The Due Process Clause requires us to ask whether a government regulation of property is legitimate. Then the Takings Clause applies to the subset of legitimate property regulations that take property for public use. Of course, there are also legitimate property regulations that do not qualify as takings, for which no compensation is required.<sup>63</sup>

In practice, courts are unlikely to distinguish between a valid regulation that effectuates a taking and an invalid regulation that violates due process of law in part because of a reluctance related to “using substantive due process to do the work of the Taking Clause.”<sup>64</sup> Often inclusionary zoning regulations are challenged on both grounds—as due process violations and, in the alternative, as illegal takings—because of the burden they impose on private property. In the following sections we analyze the legal theories underlying both kinds of claims, the standards that courts have applied in evaluating these claims, and their potential application to the city’s proposed MIH policy.

Notably, however, zoning laws, because they are legislative, “enjoy a strong presumption of constitutionality and the burden rests on the party attacking them to overcome that presumption beyond a reasonable doubt.”<sup>65</sup>

### **Does MIH Deprive Owners of Property Without Due Process of Law?**

Regulation of private property is permissible, but “unreasonable” regulation can run afoul of the constitutional protection against deprivation of private property by the government.<sup>66</sup> This prohibition on substantively improper government action is often termed a substantive due process right and is distinct from the procedural due process protection that is also imposed by the Due Process Clause. Courts have held that, “in the zoning context, a government decision regulating a landowner’s use of his property offends substantive due process if the government action is arbitrary or irrational,” meaning the government “acts with no legitimate reason for its decision.”<sup>67</sup>

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<sup>62</sup> See *Lingle v. Chevron*, 544 U.S. 528, 543 (2005) (The Takings Clause “expressly requires compensation where government takes private property ‘for public use’ [...] Conversely, if a government action is found to be impermissible... [because it] is so arbitrary as to violate due process – that is the end of the inquiry. No amount of compensation can authorize such action.”).

<sup>63</sup> See *Lingle v. Chevron*, 544 U.S. 528, 541-42 (2005) (discussing the distinction between a substantive due process inquiry and a regulatory taking inquiry).

<sup>64</sup> *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 721 (2010); See also *Harmon v. Markus*, 412 F. App’x 420, 423 (2d Cir. 2011) (citing *Stop the Beach Renourishment Inc.* and holding that due process claims “fail as a matter of law” when affirming dismissal of takings claim).

<sup>65</sup> *Asian Americans for Equality*, 72 N.Y.2d at 131.

<sup>66</sup> *Charles v. Diamond*, 360 N.E.2d 1295, 1300 (1977) (“We have held that police power enactments must be reasonable and that unreasonable exercises of the police power result in a deprivation of property without due process.”).

<sup>67</sup> *Soundview Assocs. v. Town of Riverhead*, 893 F. Supp. 2d 416, 435 (E.D.N.Y. 2012) (citing *Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84, 102 (2d Cir. 1992)). See also *Gregory v. Inc. Vill. of Ctr. Island*, 2015 U.S. Dist. LEXIS 114749, at \*29 (E.D.N.Y. Aug. 28, 2015) (finding that a violation of substantive due process is found only

Courts in New York analyze local zoning regulations challenged on due process grounds using a two-part test. First, plaintiffs “must establish a cognizable property interest.”<sup>68</sup> Second, plaintiffs must show “the governmental action was wholly without legal justification,”<sup>69</sup> defined as official actions that are “arbitrary in the constitutional sense.”<sup>70</sup> Importantly, where a municipality acts “in accordance with a legitimate concern” or “legitimate state interests,” the action will categorically not violate substantive due process because the action is then not “unconstitutionally arbitrary.”<sup>71</sup>

New York City has argued extensively that the households that are able to access the areas where MIH is applied, their neighborhoods, and the city as a whole would benefit from the policy’s creation of economically diverse neighborhoods over time, and that MIH will create such neighborhoods by linking the development of market-rate housing to the development of new affordable units. California court decisions, while not binding in New York, suggest that the city’s policy goal and the link between the policy and its goal are sufficient to survive a facial substantive due process challenge.

Most recently and notably, in the California Supreme Court case addressing the legality of the City of San Jose’s mandatory inclusionary housing ordinance, the court noted (and it was undisputed by the parties) that the city’s interest in fostering economic diversity was a legitimate governmental interest:

The legislative history of the ordinance in question establishes that the City of San Jose found there was a significant and increasing need for affordable housing in the city to meet the city’s regional share of housing needs under the California Housing Element Law and that the public interest would best be served if new affordable housing were integrated into economically diverse development projects, and that it enacted the challenged ordinance in order to further these objectives. The objectives of increasing the amount of affordable housing in the city to comply with the Housing Element Law and of locating such housing in economically diverse developments are unquestionably constitutionally permissible purposes.<sup>72</sup>

In a 2002 case also addressing the legality of an inclusionary housing policy, a California appellate court also found that the challenged ordinance withstood a substantive due process challenge. In that case, the City of Napa justified its inclusionary housing ordinance on similar

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when the “the government’s infringement was ‘arbitrary,’ ‘conscience shocking,’ or ‘oppressive in a constitutional sense,’ not merely ‘incorrect, or ill-advised’”(citing *Ferran v. Town of Nassau*, 471 F.2d 363, 369-70 (2d Cir. 2006); *Ahmed v. Town of Oyster Bay*, 7 F. Supp. 3d 245 256 (E.D.N.Y. 2014) (denying motion to dismiss and finding there was a “plausible claim for denial of substantive due process”).

<sup>68</sup> *Id.*; see also *Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127, 136 (N.Y. 2010); *Matter of Upstate Land & Props., LLC v. Town of Bethel*, 905 N.Y.S.2d 284, 286 (App. Div. 3d Dep’t 2010); *Matter of Ken Mar Dev., Inc. v. Dep’t of Pub. Works of City of Saratoga Springs*, 862 N.Y.S.2d 202, 206 (App. Div. 3d Dep’t 2008).

<sup>69</sup> Bower at 627.

<sup>70</sup> *Id.* (citing *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198 (2003)).

<sup>71</sup> *Id.* (citing *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 501 (2d. Cir. 2001) and *Lisa’s Party City, Inc. v. Town of Henrietta*, 185 F. 3d 12, 17 (2d. Cir. 1999)).

<sup>72</sup> *California Bldg. Indus. Assn. v. City of San Jose*, 61 Cal. 4th 435, 462-63 (2015).

grounds, citing the need for affordable housing within the jurisdiction. The California Court of Appeal held that there was little question that creation of affordable housing was “a legitimate state interest,” and that by requiring the creation of affordable units “it is beyond question” that the policy would advance that interest.<sup>73</sup>

The California Court of Appeal also held that the existence of a procedure by which the city could “reduce, modify or waive” the requirement saves it from a facial due process challenge: “‘A claim that a regulation is *facially* invalid is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional *application* to the complaining parties....’”<sup>74</sup> When an ordinance contains provisions that allow for administrative relief, we must presume the implementing authorities will exercise their authority in conformity with the Constitution.”<sup>74</sup> Like the ordinance at issue in the City of Napa Valley case, New York City’s proposed policy also contains a waiver/modification mechanism, making a facial due process challenge more difficult.

Though New York State courts have yet to directly rule on the validity of inclusionary zoning programs, precedent involving incentive zoning and residential zoning suggests that the city has some latitude in designing its MIH zoning regulations. While often not framed as due process challenges, New York courts have considered the legitimacy of zoning regulations and, in their analyses, deferentially reviewed the justification for the policy and the link between the policy’s means and its goal. For example, the New York Court of Appeals has held that zoning designed to increase the provision of housing for populations lacking access to housing (in that case, the elderly) had a rational basis.<sup>75</sup> The Court of Appeals has also upheld an incentive zoning scheme intended to produce more housing, finding that the goal (production of more housing) was rational and the means (the incentive zoning scheme) was reasonably related to that goal.<sup>76</sup> New York courts have also held that municipalities have some measure of authority to restrict the nature of a residence’s composition in a particular zone. For example, a town regulation creating a unique zoning designation for residential neighborhoods to be occupied only by “families” and functional equivalents of “families” (as defined in the town’s zoning code), was upheld as a valid zoning regulation.<sup>77</sup>

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<sup>73</sup> Home Builders Ass’n of N. California v. City of Napa, 89 Cal. App. 4th 897, 198 (2001), *cert. denied*, 535 U.S. 954 (2002). In its discussion, the Court of Appeals applied the “substantially advances” standard in adjudication of the plaintiff’s takings claim; subsequently, however, in *Lingle v. Chevron*, 544 U.S. 528 (2005), the U.S. Supreme Court clarified that the test is actually a due process inquiry.

<sup>74</sup> *Id.* at 199 (internal citations omitted). *But see* *Sintra, Inc. v. City of Seattle*, 119 Wash. 2d 1, 22 (1992) (holding, even where variance procedure existed, charge of \$218,000 fee to develop a \$670,000 property was “a regulation with such an unbalanced impact [that it] violates due process”).

<sup>75</sup> *Maldini v. Ambro*, 36 N.Y.2d 481, 484-86 (N.Y. 1975) (reasoning that “[c]ertainly, when a community is impelled, consistent with such criteria, to move to correct social and historical patterns of housing deprivation, it is acting well within its delegated ‘general welfare’ power.” Note however that in dicta, the court actually expressly distinguished age, as a stage in life that is common to all people, from “unalterable or obstinate classification like race, religion or economic status” (emphasis added)).

<sup>76</sup> *Asian Americans for Equality*, 72 N.Y.2d at 131.

