URBAN
JUSTICE
CENTER

July 22, 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:

As longtime advocates for affordable housing in New York City and attorneys with significant experience in land use matters and legislative drafting and interpretation, we were gravely concerned to learn of the City's intent not to apply the requirements of Mandatory Inclusionary Housing to the Adorama Special Permit application for the proposed development in Chelsea. Failure to apply the requirements of MIH in this instance would both thwart the goals of the MIH program, and run contrary to the plain language of the MIH zoning text. Importantly, we do not feel that this is an instance where the City Planning Commission can exercise its discretion and elect *not* to apply the requirements of MIH. Instead, after reviewing the record pertaining to this application, provisions of the Zoning Resolution, and relevant case law, we believe that the Planning Commission is *obligated* to impose the requirements of MIH on this Special Permit – *and all future Special Permits that result in a significant increase in residential floor area*. Regardless of what the Department of City Planning may have intended with regard to the applicability of MIH to special permits, the fact remains that the text of the Zoning Resolution as passed requires the imposition of MIH to *all* special permits where the actual amount of floor area that can be built increases significantly – not only instances where the floor area ratio, or permitted floor area, is increased.

I. Legal Interpretation of Relevant Provisions of the Zoning Text

The Urban Justice Center has concluded that the affordable housing requirement of Mandatory Inclusionary Housing must be applied to this special permit application, and to all future special permit applications that have the effect of significantly increasing a building's residential floor area. Importantly, this requirement applies not only to significant increases in the maximum Floor Area Ratio (FAR) of a given lot, but also to all increases in residential floor area resulting from the grant of a special permit, whether the result of a use modification or *any* type of bulk modification, including those at issue in the instant application.

A. Provisions within the Zoning Resolution Relevant to Mandatory Inclusionary Housing and Special Permits

Zoning Resolution (ZR) Section 23-933 provides that:

> Inclusionary Housing Program shall … apply as a condition of City Planning Commission approval of special permits as set forth in ZR Section 74-32...

ZR Section 74-32, called "Additional Considerations for Special Permit Use and Bulk Modifications," reads:

> 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 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). However, where the Commission finds that such special permit application would facilitate significant public infrastructure or public facilities addressing needs that are not created by the proposed #development#, #enlargement# or #conversion#, the Commission may modify the requirements of such paragraph (d).

Paragraph (d) of Section 23-154 sets forth the special floor area provisions for zoning lots in MIH areas, including the affordable housing requirement. Finally, the objectives of MIH as described in Section 23-92 are as follows:

> The Inclusionary Housing Program is established to promote the creation and preservation of housing for residents with varied incomes in redeveloping neighborhoods and to enhance neighborhood economic diversity and thus to promote the general welfare.

B. Analysis

Representatives from the Department of City Planning have insisted that MIH is triggered only by increases in *permitted* residential floor area, whether achieved by an increase in a lot's overall maximum FAR or a through a use conversion (from manufacturing or commercial to residential). For example, at the June 20, 2016 hearing on the subject application, John Mangin, an attorney for the Department of City Planning, stated that:

> MIH applies to special permits that would significantly increase permitted residential floor area. So, the archetypal situation is, say, a 74-711 that was enabling new residential floor area within a manufacturing district... MIH does not apply when an applicant is just seeking bulk modifications to reconfigure residential floor area that's already permitted.

Mangin concluded that because (1) the subject development falls within an existing R-10 district, (2) the Commission's actions will not increase residential capacity at the site, and (3) bulk modifications alone do not trigger MIH, MIH should not apply to the application.

However, the Commission's actions *will* constitute bulk modifications and result in increased residential capacity, and there is nothing within the zoning text to support the notion that bulk modifications alone are insufficient to trigger MIH. The text does not justify limiting the application of MIH to increases in "permitted" or "maximum" residential floor area, to use rather than bulk modifications, or to bulk modifications that increase maximum FAR. Instead, the MIH affordability requirements must be applied to *all* instances where residential floor area is significantly increased through the issuance of a special permit.

1. *MIH Is Triggered Because the Actions Would Increase "Residential Floor Area"*

The phrase "#residential floor area#," as used in ZR Section 74-32, refers to the actual amount of residential floor area that can be built on a zoning lot, taking into account available FAR, bulk rules, and all other zoning constraints. The phrase comprises two terms defined in ZR Section 12-10:

- "'Residential' means pertaining to a #residence#"
- "'Floor area' is the sum of the gross areas of the several floors of a #building# or #buildings#, measured from the exterior faces of exterior walls or from the center lines of walls separating two #buildings#."

