August 9, 2016

Via email to CalendarOffice@planning.nyc.gov and facsimile to (212) 720-3488
New York City Planning Commission
120 Broadway, 31st Floor
New York, NY 10271

Re: Adorama Special Permit, Land Use Application ID: C 160082 ZSM

Dear Commissioners:

I am submitting this letter into the record as you consider taking action on the Adorama Special Permit. In a memo dated June 20th, 2016 and a subsequent memo dated July 22nd, 2016, the Counsel Division of the Department of City Planning made a number of assertions that need to be closely examined. Upon review, you will see that the assertions used to justify the argument that MIH **cannot** be applied to the Adorama Special Permit are not supported by either the Zoning Resolution or the administrative record.

Assertion #1 [from June 20th 2016 Memo]:

"The zoning resolution and the CPC report are explicit that MIH applies only to special permits that increase permitted residential floor area."

Facts:

The Zoning Resolution does not say that MIH applies only to special permits that "increase permitted residential floor area." Rather, ZR Section 74-32 refers to only an increase in "#residential floor area#" and does not use the word "permitted." Elsewhere in the MIH text amendment, in ZR Section 23-911, the phrase "#residential floor area# permitted" is used. An interpretation that the phrase "#residential floor area#" as used in ZR Section 74-32 is synonymous with the "#residential floor area# permitted" of ZR Section 23-911 would render the word "permitted" in ZR Section 23-911 to be entirely meaningless.

Further, the CPC report does not say that MIH can only apply to special permits that increase "permitted" residential floor area. The only text in the CPC report on the applicability of MIH to special permits says the following:

> *"The Commission anticipates applying the MIH program to, for instance, zoning map changes that encourage the creation of substantial new housing in medium- and high-density districts, and to special permits that increase residential capacity. However, it also recognizes that the program should not discourage types of actions with a valid land use rationale that may facilitate residential development but would not themselves 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."*

The phrase "the program is not expected to be applied" is not identical, as Department of City Planning staff would have you believe, to "the program will not be applied" or "the program cannot not be applied." Even if the CPC report held the force of law on par with the Zoning Resolution, which it does not, nothing in the CPC Report would prohibit the Commission from applying the requirements of MIH to the Adorama Special Permit.

Assertion #2 [from June 20th 2016 Memo]:

"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."

Facts:

Administrative decisions made pursuant to a local law or the Zoning Resolution of the City of New York must be consistent with the words of the local law or the Zoning Resolution. If a phrase is not defined, then one may look to the administrative record to glean the meaning of unclear terminology. Because basic statutory interpretation of the ZR makes it evident that MIH applies to a special permit with the facts of the Adorama case, there is no need to consult the CPC Report. And, even if the Zoning Resolution were not explicit, the CPC report would not constitute the only record consulted to establish the meaning of the law.

Assertion #3 [from July 22nd 2016 Memo]:

"MIH applicability to special permits and the meaning of "significant increase in #residential floor area#" in ZR 74-32 were explicitly and consistently represented at certification, in the CPC Report, and in testimony by the Chairman of the City Planning Commission before City Council. In the context of the Charter-mandated land use review procedure, this constitutes a binding administrative record that defines and delimits the scope of the law; it is not mere legislative history."

Facts:

Even if the Commission had the discretion to pick and choose which portions of the administrative record it sought to consult (i.e. only considering the Department of City Planning presentation at certification, the CPC Report and the Chairperson's testimony at City Council while excluding from consideration the environmental assessment statement, the recommendation of Manhattan Borough President Gale Brewer, and the testimony of former Department of City Planning General Counsel David Karnovsky), there was not even one representation in the administrative record that MIH **could not be** applied to special permits such as the Adorama Special Permit. Portions of the below text are bolded for emphasis:

> *"Sometimes there's a...standalone special permit application that comes before the Commission. So for instance an application under 74-711 to modify use regulations to facilitate the preservation of a landmarked building – that type of special permit application, where it creates residential floor area where none existed previously, we would anticipate applying this policy to it. There are other types of special permits that might just modify height and setback, that apply to the existing floor area that's already allowed –* ***we're not anticipating applying this policy*** *where you're essentially reconfiguring the existing floor area that is allowed under zoning today."* – Department of City Planning Deputy Executive Director Howard Slatkin at the September 21, 2015 certification

"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."* – CPC Report

When a special permit is reshaping a building, that is, not creating new floor area, not creating any new housing opportunities, but simply moving around floor area that's already permitted, ***we would not apply MIH****. But where the special permit is creating substantial new floor area, we would apply MIH for special permits. The MIH options made available to the projects will be set forth in the restrictive declaration attached to the special permit and this, like the rest of the rest of the application, will be subject to the City Council's approval."* — City Planning Commission Chairperson Weisbrod's testimony at the City Council on February 9, 2016

Within City Planning Commission Chairperson Weisbrod's testimony at the City Council, the words "would not," do not mean "could not." Even if "would not" meant "could not," testimony at the City Council does not have the ability to delimit the law as written in the Zoning Resolution. Finally, there is no administrative rule, law, or case that causes a CPC Report or other communication from staff of the Department of City Planning in the ULURP process to become a "*binding administrative record that defines and delimits the scope of the law*" in a way that is contrary to the words of the Zoning Resolution.