<sup>77</sup> *Atlas Henrietta, LLC v. Town of Henrietta Zoning Bd. of Appeals*, No. 12/9441, 2013 WL 9774733, at \*10 (N.Y. Sup. Ct. 2013) (quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (“A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make



Given the very deferential standard employed by courts in evaluating a legislative body's assessment of the governmental interest embodied in a zoning amendment,<sup>78</sup> it is likely that the city's interest in promoting the creation of economically diverse neighborhoods is likely to be upheld as promoting a legitimate governmental interest.

### **Does MIH Constitute Taking of Property for Public Use Without Just Compensation?**

The Fifth Amendment to the United States Constitution states “nor shall private property be taken for public use, without just compensation,” and through the Fourteenth Amendment this prohibition applies to state and local governments. Challenges to inclusionary zoning programs often include a claim that the local government's regulation deprives private land owners of their property for public use without offering just compensation, in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution.<sup>79</sup> The U.S. Supreme Court has recognized three types of government actions that can result in a taking: physical occupation or invasion of property, government regulation of property, and land-use exactions.<sup>80</sup>

A permanent physical occupation of property by the government for public use is the axiomatic example of a taking. This type of government action on its face requires compensation.<sup>81</sup>

However, regulation of property can also amount to a taking in violation of the Fifth Amendment. It is well established that local governments have the power to regulate property and land use in furtherance of the general welfare. And, of course, government regulation of property can have the effect of reducing the property's value without offending the Constitution. However, when regulations go “too far” in diminishing the value of private property, they can trigger an owner's right to compensation.<sup>82</sup> A regulation that “deprives land of all economically beneficial use” constitutes a per se taking, though the Supreme Court has characterized such a “total taking” as “relatively rare” and an “extraordinary circumstance.”<sup>83</sup> To prevail on such a challenge, landowners must show by “dollars and cents” evidence that a regulation so restricts their property's uses that it destroys “all but a bare residue of” the property's economic value.<sup>84</sup>

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the area a sanctuary for people”). The court reasoned that the regulation still permitted reasonable rental situations for non-families in other zones.

<sup>78</sup> *Asian Americans for Equality*, 72 N.Y.2d at 131 (“Because zoning is a legislative act, zoning ordinances and amendments enjoy a strong presumption of constitutionality and the burden rests on the party attacking them to overcome that presumption beyond a reasonable doubt.”).

<sup>79</sup> See e.g., *Holmdel Builders Ass'n v. Holmdel*, 121 N.J. 550, 556 (1990); *Cal. Bldg. Indus. Assn. v. City of San Jose*, 61 Cal. 4<sup>th</sup> 435, 457 (2015); *2910 Ga. Ave. LLC v. District of Columbia*, 983 F. Supp. 2d 127, 130 (D.D.C. 2013).

<sup>80</sup> See generally ROBERT MELTZ, *SUBSTANTIVE TAKINGS LAW: A PRIMER*, UNITED STATES COURT OF FEDERAL CLAIMS, 27TH ANNUAL JUDICIAL CONFERENCE (2014).

<sup>81</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (“We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.”). See also *Horne v. Department of Agriculture*, 135 S.Ct. 2419, 2426 (2015) (“The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.”).

<sup>82</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

<sup>83</sup> *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1017-18 & 1027 (1992).

<sup>84</sup> *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 681 N.Y.S.2d 329, 330 (1998), *aff'd*, 721 N.E.2d 971 (1999).

Where a regulation falls short of achieving a total taking, it is still possible that it runs afoul of the Takings Clause if it perpetrates a “partial” regulatory taking, as defined by the three-part test set forth by the Supreme Court in *Penn Central Transportation Co. v. City of New York*. Noting that this test involves “ad hoc, factual inquiries,” the Court identified the following three factors for this partial regulatory takings test: (i) “the economic impact of the regulation;” (ii) “the extent to which the regulation has interfered with distinct investment-backed expectations;” and (iii) “the character of the government action.”<sup>85</sup>

The third category of government action that can qualify as a taking is a land use exaction, which is when a local government places condition that amounts to a taking on the right to develop land. Valid land use exactions are aimed at mitigating the harm caused by development, and they are permissible as long as the condition is closely related to the harm.<sup>86</sup> When the connection between the condition and the harm of the development is insufficient, the condition burdens the constitutional right to just compensation and is, thus, an unconstitutional condition.

The test for whether an exaction is constitutional derives from the Supreme Court in three separate cases *Nollan v. California Coastal Commission*, *Dolan v. the City of Tigard*, and *Koontz v. St. Johns River Water Management District*. In *Nollan*, the U.S. Supreme Court established that an exaction condition must “serv[e] the same governmental purpose that would justify denial of the permit”—that is, there must be an “essential nexus” between the purpose of the regulation and the condition it imposes.<sup>87</sup> Building on *Nollan*, the Court emphasized in *Dolan* that a development condition must demonstrate “roughly proportionality” to the proposed development’s impact.<sup>88</sup> While “no precise mathematical calculation” is required, “some sort of individualized determination” is necessary.<sup>89</sup> The Court in *Koontz* reaffirmed the standards from *Nollan* and *Dolan*, and went further to hold that the nexus and rough proportionality standards apply “even when the government denies the [land use] permit and even when its demand is for money.”<sup>90</sup>

### Takings Analysis Applied to Inclusionary Zoning

In the case of the city’s MIH proposal, simply stated, when a property owner chooses to create new residential units, some portion of those units must be rented or sold at affordable prices. The property owner maintains possession and control over the use of his or her property. In other words, the MIH policy regulates the private use of property; it does not seize that property, or any portion of it, for public use. For this reason, inclusionary zoning policies are not typically challenged as physical takings;<sup>91</sup> and any such challenge against New York City’s MIH policy seems very unlikely.

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<sup>85</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

<sup>86</sup> In this section, we call use the terms illegal exaction claim or exaction analysis, but courts also talk about such a claim as an unconstitutional conditions claim or analysis.

<sup>87</sup> *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987).

<sup>88</sup> *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>89</sup> *Id.* at 391.

<sup>90</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (2013).

<sup>91</sup> See e.g., *Cal. Bldg. Indus. Assn. v. City of San Jose*, 61 Cal. 4th 435, 462 (2015) (differentiating regulatory from physical takings and conducting only regulatory takings analysis); *Board of Supervisors v. De Groff Enterprises*,

It is also unlikely that the MIH policy could be successfully challenged as a regulatory taking.

It would be very hard to establish that the policy is a total regulatory taking, depriving an owner of all economically beneficial use of a property. First of all, MIH only applies when a property is being developed or significantly rehabilitated for residential use. It has no bearing on the existing use of the property or any non-residential uses. And, most critically, the policy does not apply at all to developments with 10 units or less.<sup>92</sup> Thus, there is always a development option to which the policy would not apply. There is also, of course, the BSA hardship waiver through which owners can obtain relief from the MIH requirements if the requirements are too onerous in a particular circumstance.<sup>93</sup>

Moreover, where MIH does apply, it only partially reduces the income from a relatively small subset of units in the property. The unit of measurement for the takings inquiry, the Supreme Court has held, is the entire property being regulated—not any specific portion of the land or rights at issue.<sup>94</sup> And, in the context of inclusionary zoning, courts have evaluated the entire property as the relevant unit of measurement. In the case of MIH, at most only 30 percent of the newly built residential floor area on the affected zoning lot will be subject to the affordability requirement.<sup>95</sup>

For similar reasons, it is also unlikely that the policy amounts to a partial regulatory taking under the *Penn Central* test. Considering the first prong of the partial regulatory takings test, as we have noted, the economic impact of the policy on any potential plaintiff only equates to the difference between the market value and the regulated value of one-third or less of any newly built residential units. If an owner chooses to continue to operate his or her property without adding additional units, develops a non-residential property, or builds a small residential building, the regulation has no impact. And, if the MIH requirements are triggered, only a fraction of the value generated by those units is lost due to the regulation. Indeed, if in any particular instance, the city's proposed MIH policy threatens an owner's ability to "realize a reasonable return," the proposal includes a procedure through which the requirement can be reduced.<sup>96</sup> The impact, therefore, is not likely to support a finding that the policy is a regulatory taking.<sup>97</sup>

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Inc., 198 S.E.2d 600, 602 (1973) (Virginia Supreme Court holds inclusionary zoning ordinance violates State Constitution takings clause after "depriving the owner of beneficial use," not physical occupation).

<sup>92</sup> Proposed MIH Text § 23-154(d)(4)(i) at 9.

<sup>93</sup> Proposed MIH Text § 73-624 at 58.

<sup>94</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978) ("Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the 'landmark site.'").

<sup>95</sup> Proposed MIH Text § 23-154(d)(3) at p. 6-7.

<sup>96</sup> Proposed MIH Text § 73-624 at p. 55.

<sup>97</sup> *Compare with* *First English Evangelical Lutheran Church v. Cty. Of L.A.*, 482 U.S. 304, 329 (1987) ("A regulatory program that adversely affects property values does not constitute a taking unless it destroys a *major portion* of the property's value") (emphasis added); *Concrete Pipe & Prods. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 645 (1993) ("mere diminution in the value of property, however serious, is insufficient to demonstrate a taking") (citing approximately 75% diminution in value in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926), and 92.5% diminution in *Hadacheck v. Sebastian*, 239 U.S. 394, 405(1915)).

Moving to the second *Penn Central* factor, the proposed MIH policy itself would do little to interfere with reasonable investment-backed expectations because it would not interfere with landowners' existing use of property. Rather, it applies new conditions on use. There may be instances when it is coupled with a rezoning that change the underlying use of the land (for example, a rezoning of a manufacturing zone to a residential zone), but that change in permitted use is not accomplished through the MIH policy. The *Penn Central* Court noted that landowners' "primary expectation concerning the use of the parcel" would be the "present uses of the Terminal;" and, because the landmarks regulation in that case did not interfere with the reasonable returns to be secured from that expected, present use, it was constitutional.<sup>98</sup> Landowners may also claim a land use decision interferes with their reasonably expected future use of a property.<sup>99</sup> However, MIH does not define the use of the property—that is done through the underlying zoning; MIH places conditions on use. Generally, if a regulation is only "readjusting rights and burdens" in fields or businesses that "had long been subject" to regulation, the plaintiff "cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."<sup>100</sup>

Finally, addressing the third *Penn Central* factor, the "character of the governmental action" generally requires distinguishing between "whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'"<sup>101</sup> New York City has established a firm justification for its actions here as a legitimate use of its police power, as we discuss elsewhere in this paper, and is well within its authority to regulate land use under state law. For these reasons, the city's proposed policy is well-insulated from successful regulatory takings claims.