Importantly, the phrase "residential floor area," without more, does *not* refer to the maximum residential floor area that could potentially be achieved on a site based solely on the lot's floor area ratio[1] multiplied by the lot area – a concept described elsewhere within the MIH text by the phrase "maximum #residential floor area ratio#." Specifically, ZR Section 23-154(b) states:

> 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.

In the first sentence of this section, the phrase "may not exceed" makes clear that a lot's "residential floor area" can range in size, with the base or maximum floor area ratio establishing the upper boundary of what is permissible. A range in the ultimate "residential floor area" is possible because this figure is affected both by the applicable FAR, *and by other factors* (such as height and setback limits). In contrast, the table that follows absolutely defines both the base and maximum floor area ratios for each zoning district – fixed figures that do not vary.

ZR Section 23-22 likewise supports the interpretation that the phrase "residential floor area," without more, refers to the actual residential floor area capable of being built on a site, taking into account both available FAR and other constraints. There, the phrase "*maximum* #residential floor area# *permitted*"

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[1] Defined in Section 12-10 as "the total #floor area# on a #zoning lot#, divided by the #lot area# of that #zoning lot#."

(emphasis added) is used to describe the figure used to determine the maximum number of dwelling units allowed in each residential district. It is a general principle of statutory interpretation that each word in a statute must be assumed to be meaningful, and that interpretations that would render certain words redundant or without content must be rejected. Here, an interpretation that the phrase "residential floor area" as used in Section 23-154(b) is synonymous with "maximum residential floor area permitted" as used in Section 23-22 would gut the words "maximum … permitted" of their meaning.

Although the Commission's actions would not increase the overall permitted FAR of the site or increase maximum permitted residential FAR via a use conversion from commercial or manufacturing to residential, it is beyond dispute that the Adorama Special Permit *would* allow for the construction of 26 residential units and 22,367 zoning square feet of residential floor area that could not otherwise be built. Because ZR Section 74-32 clearly calls for the application of MIH "[w]here a special permit application would allow a significant increase in #residential floor area#," MIH must be applied.

2. *Any Bulk Modifications Are Sufficient to Trigger the Affordability Requirements of MIH*

As described above, DCP has testified that "MIH does not apply when an applicant is just seeking bulk modifications to reconfigure residential floor area that's already permitted." But ZR Section 74-32 is titled, "Additional Considerations for Special Permit Use *and Bulk Modifications*" (emphasis added), and within that Section, there is nothing that justifies limiting the application of MIH to bulk modifications where the maximum permitted residential FAR is increased. Instead, MIH applies to the full range of bulk modifications that result in a significant increase in residential floor area, with "bulk" defined in ZR Section 12-10 as:

> the term used to describe the size of #buildings or other structures#, and their relationships to each other and to open areas and #lot lines#, and therefore includes
> (a) the size (including height and #floor area#) of #building or other structures#;
> (b) the area of the #zoning lot# upon which a #building# is located, and the number of #dwelling units# or #rooming units# within a #building# in relation to the area of the #zoning lot#;
> (c) the shape of #buildings or other structures#;
> (d) the location of exterior walls of #buildings or other structures# in relation to #lot lines#, to other walls of the same #building#, to #legally required windows#, or to other #buildings or other structures#; and
> (e) all open areas relating to #buildings or other structures# and their relationship thereto."

Because this Special Permit seeks "waivers in rear yard equivalent, rear setback, minimum distance between buildings, maximum base height and setback, and narrow buildings" – all of which will significantly alter the building envelope at the site in question – MIH must apply.

The principle of expressio unius – "inclusion of one thing implies the exclusion of the other" – further supports the interpretation that the application of MIH to special permits granting bulk modifications resulting in an increase in residential floor area is broad and unqualified. This is so because ZR Section 74-32 limits the application of MIH in numerous *other* ways that *are* enumerated, namely to situations where:

- There is a special permit application
- The permit application would allow an increase in residential floor area
- That increase would be significant

- The special floor area requirements in MIH housing areas are not otherwise applicable
- Application of the MIH requirements would be consistent with the objectives of the MIH program as set forth in ZR Section 23-92
- The special permit application does not facilitate significant public infrastructure or public facilities addressing needs that are not created by the proposed development, enlargement, or conversion

It is clear that numerous limitations to the imposition of MIH requirements in the context of special permits were considered and ultimately adopted; a limitation to particular types of bulk modifications from among all those that might produce a significant increase in residential floor area was not included. Therefore, it would be improper for the Commission to impose this new limitation at this stage by declining to impose MIH in the context of this special permit application.