Assertion #4 [from July 22nd 2016 Memo]:

"The Commission does not have the discretion to apply the law in a way contrary to explicit and consistent representations of the law to the City Council and the public during public review."

Facts:

The Commission is obligated to apply the law in a way that is consistent with the Zoning Resolution of the City of New York. If there is a discrepancy between the law as written in the Zoning Resolution and the law as summarized or otherwise described during public review by staff of the Department of City Planning, the Commission is obligated to apply the law as it is written. In the event where staff of the Department of City Planning had one intention when drafting the law but the law as written does not comport with that intention, the Zoning Resolution can be amended in accordance with the rules set forth in the City Charter.

Assertion #5 [from July 22nd 2016 Memo]:

"An increment identified by environmental review cannot serve as the basis for a threshold determination for MIH because an increment can vary widely depending on bulk assumptions embedded in the no- and with-action scenarios and the range of uses permitted within a project area. Neither the assumptions made in environmental review nor the terms of the special permit will commit the Adorama applicant team to particular

uses within the C6-4A district. If the Commission approves the proposed envelopes, the applicant can fill those envelopes with any permitted uses it chooses."

Facts:

The EAS for the Adorama Special Permit has been accepted by City Planning and the City Planning-accepted assumptions that are a core part of the establishment of the reasonable worst case development scenarios result in an increment that has meaning for this discretionary land use review process. In the same way that the Commission may approve of a special permit after considering the facts as presented in environmental review, so too can it make decisions on MIH applicability based on data from environmental review. There is no legal or policy rationale as to why the Commission may make all sorts of land use decisions based on environmental review but shall be prohibited from using such environmental review from determining an increment for purposes of MIH applicability.

Further, ZR Section 74-32 does not say that MIH applies to a special permit that "results" in a significant increase in residential floor area. Rather, it says that MIH shall apply to special permits that "allow" for a significant increase in residential floor area. The Commission, in applying MIH to special permits, could ensure that the affordable housing, or contribution to an affordable housing fund, is only required at the time that Department of Building permits are issued for the portion of the residential floor area that can be built as a result of the bulk modifications of the special permit.

Assertion #6 [from July 22nd 2016 Memo]:

"Similarly, and consistent with CEQR, the Adorama applicant team could have presented the Commission with reasonable no-action and with-action scenarios with a mix of uses that produced a very low or even negative residential increment."

Facts:

The City of New York could not have accepted *no-action* and *with-action* scenarios that would have shown a very low or negative residential increment because accepting such scenarios would have only been possible if one accepted widely divergent baseline assumptions for the *no-action* and *with-action* scenarios regarding the likelihood of conservation of existing commercial space to residential use. In the EAS as presented by the applicant at the start of ULURP, both the *no-action* and the *with-action* scenarios maintain the existing commercial floor area of the building as commercial. The applicant team has sought to create confusion by presenting an alternative *no-action* scenario whereby they convert portions of the existing commercial space to residential use and do not receive the bulk modifications sought in the special permit application. The applicant claims that a newly contemplated *no-action* scenario (with conversion of significant existing commercial space to residential use but with no bulk modifications approved) allows for more residential floor area on the zoning lot than the *with-action* scenario presented to the Commission initially (where existing commercial space remains commercial and the bulk modifications allow for more residential floor area on the zoning lot).

If the applicant now states that it is feasible and reasonably likely that the existing commercial space could be converted to residential use, an additional *with-action* scenario needs to be contemplated showing the amount of residential floor area on the entire zoning lot in the reasonable worst case development scenario (i.e. the converted commercial space to residential floor area plus the residential floor area in the newly built

structures that would be achievable due to the bulk modifications). In other words, there are four scenarios that would need to be considered and scenario #4 is missing:

	No-Action	**With-Action**
Maintain existing built commercial floor area as commercial	Scenario #1: Included in EAS	Scenario #2: Included in EAS
Convert portion of existing built commercial floor area to residential	Scenario #3: Submitted to Manhattan Borough President Gale Brewer on June 10, 2016 ("ALTERNATIVE #2 AS-OF-RIGHT")	Scenario #4: Missing

The increment of residential floor area for environmental review purposes must be determined after this decision this key decision is made: under a reasonable worst case development scenario, will the existing built commercial floor area remain as is (Scenarios #1 and #2 as accepted by the City Planning Commission at certification), or, is it reasonable to assume that some of the built commercial floor area will be converted to residential use (as is put forth by the applicant for Scenario #3 though not presented in what should be Scenario #4) because residential use is generally considered to be more profitable for an owner than commercial use in this neighborhood? Staff of the Department of City Planning errs in arguing it is "reasonable" to calculate an increment by assuming conversion of commercial floor area to residential floor area in a *no-action* scenario and then assume the opposite for the *with-action* scenario. There must be an apples to apples comparison and what the applicant presents and the staff of the Department of City Planning argue should be accepted is in fact an apples to oranges to comparison.