The city's MIH policy, and indeed inclusionary zoning policies in general, are most vulnerable to takings claims formulated on the grounds that they constitute illegal land use exactions. Inclusionary zoning policies are likened to exactions when they are characterized as concessions required from developers by local governments in exchange for the right to build. New York City is plainly trying to avoid this characterization and deliberately not seeking to support its proposed policy as a constitutional exaction.<sup>102</sup> However, plaintiffs often argue that inclusionary housing laws should be treated as exactions.<sup>103</sup> The remainder of this section will consider whether New York courts are likely to subject the city's MIH policy to review as a land use exaction, if such a challenge were to arise. Ultimately, we doubt that a court would consider the proposed MIH policy an exaction, so we think it unlikely that the policy would be subject to *Nollan/Dolan* analysis. However, as we address briefly at the end of the section below, if it were subject to this analysis, it is unlikely that the policy would survive challenge in its current form.

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<sup>98</sup> *Penn Central* at 136

<sup>99</sup> *Consumers Union of U.S., Inc. v. State*, 806 N.Y.S. 99, 134 (N.Y. 2005).

<sup>100</sup> *Concrete Pipe & Prods. V. Constr. Laborers Pension Tr.*, 508 U.S. 602, 645-46 (1993).

<sup>101</sup> *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (citing *Penn Central* at 123).

<sup>102</sup> See discussion *supra* Section I.b.i.

<sup>103</sup> Iglesias, *supra* note 6 at 8.

## Will Courts Apply Exactions Analysis to MIH?

The first question to consider when evaluating an illegal exaction claim is, of course, whether the challenged government action constitutes an exaction. Until the 2013 U.S. Supreme Court decision in *Koontz* suggested the definition might be broader, it was well established that an exaction is a condition on development that, if directly imposed, would constitute a taking.<sup>104</sup> Based on the pre-*Koontz* understanding of the law, MIH would not amount to an exaction for the same reasons why it is not a physical or regulatory taking, as addressed above.

Moreover, there is also case law (pre-dating *Koontz*) that supports the argument that, because MIH is a legislative enactment, it is not subject to the *Nollan/Dolan* standard. Many state and federal courts have held that the legislative nature of a condition on development rendered it less suspect and therefore not subject to the more onerous nexus and proportionality standards. Indeed, the U.S. Supreme Court in *Dolan* limited its holding to adjudicative exactions, and distinguished such exactions from generally applicable land use regulations.<sup>105</sup> The *Koontz* court did not address the legislative/adjudicative distinction; however, the dissent suggests that the legal import of this distinction has not yet been decided by the high court.<sup>106</sup> There is at least one justice on the Court, however, who has expressed skepticism that this often-cited distinction is valid.<sup>107</sup> However, even if *Nollan/Dolan* were to be applied to legislative acts deemed exactions, the city's MIH policy would have still been exempt from that analysis because regulation in this case does not perpetrate a taking.

In the preeminent New York State case addressing the illegal exactions standard, *Smith v. Town of Mendon*,<sup>108</sup> the New York Court of Appeals held that *Nollan/Dolan* analysis applies only to "exactions" that are administratively imposed.<sup>109</sup> Moreover, the court defined an "exaction"

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<sup>104</sup> See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546-47 (2005) ("The question was whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny.").

<sup>105</sup> *Dolan*, 512 U.S. at 385 ("First, [generally applicable land use regulations] involve[] essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city."); see also *Lingle*, 544 U.S. at 547 (noting that *Dolan*'s holding is limited to adjudicative exactions).

<sup>106</sup> *Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting) ("The majority might, for example, approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable. *Dolan* itself suggested that limitation by underscoring that there 'the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel,' instead of imposing an 'essentially legislative determination [ ] classifying entire areas of the city.' Maybe today's majority accepts that distinction; or then again, maybe not." (internal citations omitted)).

<sup>107</sup> See *California Bldg. Indus. Ass'n v. City of San Jose, Calif.*, 136 S. Ct. 928 (2016) (Thomas, J., concurring in the denial of cert.) ("For at least two decades, however, lower courts have divided over whether the *Nollan/Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one. That division shows no signs of abating. The decision below, for example, reiterated the California Supreme Court's position that a legislative land-use measure is not a taking and survives a constitutional challenge so long as the measure bears 'a reasonable relationship to the public welfare.' I continue to doubt that 'the existence of a taking should turn on the type of governmental entity responsible for the taking.'" (internal citations omitted)).

<sup>108</sup> 822 N.E.2d 1214, 1219 (N.Y. 2004).

<sup>109</sup> *Bonnie Briar Syndicate, Inc.*, 721 N.E.2d at 975 (interpreting *City of Monterey* as rejecting *Nollan/Dolan*'s applicability to generally applicable zoning regulations).

narrowly as a “dedication of property to public use”—that is, dedications that implicate a property owner’s “right to exclude others” from her private property.<sup>110</sup> Remaining consistent with precedent that it had established, the Court of Appeals in *Smith* also allowed that a fee imposed “in lieu of the physical dedication of property to public use” is an exaction.<sup>111</sup> The *Smith* court’s narrow definition of “exactions” seems to exclude the city’s MIH set-aside conditions, wherein developers allocate a number of residential units to be rented at certain affordability levels, but in no manner transfer any claim of title to the city.<sup>112</sup>

In the decade since *Smith*, however, the land use exactions landscape has shifted with the U.S. Supreme Court’s decision in *Koontz v. St. Johns River Water Management District*, a wetlands environmental mitigation case.<sup>113</sup> *Koontz* might be read to expand the types of conditions to which *Nollan/Dolan* analysis applies. In *Koontz*, the Court held that *Nollan/Dolan* analysis applied to monetary fees that operate on an identifiable property interest in reference to the government’s condition that a landowner hire contractors to make improvements to off-site wetlands—i.e., that the landowner *spend* money—not give *fees* to the government. The Majority implicitly reasoned that requiring a developer to spend money is functionally equivalent to paying a monetary fee to the government,<sup>114</sup> since both involve a “monetary obligation [that] burden[s] petitioner’s ownership of a specific parcel of land.”<sup>115</sup>

An expansive reading of *Koontz* could mean that regulations that require an owner to spend money as a condition of development qualify as exactions subject to the nexus and rough proportionality tests. This reading would significantly broaden the set of land use decisions subject to *Nollan/Dolan* analysis. The *Koontz* dissent writes, “The majority’s approach, on top of its analytic flaws, threatens significant practical harm. By applying *Nollan* and *Dolan* to permit conditions requiring monetary payments—with no express limitation except as to taxes—the

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<sup>110</sup> *Smith*, 822 N.E.2d at 1219 (required dedications of property amount to exactions only when they are for public use) (interpreting *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999), and applying *Nollan* and *Dolan* narrowly). The dissent in *Smith v. Town of Mendon* criticized the majority’s interpretation of “public use,” doubting that the U.S. Supreme Court has intended to limit the definition of exactions to those dedications of property that “entail public access or otherwise restrict the landowner’s right to exclude,” reasoning that “of course, the phrase ‘public use’ does not unambiguously equate with public access. Indeed, in takings jurisprudence ‘public use’ has come to mean something more akin to a public purpose or public benefit.” *Smith*, 822 N.E.2d at 1226-27.

<sup>111</sup> See *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d 821 (N.Y. 2003). Judge Read, dissenting in *Smith v. Town of Mendon*, disagreed with what he considered the Majority’s narrow reading of *Twin Lakes*: “In *Twin Lakes*, the parties agreed that *Nollan/Dolan* applied to the exaction, but there is no indication that [the application] hinged on the fact that the fees were exacted in lieu of a land dedication.” Judge Read disapproved of the Majority’s formulation for “run[ning] counter to the expectations of localities and developers throughout the United States.” *Smith*, 822 N.E.2d at 1219, 1228 (N.Y. 2004).

<sup>112</sup> But cf. *Sterling Park v. Palo Alto*, 57 Cal.4th 1193 (Cal. 2013) (defining a requirement to grant a purchase option on affordable set-aside units to government as an “exaction” under California Mitigation Fee Act, on theory that purchase option requirement qualified as a possessory interest in property). See also *Seawall Associates v. New York*, 74 N.Y.2d 92, 104 (N.Y. 1989) (government-coerced set-asides imply a loss of possessory interest in the right to exclude amounting to per se physical takings) (impliedly abrogated on related but distinct grounds by *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 721 N.E.2d 971 (N.Y. 1999), cert. denied, 529 U.S. 1094 (2000)).

<sup>113</sup> 133 S. Ct. 2586 (2013).

<sup>114</sup> Cf. J. Kagan, dissent, *Koontz*, 133 S. Ct. at 2606 (“[A] requirement that a person pay money to repair public wetlands is not a taking [...] it simply ‘imposes an obligation to perform an act’ (the improvement of wetlands) that costs money”) (quoting *Eastern Enterprises v. Apfel*, 524 U.S. 498, 540-541 (1998)).