3. *The Adorama Special Permit Would Significantly Increase Residential Floor Area*

ZR Section 74-32 does not define what constitutes a "significant increase" in residential floor area triggering the application of MIH within the context of a special permit. However, ZR Section 23-154(4) establishes a threshold of 10 units or 12,500 square feet of residential floor area as the threshold for applying MIH requirements to developments, enlargements or conversions in MIH areas, and it is reasonable to apply that same threshold to special permit applications, as "it is well settled that a statute must be construed as a whole and that its various sections must be considered with reference to one another."[2] As the purpose of the application of MIH to special permits is the same as that for the application of MIH within MIH areas – i.e. "to promote the creation and preservation of housing for residents with varied incomes in redeveloping neighborhoods and to enhance neighborhood economic diversity and thus to promote the general welfare" (ZR Section 23-92) – there is no reason to think that developments, enlargements, and conversions resulting from the issuance of special permits, especially those in strong housing markets, would be subject to a different and less rigorous affordable housing requirement than projects in MIH areas. Therefore, the MIH zoning text supports the conclusion that MIH is triggered by any increase of 10 or more residential units or 12,500 square feet of residential floor area, whether in an MIH area or resulting from a special permit. Finally, within the context of this specific application, there has been little if any debate about whether the residential floor area resulting from the issuance of the Special Permit would be "significant;" instead, the discussion has centered around the question of whether the residential floor area (or maximum permitted residential floor area, as some insist) will be increased at all. In light of the text of the Zoning Resolution and the specific facts of this application, the Urban Justice Center concludes that the increase in residential floor area is "significant" and warrants application of MIH.

4. *Applying the MIH Affordability Requirement Would Advance the Goals of MIH*

ZR Section 74-32 calls for the Planning Commission to apply the MIH affordability requirements to special permit applications where "consistent with the objectives of the Mandatory Inclusionary Housing program as set forth in Section 23-92." Per Section 23-92, the objectives of MIH are "[1] to promote the

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[2] Albany Law School v. New York State Office of Mental Retardation and Developmental Disabilities, 968 N.E.2d 967, 974 (NY 2012) (citing Friedman v. Connecticut Gen. Life Ins. Co., 877 N.E.2d 281 (2007)).

creation and preservation of housing for residents with varied incomes in redeveloping neighborhoods and [2] to enhance neighborhood economic diversity and thus to promote the general welfare." It is clear that applying MIH to the development at 38-42 West 18th Street would advance both of these objectives.

First, the application of MIH to any and every development where such application is legally and financially sustainable advances the goal of creating and preserving housing for residents with varied incomes. This is so because MIH is one of the few tools that the City can leverage to secure permanently affordable housing for moderate- and low-income people, including individuals and families below 40% AMI. Market pressures, past policies that have failed to adequately produce and protect affordable housing, and present failures to establish and enforce policies sufficient to preserve the City's existing affordable housing stock have created a housing landscape from which low- and moderate-income residents are rapidly disappearing. Even neighborhoods that today have ample housing stock accessible to lower-income people desperately need the long-term protection that Mandatory Inclusionary Housing can provide. Therefore, the Urban Justice Center believes that MIH must apply to all special permit applications resulting in a significant increase in residential floor area, wherever the proposed development, enlargement, or conversion may occur.

Applying MIH to the Adorama Special Permit, and to special permit applications within landmark districts more generally, would also advance the second objective of MIH: the enhancement of neighborhood economic diversity. As noted in the Environmental Assessment Statement for the MIH Zoning Text Amendment:

> [T]here have been approximately 180 applications for landmark special permits since 1977, the earliest date for which data are available … The vast majority (93 percent) of 74-71 applications have occurred in community districts in Manhattan below 96th Street. According to the *Market and Financial Study* conducted by BAE, these neighborhoods contain some of the strongest housing real estate markets in the city. They also represent some of the least economically diverse neighborhoods in the city, according to analysis provided in the DCP report, *Mandatory Inclusionary Housing: Promoting Economically Diverse Neighborhoods* … [T]he community districts where 74-71 applications are concentrated overlap substantially with the neighborhoods where the majority of households are concentrated within higher income brackets.[3]

The subject site's census tract, Manhattan 54, is a powerful illustration of this trend. Though the 2009-2013 American Community Survey estimates that 17.3% of New York City's population has income below the poverty rate, only 2.0% of the subject site's census track has income below that threshold. By applying MIH to this and future special permit applications, including 74-711 applications, the City can generate affordable housing construction in areas that are among the least accessible to low-income New Yorkers today.