Assertion #7 [from July 22nd 2016 Memo]:

"The indefiniteness of such an increment makes it unsuitable for MIH applicability determinations, even if using the increment in that way were permitted by the MIH law."

Facts:

First, nothing in the Zoning Resolution or elsewhere in the law prohibits the Commission from using an increment identified in environmental review for purposes of determining MIH applicability.

Second, environmental review is based on meaningful assumptions and once those assumptions are deemed appropriate, there is only to be one increment between the *no-action* scenario and the *with-action* scenario tied to a specific discretionary land use approval. This increment can be used to establish the increment for MIH applicability.

Assertion #8 [from July 22nd 2016 Memo]:

"It is not the case that #floor area ratio# always refers to regulatory limits on building size (or some other more abstract usage) and that #floor area# always refers to the size of existing buildings (or some other more concrete usage). Usage is typically made clear by context.[ii]

[ii] *For an example of #floor area# used to denote "permitted floor area" see:*
ZR 23-154I(1):
The #residential floor area# of a #development# or #enlargement# may

be increased by 0.833 square feet for each one square foot of #moderate income floor area#, or by 0.625 square feet for each one square foot of #middle income floor area#, provided that for square foot of such #floor area compensation# there is one square foot of #floor area compensation#, pursuant to paragraph (b) of this Section."

Facts:

The staff of Department of City Planning implies that the example given in the footnote is sufficient to prove that #residential floor area# can have the same meaning as "#residential floor area# permitted" but without the need for the word "permitted" to be written. In fact, when one deconstructs ZR Section 23-154, we see that the preceding portions of the ZR Section clearly defines an increase in #residential floor area# in this portion of ZR Section 23-154 as being an increase in #residential floor area# permitted on a zoning lot due to the "Maximum #Residential Floor Area Ratio#" regulations set forth in paragraph (b) of ZR Section 23-154.

(c) Special provisions for specified #Inclusionary Housing designated areas#

(1) Optional provisions for #large-scale general developments# in C4-6 or C5 Districts

Within a #large-scale general development# in a C4-6 or C5 District, the special optional regulations as set forth in this paragraph (c)(1), inclusive, modify the provisions of paragraph (b) of this Section:

(i) The #residential floor area# of a #development# or #enlargement# may be increased by 0.833 square feet for each one square foot of #moderate income floor area#, or by 0.625 square feet for each one square foot of #middle income floor area#, provided that for each square foot of such #floor area compensation# there is one square foot of #floor area compensation#, pursuant to paragraph (b) of this Section;

"Paragraph (b) of this Section" is the following:

(b) #Inclusionary Housing designated areas#

The #residential floor area# of a #zoning lot# may not exceed the base #floor area ratio# set forth in the table in this paragraph (b), except that such #floor area# may be increased on a #compensated zoning lot# by 1.25 square feet for each square foot of #low income floor area# provided, up to the maximum #floor area ratio# specified in the table, as applicable. However, the amount of #low income floor area# required to receive such #floor area compensation# need not exceed 20 percent of the total #floor area#, exclusive of ground floor non-#residential floor area#, or any #floor area# increase for the provision of a #FRESH food store#, on the #compensated zoning lot#.

Maximum #Residential Floor Area Ratio#

District	Base #floor area ratio#	Maximum #floor area ratio#
R6B	2.00	2.20
R6[1]	2.20	2.42
R6[2] R6A R7-2[1]	2.70	3.60
R7A R7-2[2]	3.45	4.60
R7-3	3.75	5.0
R7D	4.20	5.60
R7X	3.75	5.00
R8	5.40	7.20
R9	6.00	8.00
R9A	6.50	8.50
R9D	7.5	10.0
R9X	7.3	9.70
R10	9.00	12.00

[1] for #zoning lots#, or portions thereof, beyond 100 feet of a #wide street#

[2] for #zoning lots#, or portions thereof, within 100 feet of a #wide street#

If ZR Section 74-32 had a header of "Additional Considerations for Maximum Permitted Residential Floor Area Ratio Modifications" then the phrase "#residential floor area#" in ZR Section 74-32 would be construed to mean an increase in "permitted" "#residential floor area#." However, because the header and the text of ZR Section 74-32 does not modify the meaning of #residential floor area# in the same way that paragraph (b) and paragraph (c) (1) of ZR Section 23-154 does, one cannot use ZR Section 23-154 as an example of an instance where "#residential floor area#" by itself means "#residential floor area# permitted"

Sincerely,

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