<sup>115</sup> *Koontz*, 133 S. Ct. at 2599.

majority extends the Takings Clause, with its notoriously ‘difficult’ and ‘perplexing’ standards, into the very heart of local land-use regulation and service delivery.”<sup>116</sup>

However, it is also possible that *Koontz* will be read more narrowly, as it has recently been interpreted by the California Supreme Court in an inclusionary zoning case. And, notably, the U.S. Supreme Court has declined to take up the case.<sup>117</sup> The California Supreme Court, in its recent decision addressing San Jose’s inclusionary housing policy, considered whether an inclusionary housing policy was subject to the standard for exactions under *Koontz*.<sup>118</sup> Ultimately, the court held it was not, because the policy was not an exaction.<sup>119</sup> San Jose’s policy required that “all new residential development projects of 20 or more units to sell at least 15 percent of the for-sale units at a price that is affordable to low or moderate income households.”<sup>120</sup> The court explained that this requirement “is an example of a municipality’s permissible regulation of the use of land under its broad police power,” and does not constitute “a government exaction of property.”<sup>121</sup> As such, the court held that *Koontz* is inapplicable.

The California court explained,

Nothing in *Koontz* suggests that the unconstitutional conditions doctrine under *Nollan* and *Dolan* would apply where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval. . . . This condition does not require the developer to dedicate any portion of its property to the public or to pay any money to the public. Instead, like many other land use regulations, this condition simply places a restriction on the way the developer may use its property by limiting the price for which the developer may offer some of its units for sale.<sup>122</sup>

The court also concluded that because the set-aside was permissible, so was the city’s alternative off-site and in lieu fee options: because the set-aside requirement “does not violate the *Nollan/Dolan* doctrine, it follows that the affordable housing requirement of the San Jose ordinance as a whole—including the voluntary off-site options and in lieu fee that the ordinance makes available to a developer—does not impose an unconstitutional condition in violation of the takings clause.”<sup>123</sup>

The California court’s reasoning is in line with that of the pre-*Koontz* New York Court of Appeals.<sup>124</sup> But, the Court of Appeals has not yet addressed an exactions/development conditions

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<sup>116</sup> *Koontz*, 133 S. Ct. at 2607 (Kagan, J., dissenting)

<sup>117</sup> *California Bldg. Indus. Ass’n*, 136 S. Ct. at 928 (denying petition for writ of certiorari).

<sup>118</sup> *California Bldg. Indus. Assn. v. City of San Jose*, 61 Cal. 4th 435 (2015), cert. denied, 136 S.Ct. 928 (2016).

<sup>119</sup> *See id.* at 443-44.

<sup>120</sup> *Id.* at 442.

<sup>121</sup> *Id.* at 457.

<sup>122</sup> *Id.* at 460-61.

<sup>123</sup> *Id.* at 468-69.

<sup>124</sup> *See Smith*, 822 N.E.2d at 1219; *Consumers Union of U.S., Inc. v. State*, 840 N.E.2d 68, 83 (N.Y. 2005) (“We have confined our exaction analysis to those cases where the condition affects a property owner’s ‘right to exclude

claim post-*Koontz*, so it remains to be seen how it might re-align *Smith*'s treatment of *Nollan/Dolan*. In one case post-*Koontz*, however, an Appellate Division court indicated in dicta that the *Smith* court's narrow application of *Nollan/Dolan* remains intact, noting that petitioners had failed to "clai[m] that the conservation fee falls within the narrow category of exactions to which the rough proportionality test is applicable,"<sup>125</sup> citing to *Smith*'s "dedication of property to public use" analysis.<sup>126</sup>

However, if a court were to conclude that the city's proposed MIH policy was subject to the standard set forth for evaluating the constitutionality of exactions, it likely that the current version of the policy would fail. The city has not completed the kind of nexus study common now as precursors to exaction regulation to establish the impacts of the development on the municipality. And, without such a study, it would be very hard—maybe impossible—for the city to establish that its set-aside requirement was necessary to address and proportional to the harm caused by any specific new development project.<sup>127</sup> The city has not attempted to justify the policy as mitigation for any particular harm stemming from new development; nor is the set-aside requirement linked to the magnitude of any particular development-specific harm. Rather, the city has gone to great lengths to document and justify its policy as necessary to meet a public policy goal of fostering economically diverse neighborhoods—both the policy itself and the terms of its requirements are aimed at furthering that generally applicable governmental interest, as currently framed. While it may be possible for the city to justify the existing policy as an exaction, it would need to present a wholly distinct set of rationales for the policy and its design in order to meet the *Nollan/Dolan* standard, if it were found to apply.

### State Law Restrictions on Regulation of Property

In addition to the constitutional limits on a city's ability to regulate property, there are also state law limits on this power that cities must consider as they design land use policies. Below we consider the three major areas of state law that could pose impediments to the imposition of an inclusionary zoning policy.<sup>128</sup>

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others,' and where a fee is imposed 'in lieu of the physical dedication of property to public use'.") (internal citations omitted).

<sup>125</sup> *Matter of Gabrielli v. Town of New Paltz*, 116 A.D.3d 1315, 1321 (N.Y. App. Div. 2014).

<sup>126</sup> *See Smith v. Town of Mendon*, 4 N.Y.3d 1, 11-12 (N.Y. 2004).

<sup>127</sup> *See generally* Josephine L. Ennis, Comment, *Making Room: Why Inclusionary Zoning is Permissible Under Washington's Tax Preemption Statute and Takings Framework*, 88 Wash. L. Rev. 591, 632 ("A city that produces findings showing the nexus between development and the need for set-asides will have a much easier time overcoming the *Nollan* and *Dolan* tests."); Adam F. Cray, *The Use of Residential Nexus Analysis in Support of California's Inclusionary Housing Ordinances: A Critical Evaluation* (Nov. 2011), available at <http://www.cbias.org/go/linkservid/06D3172D-35C3-4C71-9A9098D439C63874/showMeta/0/>. *See also* CITY AND COUNTY OF SAN FRANCISCO, RESIDENTIAL NEXUS ANALYSIS (APRIL 2007); CITY OF FREMONT, RESIDENTIAL NEXUS ANALYSIS: INCLUSIONARY HOUSING ORDINANCE (APRIL 2010); CITY OF SAN JOSE, RESIDENTIAL NEXUS ANALYSIS (OCTOBER 2014).

<sup>128</sup> *See Iglesias, supra* note 6.



## Does MIH Exceed the Authority Granted to New York City by the State to Zone?

In 1916, New York City was the first American city to enact a comprehensive zoning ordinance. The ordinance separated uses into different districts, creating residential, business, and unrestricted districts. In 1920, the New York Court of Appeals upheld the zoning ordinance as constitutional and as a “proper exercise of the police power.”<sup>129</sup> Other states followed New York, and by the time the United States Supreme Court upheld the right of local governments to regulate the use of land within their established boundaries in *Village of Euclid v. Ambler Realty Co.*,<sup>130</sup> in 1926, over 500 U.S. municipalities had adopted similar zoning ordinances.<sup>131</sup> *Euclid* established that zoning power must be “asserted for the public welfare,” and that a local government’s use of zoning power should generally be granted a broad measure of judicial deference.<sup>132</sup>

The Supreme Court also affirmed in *Euclid* that a local government derives its zoning power through state allocation of that power (along with more general police power) to municipalities—either through state enabling legislation or by a state grant of home-rule authority.<sup>133</sup>

The New York State legislature<sup>134</sup> grants municipalities their zoning power through the standard land use and zoning enabling legislation provided in the New York General City Law § 20(24) and (25)<sup>135</sup> and by the broader grant of home rule authority from the state to municipalities in New York Municipal Home Rule Law § 10, as permitted in Article IX of the NYS Constitution.<sup>136</sup> These grants establish the legitimate purposes for which municipalities must or may exercise their zoning powers.

The New York State legislature even further lays out the breadth and limits of municipal zoning power with additional enabling legislation in Article 5-A (Buildings and Use Districts) of the New York General City Law, but specifically excludes cities with populations over one million

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<sup>129</sup> *Lincoln Trust Co. v. Williams Building Corp.*, 128 N.E. 209 (N.Y. 1920).

<sup>130</sup> 272 U.S. 365, 47 S. Ct. 114 (1926).

<sup>131</sup> See “Overlay Zoning in NYS,” at 2.

<sup>132</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (“If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.”) See also *McMinn v. Town of Oyster Bay*, 488 N.E.2d 1240, 1242 (N.Y. 1985) (“Zoning ordinances, like other legislative enactments, are presumed constitutional and the burden is on the party challenging the ordinance to prove its unconstitutionality beyond a reasonable doubt”).

<sup>133</sup> *Euclid*, 272 U.S. at 387.

<sup>134</sup> NYS courts have explicitly rejected reading Article IX, §2(c) of the NYS Constitution as directly conferring local zoning power on local governments. *Kamhi v. Planning Bd. of Yorktown*, 452 N.E.2d 1193, 1195 (N.Y. 1983) (“Towns and other municipal authorities have no inherent power to enact or enforce zoning or land use regulations. They exercise such authority solely by legislative grant”).

<sup>135</sup> N.Y. GEN. CITY LAW, ARTICLE 2-A (POWERS OF CITIES), § 20 (McKinney 2011).

<sup>136</sup> N.Y. CONST. art. IX, § 2; N.Y. MUN. HOME RULE LAW §10.1(ii)(a)(12) (Local governments have police power to adopt local laws relating to: “the government, protection, order, conduct, safety, health and well-being of persons or property therein”); N.Y. MUN. HOME RULE LAW §10.1(ii)(a)(14) (Local governments have “powers granted to it in the statute of local governments”); and N.Y. STAT. LOC. GOV. §10.6 (Local governments have the “power to adopt, amend and repeal zoning regulations”). See *Kamhi*, 452 N.E.2d at 351. Article IX of the NYS Constitution permits the Legislature to grant such home rule authority. See generally Joe Stinson, *The Home Rule Authority of New York Municipalities in the Land Use Context* (Pace Law School Land Use Center 1997), on file.