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[3] Environmental Assessment Statement for the Mandatory Inclusionary Housing Zoning Text Amendment, p.42-43 (EAS Attachments).

5. *Because the Conditions of 74-32 Have Been Met, The Planning Commission Does Not Have Discretion to Decline to Apply MIH to This Application*

Regarding the role of the Planning Commission in applying the requirements of MIH to special permit applications, ZR Section 74-32 states, in relevant part:

> Where a special permit application would allow a significant increase in #residential floor area# [and the other conditions for applying MIH to special permits, as described above, have been met] … the City Planning Commission … *shall apply* such requirements [emphasis added] … However, where the Commission finds that such special permit application would facilitate significant public infrastructure or public facilities addressing needs that are not created by the proposed #development#, #enlargement# or #conversion#, the Commission *may modify* [emphasis added] the requirements of such paragraph (d).

ZR Section 12-01, "Rules Applying to Text of Resolution," establishes that "shall" denotes a mandatory action. That Section provides that, "The word 'shall' is always mandatory and not discretionary. The word 'may' is permissive." Per ZR Section 74-32, the *only* instance in which the Commission "may" exercise discretion and modify the affordability requirements of MIH is "where the Commission finds that such special permit application would facilitate significant public infrastructure or public facilities addressing needs" not created by the subject application. Suggesting that the Commission may exercise discretion under other circumstances not expressly enumerated would again violate the principle of expressio unius – "inclusion of one thing implies the exclusion of the other."

C. Legal Conclusion

Having clarified the meaning of the relevant provisions of the Zoning Resolution through basic principles of statutory interpretation, it is evident that the City Planning Commission *must* apply the affordability requirements of the Mandatory Inclusionary Housing program to any special permit for modification of use or bulk (including height, setback, rear yard or other regulations that limit the shape of a building) that results in a significant increase in actual residential floor area.

Regardless of what the intent of certain officials within the Department of City Planning may have been – a subject that is itself open to debate, as the administrative record includes evidence of intent supportive of the Urban Justice Center's interpretation that the application of MIH is always required where special permits, including 74-711 permits, result in a significant increase in residential floor area[4] – rules of statutory interpretation require that we look primarily to the law as written. As the Court of Appeals has

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[4] For instance, Environmental Assessment Statement for MIH (p.44) described the Future With-Action Condition – i.e., the future in which MIH was adopted – as follows: "Developers could continue to pursue bulk modifications under 74-71 to facilitate a *fully commercial or community development without triggering a MIH requirement* [emphasis added]. It is possible that some property owners who might otherwise choose to apply for 74-711 might instead pursue as-of-right redevelopment options for their property, such as commercial or community facility use, where these offer superior returns to those of mixed-income housing." The language in this section strongly conveys an intent that bulk modifications under 74-41 resulting in an increase in residential floor area would – *unlike fully commercial or community developments* – trigger the affordability requirements of MIH.

explained, "As this is a question of statutory interpretation, we turn first to the plain language of the statutes as the best evidence of legislative intent."[5] If the law as written is clear and unambiguous, as in this case, there is no need to look to the administrative record to determine the meaning of words or phrases in the Zoning Resolution. Should this matter come before a court,

> Courts are constitutionally bound to give effect to the expressed will of the Legislature and the plain and obvious meaning of a statute is always preferred to any curious, narrow or hidden sense that nothing but a strained interpretation of legislative intent would discern. . . . If, as here, the terms of a statute are plain and within the scope of legislative power, it declares itself and there is nothing left for interpretation.[6]

We therefore urge the Planning Commission to adopt the interpretation of 74-32 we have described, as we believe this interpretation is both the only legally permissible option, and the most desirable option from a policy perspective, as described more fully below.

