

June 20, 2016

To: The City Planning Commission  
From: Department of City Planning, Counsel Division  
Re: MIH Applicability to Adorama Special Permit

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The City Planning Commission has asked Counsel Division at the Department of City Planning to prepare a memo on the applicability of MIH to the Adorama 74-711 Special Permit.

**Issue:** Does MIH apply to special permits that do not increase permitted residential floor area but that enable developments to achieve more already-permitted residential floor area than would be possible in the absence of the special permit?

**Short answer:** No. The zoning resolution and the CPC report are explicit that MIH applies only to special permits that increase permitted residential floor area. Applying MIH to a special permit that does not increase permitted residential floor area would go beyond the bounds of the law enacted by the Commission and City Council and would incur significant exactions risk.

**Facts:** The applicant seeks bulk modifications to facilitate construction of a new ~84,000sf mixed-use development with 15,300sf of commercial space and 68,100sf (66 units) of market-rate residential. The development site is within the Ladies Mile Historic District in a C6-4A district, which permits 10 FAR of residential or commercial, bonusable to 12 FAR through the R10 Inclusionary Housing program or the public plaza bonus. The proposed development will share a zoning lot with existing buildings that will be preserved through the special permit. Overall, the zoning lot will be developed to 8.6 FAR.

**Text and Report:** The text governing MIH applicability to Special Permits is found in 74-32, excerpted in part below:

**Additional Considerations for Special Permit Use and Bulk Modifications**

Where a special permit application would allow a significant increase in #residential floor area# and the special #floor area# requirements in #Mandatory Inclusionary Housing areas# of paragraph(d) of Section 23-154 (Inclusionary Housing) are not otherwise applicable, the City Planning Commission, in establishing the appropriate terms and conditions for the granting of such special permit, shall apply such requirements where consistent with the objectives of the Mandatory Inclusionary Housing program as set forth in Section 23-92 (General Provisions).

On page 38, the Applicability section of the CPC Report for MIH provides additional clarity:

The Commission anticipates applying the MIH program to...special permits that increase residential capacity. [...] The program is not expected to be applied in conjunction with special permit applications that would reconfigure residential floor area that is already permitted under zoning, without increasing the amount of residential floor area permitted. Under this policy, for instance, a special permit that facilitates the transfer of floor area from one zoning lot to

another without increasing FAR would not be subjected to an MIH requirement, while a special permit that converts non-residential floor area to residential floor area would be.

In the context of the Charter-mandated land use review process, a CPC Report is binding administrative record. Unless explicitly modified by Council pursuant to established procedure, the enacted law must comport with the law as represented by the Commission in the CPC Report accompanying the action.

This application does not seek an increase in permitted FAR. Applying MIH to this application would go beyond the bounds of the law as established and could be challenged as an exaction or as an instance of the Commission exceeding its authority under the zoning resolution.