(i.e., the City of New York) from Article 5-A applicability.<sup>137</sup> New York City has instead established its own zoning authority through its City Charter and enabled a consortium of city land-use entities to exercise elements of that authority as provided in its Administrative Code and Zoning Resolution.

While the exact language varies, these enabling provisions permit the city to regulate the use of land in furtherance of the health, safety, and welfare of the city. Zoning is distinct from the general police power because it specifically implicates the use of land.<sup>138</sup> The zoning enabling law also requires that zoning regulations be “in accord with a well considered plan.”<sup>139</sup> Failure to meet this requirement could open a city up to claims of *ultra vires* regulation.

It is possible, however, for a zoning regulation to go too far when it becomes unmoored from the regulation of land.<sup>140</sup> In review of a zoning regulation prohibiting check-cashing businesses in the business district, the New York Court of Appeals noted that the town failed to argue that the targeted businesses were a negative externality for the community or that the regulation was linked to the “legitimate objects of the zoning power.”<sup>141</sup> The Court explained that “the zoning power is not a general police power, but a power to regulate land use . . . . The provision at issue here contradicts this principle. [It] was directed at the perceived social evil of check-cashing services . . . . Whatever the merits of this view as a policy matter, it cannot be implemented through zoning. [The regulation] is obviously concerned not with the use of the land but with the business done by those who occupy it.”<sup>142</sup>

While the *Sunrise Check Cashing* case highlights the boundaries of the zoning power, courts review zoning regulations deferentially. The most apposite case for the city here is *Asian Americans for Equality v. Koch*.<sup>143</sup> In that case, the Court of Appeals upheld the validity of an incentive-based affordable housing zoning ordinance on the rationale that because it had been enacted after careful study, preparation, and consideration, it had been enacted according to a well-considered plan to achieve a legitimate purpose.<sup>144</sup> The Court of Appeals thus condoned the city’s zoning ordinance as a valid “attemp[t] to use incentive zoning to provide realistic housing

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<sup>137</sup> N.Y. GEN. CITY LAW § 81-E (Consol. 1994) (“[t]he provisions of this article shall not apply to any city having a population in excess of one million people”). See generally Chapter 3: New York City Land Use Law, John R. Nolon, *Well Grounded: Using Local Land Use Authority to Achieve Smart Growth* (Envtl. Law Inst. 2001) and 6 NO. 4 New York Zoning Law and Practice Report 1.

<sup>138</sup> *Sunrise Check Cashing and Payroll Services v. Town of Hempstead*, 986 N.E.2d 898, 900 (2013) (“Our cases make clear that the zoning power is not a general police power, but a power to regulate land use.”).

<sup>139</sup> N.Y. GEN. CITY LAW, ARTICLE 2-A (POWERS OF CITIES), § 20(25) (McKinney 2011). The Court of Appeals has explained that this requirement of the General City Law is also linked to constitutional limit imposed by the Due Process Clause. The court has explained that land use regulations are “constitutional only if the restrictions are necessary to protect the public health, safety or welfare. The requirement of a comprehensive or well-considered plan not only insures that local authorities act for the benefit of the community as a whole but protects individuals from arbitrary restrictions on their use of their land.” *Asian Americans for Equality v. Koch*, 527 N.E.2d 265, 270 (N.Y. 1988).

<sup>140</sup> *Sunrise Check Cashing and Payroll Services*, 986 N.E.2d at 899.

<sup>141</sup> *Id.* at 900.

<sup>142</sup> *Id.*

<sup>143</sup> *Asian Americans for Equality*, 527 N.E.2d 898.

<sup>144</sup> *Id.* at 271.

opportunities which include new apartments for the poor.”<sup>145</sup> The decision carves out a landing pad for the City’s proposed MIH program as against *ultra vires* regulation challenges.

The court specifically addressed how it evaluates whether a zoning regulation is in “accord with a well considered plan”:

A well-considered plan need not be contained in a single document; indeed, it need not be written at all. The court may satisfy itself that the municipality has a well-considered plan and that authorities are acting in the public interest to further it by examining all available and relevant evidence of the municipality’s land use policies. Zoning legislation is tested not by whether it defines a well-considered plan but by whether it accords with a well-considered plan for the development of the community. When a zoning ordinance is amended, the court decides whether it accords with a well-considered plan in much the same way, by determining whether the original plan required amendment because of the community’s change and growth and whether the amendment is calculated to benefit the community as a whole as opposed to benefiting individuals or a group of individuals.<sup>146</sup>

Because the zoning amendment at issue “was enacted after study and consideration,” “there was no allegation that it was not consistent with the City’s general planning,” and the “legislation was reasonably related to its goals,” the court held that it was in accord with a well-considered plan.<sup>147</sup>

In an earlier case, the Court of Appeals upheld a zoning regulation intended to create housing opportunities for the elderly. In that case, *Maldini v. Ambro*, the Court cited with approval the town’s intention to craft an “inclusionary” policy intended to meet the needs of residents “who otherwise would be likely to be excluded from enjoyment of adequate dwellings within the community.”<sup>148</sup> And, noting the deferential standard of review for zoning enactments, the Court concluded that “even if the validity of that zoning classification were ‘fairly debatable, [the town board’s] legislative judgment must be allowed to control.’”<sup>149</sup>

As with the zoning ordinance at issue in *Asian Americans for Equality*, the city has created an extensive record to document its consideration of the policy and how it fits in with the existing zoning and affordable housing policy of the city.<sup>150</sup> It is also hard to see how the proposed MIH policy would be in conflict with the existing zoning regime—it will be imposed based on neighborhood-based assessments in areas where the city is adding additional zoning capacity. Moreover, each application will require affirmative city action and will trigger an extensive

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<sup>145</sup> *Asian Americans for Equality*, 527 N.E.2d at 273. Though it has declined to *require* local governments to provide for affordable housing, the Legislature has at least opted to enact an enabling statute that *permits* local governments to include housing goals in their statutorily required comprehensive plans.<sup>145</sup> Note that the legislature leaves the City of New York to define its own articulation of a comprehensive plan.<sup>145</sup>

<sup>146</sup> *Id.* at 270 (citations omitted).

<sup>147</sup> *Id.* at 271.

<sup>148</sup> *Maldini*, 330 N.E.2d at 403.

<sup>149</sup> *Id.* (internal citations omitted).

<sup>150</sup> See discussion *supra* Section I.b.

public review procedure, which will presumably result in careful consideration of whether it is in keeping with the other zoning regulations and planning principles at work in a neighborhood. It seems unlikely that, based on these facts and the Court of Appeals precedent, MIH is at risk of being invalidated as not in accord with a well-considered plan.

### **Does MIH Run Afoul of the State’s Prohibition on Regulating Rents?**

The Urstadt Law, New York State’s prohibition on city-imposed rent regulation, is another source of state law that might be used to challenge MIH.<sup>151</sup>

Inclusionary zoning has the effect of regulating housing prices. And, New York City’s proposed Mandatory Inclusionary Housing program is no exception—it seeks to limit the price that can be charged, and delineates eligible households by income, for the affordable units created in regulated properties.<sup>152</sup> The affordable rental units created pursuant to the MIH zoning will also be subject to New York’s rent stabilization laws.<sup>153</sup> The proposed MIH program would apply to both ownership and rental properties.<sup>154</sup>

Some states, including New York, have laws that limit the ability of local jurisdictions to restrict rents in privately owned housing, and these laws have posed a challenge to the imposition of mandatory inclusionary zoning in rental units. In California, Colorado, and Wisconsin, state-level prohibitions on rent regulation invalidated local attempts to regulate rents through inclusionary housing policies.<sup>155</sup>

The decisions in these states do not control the outcome in New York State. The question of how MIH will fare in light of the state’s prohibition is a matter of first impression in New York State. Here we consider how a court might evaluate the question, and conclude that the city’s policy is likely safe from invalidation on this point. As we will discuss in detail below, there are two primary reasons why the Urstadt Law does not prohibit the proposed MIH policy: 1) the Urstadt Law was not intended to interfere with the city’s ability to enact valid zoning regulations, which is a robust and well-protected power under New York State law; and 2) the Urstadt Law, as evidenced by its albeit opaque text and its legislative history, was not intended to limit the ability of the city to regulate yet-to-be-built units.

### New York State’s Rent Laws and the Prohibition on Regulating Rents

Rent stabilization in New York State is a system of state laws that restrict rent increases and impose other tenant protections in certain rental units. Unlike government subsidy programs, rent stabilization does not dictate a particular rent level or tenant income, but instead restricts rent

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<sup>151</sup> Notably, this issue only applies to the regulation of rents in rental units. There is no prohibition applicable in New York that says anything about the restriction of sale prices in for-sale properties.

<sup>152</sup> Proposed MIH Text § 23-154(d)(1) at 6.

<sup>153</sup> Proposed MIH Text § 23-961(b) at 43-44.

<sup>154</sup> Proposed MIH Text §§ 23-961 (“Additional requirements for rental affordable housing”) at 42-48 & 23-962 (“Additional requirements for homeownership affordable housing”) at 48-54.