II. The Importance of Implementing Mandatory Inclusionary Housing in Wealthy Areas

Prior to the passage of the MIH policy, the City consistently underscored MIH as a critical tool in its fight "to promote economically diverse neighborhoods at locations throughout the city and in the wide range of housing market conditions that exist in various neighborhoods."[7] Within that context, the City placed particular emphasis on the importance of MIH as a tool to secure permanently affordable housing in well-resourced areas – communities that offer numerous employment, educational, and other opportunities, but remain largely inaccessible to low-income New Yorkers today, the result both of rising rents and of previous policy decisions that failed to adequately prioritize affordable housing. Recognizing that "the technical requirements of dense development, scarcity of sites, cost of land, and high costs of materials and labor" meant that "unsubsidized new construction occurs at housing prices that are accessible only to more affluent households,"[8] the City insisted that MIH was a valuable tool to combat the "trends [that] threaten the access that low- and moderate-income households have to many of city's neighborhoods."[9] In its MIH policy study, the City provided significant evidence of the benefits of programs that permit low-income people to access housing in wealthier areas, relying on research that suggests that programs like these can increase adult employment rates, improve high school graduation rates, improve mental and physical health, and increase academic performance.[10] Before MIH was passed, Commissioner Vicki Been

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[5] Malta Town Centre I, Ltd. v. Town of Malta Board of Assessment Review, 822 N.E.2d 331, 333 (N.Y. 2004).

[6] Finger Lake Racing Ass'n, et al., v. New York State Racing & Wagering Board, 382 N.E. 1131, 1136 (N.Y. 1978).

[7] *New York City Mandatory Inclusionary Housing: Promoting Economically Diverse Neighborhoods*, Dep't of City Planning, City of New York (Sept. 2015), p.10.

[8] Id. at 8.

[9] Id.

[10] The programs cited by the City include "the nation's first mobility experiment … the court-ordered relocation of Chicago Public Housing Authority residents from racially segregated, high poverty neighborhoods to communities with a higher degree of racial and economic integration," a program found to increase adult employment rates and improve high school graduation rates; the HUD-sponsored Moving to Opportunity program, which "found that among households that moved to neighborhoods with lower poverty rates, adults had both physical and mental

also told the press that, "The goal [of the program] is to harness the private market"[11] – a goal that can be achieved only in strong housing markets, where the income from market-rate apartments is sufficient to cross-subsidize affordable housing units without additional investment from the City. Taken together, the City's statements around MIH prior to its passage suggested that a primary purpose of the policy is to secure affordable housing in wealthy communities, including the community where the development that is the subject of this application would be sited.

But so far, the City has named only low-income communities of color as target areas for neighborhood rezonings – areas where residents have faced generations of structural exclusion, exploitation, and neglect. Although the Urban Justice Center's clients in these communities welcome long-overdue investments in the resources and infrastructure other areas take for granted, many have come to regard Mandatory Inclusionary Housing as a Trojan horse that is being used to justify aggressive neighborhood rezoning policies that will hasten gentrification and displacement from these areas. If a core purpose of MIH is to increase the access of low-income residents to high-opportunity areas, it is unclear why the City has elected to roll out MIH almost exclusively in neighborhoods where median incomes and rents are significantly below the citywide average. For example, rezoning communities include East New York, where the median income is less than $35,000 a year (roughly 40% AMI), and the Southwest Bronx, which includes the poorest Congressional district in the nation and where the median income is just $25,000 a year.

Within this context, questions regarding the applicability of MIH to individual developments in communities like Chelsea are of critical importance. Although the Urban Justice Center will continue to vigorously advocate for a more equitable distribution of neighborhood rezonings and the selection of higher-income, majority-white neighborhoods for future rezonings, <u>should the City retain its exclusive focus for area-wide rezonings on low-income communities of color, individual site rezonings and special permit applications that increase residential floor area will represent the *only* avenues through which MIH may generate affordable housing in high-income communities</u>. In turn, if the Commission declines to apply the requirements of MIH to the full universe of individual site developments that result in significant increases in residential floor area – an interpretation that we believe cannot be supported by the zoning text itself – MIH will fail to fulfill its promise of generating affordable housing units in the wealthy neighborhoods that are least accessible to low-income New Yorkers today.

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health improvements" and young girls had significant improvements in health and other outcomes, even years later; and a 2010 study of "the academic performance of students living in publicly-owned inclusionary housing units in Montgomery County, Maryland - one of the wealthiest counties in the nation and home to the country's largest and oldest inclusionary housing program," which found that students who attended the most advantaged schools far outperformed those who attended the least advantaged schools. Id. at 48-49.

[11] Steven Wishnia, "What Does 'Affordable Housing' Really Mean in de Blasio's New York? We're About to Find Out," GOTHAMIST (Feb. 10, 2016), http://gothamist.com/2016/02/10/affordable_housing_battle.php.

III. Conclusion

Given the text of the Zoning Resolution and the set of facts in this case, the Urban Justice Center has concluded that the City Planning Commission must and should apply the requirements of the Mandatory Inclusionary Housing program to the Adorama Special Permit.

Sincerely,

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