<sup>155</sup> *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 35 (Colo. 2000), as modified on denial of reh’g (Feb. 26, 2000); *Apartment Ass’n of S. Cent. Wisconsin, Inc. v. City of Madison*, 296 Wis. 2d 173, 196 (2006); *Palmer/Sixth St. Properties, L.P. v. City of Los Angeles*, 175 Cal. App. 4<sup>th</sup> 1396 (2009).

increases. Rent stabilization typically applies to units in buildings with six or more units built before 1974 that rent for less than \$2,700 per month.<sup>156</sup> Units may also become rent stabilized by participating in some government subsidy programs. While rent stabilization is created and controlled by state law, New York City retains the authority to administer the program.<sup>157</sup>

In 1971, an amendment to the rent stabilization law was passed that limited the ability of the city to strengthen the obligations or reach of rent stabilization. Found in the section of the rent laws entitled “Authority for local rent control legislation,” the law, commonly known as the Urstadt Law, imposes two restrictions on New York City.<sup>158</sup> First, the law prohibits the passage of a local law or ordinance that “provide[s] for the regulation and control of residential rents and eviction in respect of any housing accommodations which are (1) presently exempt from such regulation and control or (2) hereafter decontrolled . . . .”<sup>159</sup> The law further limits the ability of the city to impose a local law or ordinance that subjects currently stabilized or controlled units “to more stringent or restrictive provisions of regulation and control than those presently in effect,” without approval of the commissioner of Housing and Community Renewal.<sup>160</sup> The relevant portion of the Urstadt Law for this discussion is the first prong—its prohibition on the passage of laws that regulate rents or evictions in units that were “presently exempt” from regulation in 1971 or that were thereafter decontrolled.

In 2003, the law was amended to add a slightly modified restatement of the prohibition found in the original Urstadt Law. The 2003 addition to the law provides that New York City shall not “adopt or amend local laws or ordinances with respect to the regulation and control of residential rents and eviction . . . or otherwise adopt laws or ordinances pursuant to the provisions of this act . . . except to the extent that such city for the purpose of reviewing the continued need for existing regulation and control of residential rents or to remove a clarification of housing accommodation from such regulation and control adopts or amends local laws or ordinances pursuant to [specific provisions of the rent laws.]”<sup>161</sup>

Notably, the original language was not repealed or revised at this time. The publically available legislative history about the 2003 addendum to the law includes only a brief excerpt from the Senate Debate Transcripts from June 19, 2003.<sup>162</sup> During the debate, Senator Bonacic stated that the new wording just “reconfirmed and clarified” the Urstadt Law.<sup>163</sup> Essentially, New York State would continue to have “sole jurisdiction over housing and rent in the state of New York, including New York City.”<sup>164</sup>

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<sup>156</sup> Units are subject to the rent stabilization rules until they become decontrolled, which typically happens because (i) the existing tenant moves out and the legal rent for the unit reaches the decontrol threshold (currently \$2,700 per month) or, less frequently, (ii) because the rent reaches the decontrol threshold and the existing tenant has an income of more than \$200,000 per year. New York State Homes and Community Renewal. Rent Control and Rent Stabilization: Which apartments are covered? Available at <http://www.nyshcr.org/rent/about.htm#decontrol>

<sup>157</sup> McKinney Unconsol. L. § 8605.

<sup>158</sup><sup>159</sup> While it does not name New York City, the Urstadt Law’s application is limited to “[e]ach city having a population of one million or more.” N.Y. Unconsol. L. § 8605.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> McKinney Unconsol. L. § 8605.

<sup>162</sup> NEW YORK STATE LEGISLATIVE ANNUAL 2003 (2004).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

## Can MIH Survive an Urstadt Law Challenge?

Under New York State law, local governments have broad and well-protected authority to regulate land use. The Court of Appeals has recognized “the regulation of land use through the adoption of zoning ordinances as one of the core powers of local governance.”<sup>165</sup> The state legislature may limit the home rule authority to zone, but such a limitation must be explicit. As the court has explained,

Under the preemption doctrine, a local law promulgated under a municipality’s home rule authority must yield to an inconsistent state law as a consequence of “the untrammelled primacy of the Legislature to act with respect to matters of State concern.” But we do not lightly presume preemption where the preeminent power of a locality to regulate land use is at stake. Rather, we will invalidate a zoning law only where there is a “clear expression of legislative intent to preempt local control over land use.”<sup>166</sup>

Even where a supersession clause exists in a state statute, the state’s high court “[does] not examine the preemptive sweep of this supersession clause on a blank slate.”<sup>167</sup> Rather, it considers three factors when it determines whether the legislature intended to preempt local zoning regulation: “(1) the plain language of the supersession clause; (2) the statutory scheme as a whole; and (3) the relevant legislative history.”<sup>168</sup>

Here, these factors support a finding that the Urstadt Law was not intended to supersede the ability of the city to enact zoning, even if that zoning touches on the regulation of rents. The language of the law, the statutory scheme, and the legislative history support a finding that the Urstadt Law was, instead, intended simply to limit the power of the city to implement the state rent regulation laws. And, there is certainly no “clear expression of legislative intent” to interfere with the city’s control over land use.

### *The Plain Language of the Urstadt Law and the Statutory Scheme*

The law’s language, the case law interpreting it, and the statutory scheme support a narrow reading that limits the prohibition to the confines of actions taken under the city’s administration of the rent regulation laws, rather than a prohibition on zoning.

The Urstadt Law is located in a subsection of the rent laws entitled “Authority for local rent control legislation” that defines the city’s power to administer the rent laws, and could be read narrowly to simply limit that power:

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<sup>165</sup> Wallach v. Town of Dryden, 23 N.Y.3d 728, 743, *reargument denied*, 24 N.Y.3d 981 (2014). *See also* DJL Rest. Corp. v. City of New York, 96 N.Y.2d 91, 96, 749 N.E.2d 186 (2001) (“One of the most significant functions of a local government is to foster productive land use within its borders by enacting zoning ordinances.”).

<sup>166</sup> *Id.* (citations omitted).

<sup>167</sup> *Id.* at 744.

<sup>168</sup> *Id.*

Each city having a population of one million or more, acting through its local legislative body, may adopt and amend local laws or ordinances in respect of the establishment or designation of a city housing rent agency. When it deems such action to be desirable or necessitated by local conditions in order to carry out the purposes of this section, such city, except as hereinafter provided, acting through its local legislative body and not otherwise, may adopt and amend local laws or ordinances in respect of the regulation and control of residential rents, including but not limited to provision for the establishment and adjustment of maximum rents, the classification of housing accommodations, the regulation of evictions, and the enforcement of such local laws or ordinances. . . . Notwithstanding the foregoing, no local law or ordinance shall hereafter provide for the regulation and control of residential rents and eviction in respect of any housing accommodations which are (1) presently exempt from such regulation and control or (2) hereafter decontrolled either by operation of law or by a city housing rent agency, by order or otherwise.<sup>169</sup>

A court may find support for this interpretation of the Urstadt Law in the language and legislative history of the 2003 amendment to the law. While the language of the 2003 amendment is largely similar to that of the original Urstadt Law, it links the prohibition more clearly to the powers the state legislature is conferring under the rent laws themselves. The law states that New York City shall not

adopt or amend local laws or ordinances with respect to the regulation and control of residential rents and eviction . . . *or otherwise adopt laws or ordinances pursuant to the provisions of this act* . . . except to the extent that such city for the purpose of reviewing the continued need for existing regulation and control of residential rents or to remove a clarification of housing accommodation from such regulation and control adopts or amends local laws or ordinances pursuant to [specific provisions of the rent laws.] (emphasis added).<sup>170</sup>

This 2003 language appears to limit its prohibition to the powers exercised “pursuant to the provisions of this act.” And, while the original Urstadt Law did not have this detail, the 2003 legislative history states that this amendment was intended to clarify (rather than amend) the original prohibition. In other words, a court could hold that the Urstadt Law prohibits the city in the administration of rent regulation from making the laws more extensive or stricter, but has no bearing on the ability of the city to regulate rents as part of a larger zoning scheme.

In addition, the Court of Appeals has repeatedly held that that Urstadt Law does not curtail the city’s power to act in furtherance of its broader mandate to legislate for the public welfare. These cases, and the 2003 addition to the Urstadt Law could be used to support the claim that the Urstadt Law was not intended to circumscribe the city’s ability to exercise its zoning power.

The Court of Appeals, in *City of New York v. New York State Division of Housing and Community Renewal*, considered a substantially different fact pattern, but in its holding

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<sup>169</sup> N.Y. Unconsol. Law § 8605 (McKinney).

<sup>170</sup> N.Y. Unconsol. L § 8605.

concluded that the Urstadt Law does not prevent the city from achieving a goal that has the attendant effect of reducing financial returns. In this case, landlords challenged a determination by the city to use one measure of equalized assessed valuation (article 12-A), rather than another valuation (article 12).<sup>171</sup> The Court held that, even though the new valuation method would result in lower return on capital, the law did not violate the Urstadt Law: “Here, accuracy in capital valuation was the goal of Local Law 73. The Urstadt Law does not prohibit City Legislation aimed at achieving that goal.”<sup>172</sup> The court explained that “the Urstadt Law was intended to check City attempts, whether by local law or regulation, to expand the set of buildings subject to rent control or stabilization, and particularly to do so in the teeth of State enactment aimed at achieving the opposite effect.”<sup>173</sup> The court’s holding and narrow interpretation of the Urstadt Law in this case could support the position that when the city acts in furtherance of a goal unrelated to expansion of rent regulation, it does not violate the Urstadt Law.

Indeed, all of the cases where the Court of Appeals has held that the Urstadt Law invalidated local legislation involved local attempts to change the rent regulation laws themselves.<sup>174</sup> In other words, in those cases the city was acting in the capacity that the Urstadt Law directly addresses and thus can be distinguished from cases where the city acts pursuant to its zoning power.

Two of the trial courts that have interpreted the Urstadt Law had similarly narrow readings of the prohibition.

In *Bryant Westchester Realty Corp. v. Bd. of Health of City of New York*, a landlord challenged a local regulation requiring the installation of window guards, arguing that the rule was a form of rent control regulation more stringent than that in effect in 1971 and a violation of the Urstadt Law.<sup>175</sup> The court rejected the plaintiff’s argument, holding that the Urstadt Law’s provisions “apply only to rent control regulation. They were not intended to restrict a municipality in adopting public safety legislation or regulations for purposes other than rent regulation even though more stringent than those in effect prior to 1971, and even though they may affect rent controlled housing.”<sup>176</sup>

In *Seawall Assoc. v. City of New York*, a trial court again interpreted the Urstadt Law narrowly.<sup>177</sup> In this case, the plaintiffs challenged a local law that placed a moratorium on the demolition of SROs. The law also required that landlords rent out their SRO units so that they do not stay vacant and that they rent them at rates listed in the law. Despite the fact that the local law in fact regulated rents, among other things, the court ruled that “[t]he Urstadt Law does not

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<sup>171</sup> *City of New York v. New York State Div. of Hous. & Cmty. Renewal*, 97 N.Y.2d 216, 219 (2001).

<sup>172</sup> *Id.* at 229.

<sup>173</sup> *Id.* at 227.

<sup>174</sup> *Matter of 241 E. 22nd St. Corp. v. City Rent Agency*, 33 N.Y.2d 134 (1973); *210 E. 68th St. Corp. v. City Rent Agency*, 34 N.Y.2d 560 (1974); *Mayer v. City Rent Agency*, 46 N.Y.2d 139 (1978).

<sup>175</sup> 91 Misc. 2d 56 (Sup. Ct. 1977).

<sup>176</sup> *Bryant Westchester Realty Corp. v. Board of Health of City of N.Y.*, 91 Misc.2d 56, 59 (1977) (citations omitted).

<sup>177</sup> *Seawall Assoc. v. City of New York*, 134 Misc. 2d 187 (2010).



apply to this type of regulatory scheme. . . . Local Law 22 goes beyond the mere regulation of rental amounts and creates a broader scheme to preserve SRO units.”<sup>178</sup>

### *The Relevant Legislative History*

There is nothing in the legislative history for the Urstadt Law that suggests that the law was meant to supersede the city’s zoning authority. Indeed, even the broad statements about the law’s purpose found in the legislative history address the city’s powers in the application of the rent control laws. For example, the opening paragraph addressing the bill in the Governor’s Memoranda state, “The purpose of this bill is to encourage the construction of private housing in New York City by assuring that new housing will not be placed under rent regulation and control, and to assure that housing presently under such regulation and control will not be subject to more stringent provision than those presently in effect. . . .”<sup>179</sup> The legislative history repeatedly describes the law as limiting the power of the city under the rent control laws (e.g., “[t]erminate New York City’s authority to extend rent controls;” “removing the City’s power to take such action [under the rent laws] in the future”).<sup>180</sup>

The legislative history also suggests that it has concern about changing the rules that apply to existing buildings that was the motivation for the law; policies like MIH that only apply to new development—and thus pose no uncertainty for owners or developers—are at least arguably not the intended target of the Urstadt Law. The lawmakers who passed the Urstadt Law were concerned with preventing a reoccurrence of the application of rent stabilization to existing, unregulated buildings that took place in 1969, when the city imposed rent stabilization on all units built after 1947. Multiple statements in the Governor’s Memoranda explicitly link the Urstadt Law’s prohibition to concern about applying stricter rules to existing buildings and thereby undermining the investment-backed expectations of owners.

The bill has become a necessity to help recreate the investor confidence that is a prerequisite to private sector investment of new funds in housing construction and maintenance. After 1947, when controls were removed for new construction, there was a surge of new buildings. The implicit agreement that post 1947 housing would remain uncontrolled was breached by the City of New York in 1969, contributing to the severe decline of new housing starts in the City. . . . Removal of the threat of rent control will eliminate a major obstacle to new housing starts in the City.<sup>181</sup>

Again, the legislative history cites the ability to change the rules as they apply to existing buildings as major concern because of the impact that threat would have on new construction:

Since the enactment of the [1969 law], virtually all new private housing construction in the City has ceased. A major cause of this is the fear on the part of

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<sup>178</sup> *Id.* at 201.

<sup>179</sup> *Id.* at 312-13.

<sup>180</sup> *Id.* at 313, 560.

<sup>181</sup> New York State Legislative Annual – 1971, Governor’s Memoranda on Bills Approved, at 561.

investors and builders that new housing may in the future be made subject to rent regulation and control, as occurred in 1969 with respect to post-1947 housing. But removing the City's power to take such action in the future, this bill will greatly encourage the construction of new housing in the City by the private sector.<sup>182</sup>

The legislative history also cites concern that permitting the city to change the rules after a building is built could undermine maintenance of existing buildings, not just new construction: "By limiting the fear of more stringent control, the bill would also encourage owners to invest in the maintenance and improvement of existing housing units and thereby help to stem the tide of abandonment of sound buildings in the City."<sup>183</sup>

It is possible that a court could read the language of the Urstadt Law and the legislative history to prohibit any expansion of the rent regulation rules, much of the legislative history supports the conclusion that the legislature's primary aim was to deprive the city of the power to impose new rules, and costs, on owners after a building was built and thereby upsetting the financial transaction that was made based on a different set of rules. But, regardless of where a court comes down on this question, the legislative history is devoid of any clear statement that the purpose of the law was to supersede the city's ability to zone.

The plain language of the Urstadt Law, its statutory scheme, and the legislative history of the law are devoid of any "clear expression of legislative intent" to limit the city's zoning power. The language of the law says nothing about the city's power to zone; and the law itself is located in the section of the rent laws delineating the city's power under those laws. There is nothing about the text of the law or its placement in the statutory scheme to suggest that the prohibition of Urstadt was intended to interfere with the city's authority to zone. To the contrary, the legislative history supports a narrow reading of the Urstadt Law's intended prohibition. The legislative history makes clear that state policymakers wanted to take away a power that the city had previously held under the rent laws themselves.

### **Is MIH an *Ultra Vires* Tax?**

Though the city's proposed MIH policy would generally require the provision of affordable housing units, it would also permit residential development, enlargements, or conversions of fewer than 25 units and 25,000 square feet alternatively to satisfy the requirements by paying an in-lieu contribution into an affordable housing fund.<sup>184</sup> Both the in lieu fee included in the law, and the affordable housing set-aside itself, might make the policy vulnerable to challenge as an illegal (or *ultra vires*) tax.<sup>185</sup>

The New York State General City Law and Municipal Home Rule Law impose strict statutory limits on New York City's power to levy taxes. Unlike the power to zone, in many states, including New York, the power to levy taxes is not delegated to the city by the state. The only tax-related action that New York City may take without state level approval is setting its annual

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<sup>182</sup> *Id.* at 312-13.

<sup>183</sup> *Id.* at 313.

<sup>184</sup> Proposed MIH Text § 23-154(d)(3)(iv) at 7.

<sup>185</sup> See Igelsias, *supra* note 6.

Real Property Tax rates.<sup>186</sup> Rather, the “levy and administration of local taxes” must be specifically authorized by the state legislature, and assessments for local improvements levied as “local non-property taxes” must be consistent with laws enacted by the legislature.<sup>187</sup> Without such express authorization from the state, any MIH policy found to be a “tax” would be patently *ultra vires*.

New York State courts have declined to *expressly* rule on the question of whether General City Law § 20(24) and § 20(25) permit local governments to enact development impact fees—“a question that has been the subject of considerable comment and litigation in other jurisdictions.”<sup>188</sup> However, they have at least recognized that municipalities do have some other measure of (implied) authority to impose general fees so long as they are “reasonable in amount and necessary to the accomplishment of the municipality’s legitimate functions.”<sup>189</sup> Such fees likely “need not exactly reflect the cost of providing a service, so long as it is reasonably related to the provision of the service and is not a subterfuge for raising general revenue.”<sup>190</sup> Without much certainty on the matter, however, local governments in NYS have largely shied away from enacting impact fees, for fear that such fees would be invalidated as *ultra vires* regulation or taxation.<sup>191</sup>

Thus, a successful characterization of the MIH policy as a “tax” would almost certainly be fatal. And, if a court characterized MIH as an impact fee, this would also pose problems for the city both because of the unclear precedent for this specific type of action and because such a designation would likely trigger problems for the city on constitutional takings grounds, addressed above. However, if the city is able to sustain MIH as a legitimate exercise of its zoning power (see section beginning on page 21), it will likely overcome any challenge related to its authority to levy taxes or fees.

While courts in other states have occasionally found attempts by local governments to impose in-lieu fees as *ultra vires* taxation, New York State courts have held that such in-lieu fees are

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<sup>186</sup> See generally Marilyn Marks Rubin, A GUIDE TO NEW YORK CITY TAXES: HISTORY, ISSUES AND CONCERNS i, 1-1 (2010). <http://pjsc.magikcms.com/tax%20guides/CityGuideWeb.pdf> (“New York City has imposed the Real Property Tax (RPT) in its current format since 1983 under the NYS Real Property Tax Law, as amended by Chapter 1057 of the Laws of 1981 – generally referred to as S.7000A.1”) The city imposes four classes of real property tax: single-family residential, multifamily residential, utilities and special franchise, and all other buildings including office, industrial, retail, hospitality etc. Real property tax revenues are collected in the city’s general fund, along with revenues from other taxes that the state has specifically authorized the city to levy.

<sup>187</sup> N.Y. Municipal Home Rule Law § 10.1(ii)(a)(8).

<sup>188</sup> Albany Area Builders Ass’n v. Guilderland, 546 N.E.2d 920, 923 (N.Y. 1989).

<sup>189</sup> Twin Lakes Dev. Corp. v. Town of Monroe, 752 N.Y.S.2d 546, 547 (N.Y. App. Div. 2002), *aff’d*, 801 N.E.2d 821 (N.Y. 2003). See also Suffolk Cnty. Builders Ass’n, Inc. v. Suffolk Cnty., 389 N.E.2d 133, 135 (N.Y. 1979) (citing Jewish Reconstructionist Synagogue of North Shore v. Incorporated Vil. of Roslyn Harbor, 352 N.E.2d 115, 117-119 (1976) and City of Buffalo v. Stevenson, 100 N.E. 798, 800 (1913)). Fees imposed pursuant to such authority must be “imposed as a means of regulation, and not of raising revenue” for general government use. See City of Buffalo v. Stevenson, 100 N.E. 798, 800 (1913). See generally 12 N.Y. Jur. 2d Buildings § 45 (“Fees charged for building permit”).

<sup>190</sup> Rubin, *supra* note 186 at vi (quoting Letter from NYC Independent Budget Office to NYC Council, <http://www.ibo.nyc.ny.us/iboreports/spignerletter.pdf>).

<sup>191</sup> 15-157 WARREN’S WEED NEW YORK REAL PROPERTY § 157.19

analogous to set-aside requirements.<sup>192</sup> Generally, if a particular set-aside requirement would be a valid exercise of local government power, then its corresponding in-lieu fee likewise would be valid; New York State courts have not found any constitutional bars to a local government's collection of such cash payments, and have distinguished in-lieu fees from "unconditional and unauthorized taxes" when the moneys collected as "in lieu" fees are put into a separate fund to be used for a specific purpose.

For example, in *Jenad, Inc. v. Scarsdale*, the Court of Appeals considered Scarsdale's requirement of a cash payment in lieu of a park dedication from subdivision developers, which funded "acquisition and improvement of recreation and park lands."<sup>193</sup> The court held that the payment was "not a tax at all but a reasonable form of village planning for the general community good . . . . This was merely a kind of zoning, like set-back and side-yard regulations, minimum size of lots, etc., and akin also to other reasonable requirements for necessary sewers, water mains, lights, sidewalks, etc."<sup>194</sup> Recognizing that "in some instances, that the separate subdivisions were too small to permit substantial park lands to be set off, yet the creation of such subdivisions, too, enlarged the demand for more recreational space in the community," the *Jenad* court found that "[i]n such cases it was just as reasonable to assess the subdividers an amount per lot to go into a fund for more park lands for the village or town. One arrangement is no more of a 'tax' or 'illegal taking' than the other."<sup>195</sup> Like the village of Scarsdale's park in-lieu fee, the city's proposed MIH in-lieu option for smaller residential developments states a specific fund destination and purpose of fund expenditures, and is being offered as a pragmatic alternative for smaller developers.<sup>196</sup>

Similarly, in *Twin Lakes Development Corporation v. Town of Monroe*, the Court of Appeals held that a Monroe \$1,500 per lot recreation non-optional in-lieu fee for subdivisions with fewer than 5 lots was neither a general tax nor a special assessment.<sup>197</sup> Like the per lot recreation fee in *Twin Lakes*, the MIH requirement (whether collected as a set-aside or in-lieu fee) is *generally applicable* to all developers who seek to develop their property in a certain way, which also removes the fee from consideration as a "special assessment."<sup>198</sup> Developers who qualify to pay

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<sup>192</sup> *Twin Lakes Dev. Corp.*, 801 N.E.2d at 826 (N.Y. 2003); *Jenad, Inc. v. Scarsdale*, 218 N.E.2d 673, 676 (1966). *Accord* *Holmdel Builders Ass'n v. Holmdel*, 121 N.J. 550, 584-85, 583 A.2d 277, 294 (1990) (finding that the development fees at issue were not taxes because the development fees performed the same functions as valid set-asides).

<sup>193</sup> Local governments are authorized to request park dedications in conjunction with subdivision approvals per Village Law § 179-l.

<sup>194</sup> *Twin Lakes Dev. Corp.*, 801 N.E.2d at 826 (citing *Jenad, Inc. v. Scarsdale*, 218 N.E.2d 673, 676 (1966), while also acknowledging *Jenad* as partially abrogated on other grounds by *Dolan* ("see 512 U.S. at 389 [declining to adopt *Jenad*'s standard for measuring the sufficiency of the nexus]").

<sup>195</sup> *Jenad*, 218 N.E.2d at 676.

<sup>196</sup> In fact, the in-lieu fees are to be collected into a city affordable housing fund, in contrast to most of the city's tax revenues, which are collected into the city's General Fund (with two main exceptions dedicating tax revenues to the Police and Fire Departments). See *Rubin, supra* note 186 at iv (endnote 2).

<sup>197</sup> *Twin Lakes Dev. Corp.*, 801 N.E.2d at 826.

<sup>198</sup> *Id.* (distinguishing the fact that the town's "recreation fee is generally applicable to any Town property owner seeking to divide its property" from the special assessments imposed on a group of property owners within a street improvement project's improvement district area in *Garden Homes Woodlands Co. v. Town of Dover*, 742 N.E.2d 593 (N.Y. 2000)).

the in-lieu fee retain the option of either paying the fee or providing affordable housing set-asides per the general MIH set-aside requirements.

Affordable housing set-asides (rather than only the in-lieu cash fee component of an inclusionary housing policy) have also been challenged as *ultra vires* taxes in Washington and New Jersey. In New Jersey, the court side-stepped a substantive analysis of whether a requirement to build housing could be understood as an attempt to levy a tax, and simply found that because the set-aside in question had been previously validated as a legitimate zoning regulation, it could not also then be construed as an invalid tax.<sup>199</sup>

The Supreme Court of Washington, in *San Telmo Assocs. v. Seattle*,<sup>200</sup> invalidated a set-aside requirement under a “tax preemption” statute, though the result is unique to the state and to the facts of the case.<sup>201</sup> Under the statute, RCW 82.02.020, which precludes cities from levying “any tax, fee, or charge, either direct or indirect . . . on the development, subdivision, classification, or reclassification of land,” Washington courts have indeed found that “[r]equiring a developer either to construct low income housing or ‘contribute’ to a fund for such housing gives the developer the option of paying a tax in kind or in money . . . . The City is instead shifting the public responsibility of providing such housing to a limited segment of the population. This shifting is a tax, and pursuant to RCW 82.02.020, it cannot be allowed.”<sup>202</sup>

However, though the *San Telmo* court characterized the set-aside requirement as an “in-kind” tax, a subsequent Washington case seemed to demonstrate a broader understanding of RCW 82.02.020 as preempting not only “taxes” but also other “fees or charges,” and in fact recharacterized the result in *San Telmo* as a finding of an invalid “charge.”<sup>203</sup> The *Isla Verde* court invalidated an open space set-aside requirement as a violation of RCW 82.02.020 because the “open space set aside condition is an in kind, indirect ‘tax, fee, or charge’ on new development.”<sup>204</sup>

In short, tax challenges to inclusionary housing policies have failed when courts have been able to conclude based on state law that the set-aside (or equivalent in-lieu fee) is an otherwise valid exercise of local government authority (e.g., a permissible zoning regulation). As against an *ultra vires* tax challenges, then, the city’s proposed MIH policy would likely avoid invalidation should the policy be found as a valid local zoning regulation. As we discuss in detail above, a court is likely to conclude that, under New York State law, MIH is a legitimate exercise of the city’s power to zone; however, if a court held otherwise, the city may have difficulty sustaining its proposed MIH policy for a number of reasons, including its lack of authority to impose a tax.

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<sup>199</sup> *Holmdel Builders Ass’n v. Holmdel*, 583 A.2d 277, 294 (N.J. 1990) (relying on holding in *Mt. Laurel II*).

<sup>200</sup> 735 P.2d 673 (1987).

<sup>201</sup> The *San Telmo* court applied a test from *Hillis Homes, Inc. v. Snohomish Cy.*, 97 Wn.2d at 809, 650 P.2d 193 (1982) to distinguish a regulation from a tax: If “the primary purpose of the [ordinance] is to accomplish desired public benefits which cost money . . .”, the ordinance is a tax. If “the primary purpose is to regulate” then it is a regulation. However, the *Hillis* test has not been applied to find any other nonmonetary (non-fee) ordinances as “taxes” aside from that in *San Telmo*.

<sup>202</sup> *San Telmo Assocs. v. Seattle*, 735 P.2d 674 (Wa. 1987)

<sup>203</sup> *Isla Verde Int’l Holdings v. City of Camas*, 49 P.3d 867, 878 (Wa. 2002) (explaining that set aside requirements at issue in *San Telmo* “violated RCW 82.02.020 as indirect charge on development”).

<sup>204</sup> *Isla Verde Int’l Holdings v. City of Camas*, 49 P.3d 867, 877-78 (Wa. 2002) (emphasis added).

## Conclusion

Exploring the legal parameters that shape New York City's ability to implement mandatory inclusionary zoning provides insight into the limits the city faces as it designs its policy. It also highlights the challenges for other high-cost jurisdictions seeking to use the zoning power to address some of the challenges of a hot housing market. Many of the legal limits on the ability to regulate property at play in New York are relevant in other jurisdictions.

Despite the legitimate need in New York City and other high-cost cities for new, more effective tools to foster economically diverse neighborhoods, whether inclusionary zoning can withstand legal challenge is a complicated question. In this paper we have examined some of the possible avenues of attack on the policy, and conclude that New York City is well positioned to defend against potential legal challengers. However, these legal questions are far from settled, and indeed have become somewhat less certain in light of the recent Supreme Court decision in *Koontz v. St. Johns River Water Management District*, which further complicated an already messy area of law. It is also uncertain how a court would consider a claim that the proposed MIH policy violates the state's prohibition on the city's regulation of rents. While there is strong reason to conclude that the Urstadt Law was not intended to impede the city's ability to enact zoning regulations, this would be a case of first impression in New York and similar laws have spelled the end of inclusionary housing policies in other jurisdictions. In its crafting of the policy and its careful and well-documented consideration of the need for the policy, the city has armed itself well, however, to face these challenges. And, indeed, both the city's policy design and supporting documentation, as well as the courts' treatment of these issues if a legal challenge arises, will likely be models for other jurisdictions facing similar imbalances between the supply of housing and the demand for housing in dense urban areas.