

What to Know about NYC Mandatory Inclusionary Housing

A Practical Guidance® Article by YuhTyng Patka, Duval & Stachenfeld LLP



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With the recent rezonings in Gowanus and SoHo, there is a renewed focus on New York City's Inclusionary Housing Program, and Mandatory Inclusionary Housing (MIH) is of particular interest to developers seeking to develop in these newly rezoned neighborhoods. This article explains what MIH is and provides a primer on what is required and what to expect in the MIH application process in New York City. It also provides an overview of the city's Voluntary Inclusionary Housing (VIH) program.

Inclusionary Housing Overview

Inclusionary Housing is a zoning benefit program that encourages development of permanent affordable housing in exchange for providing the developer the zoning benefit of increased residential floor area, or, in other words, the ability to build a larger apartment building or build an apartment building at all. The zoning benefit is commonly referred to as "inclusionary air rights." The two types of inclusionary housing in New York City are MIH and VIH. MIH is of particular interest to developers seeking to develop in these newly rezoned neighborhoods (for reasons further discussed below). With MIH, providing affordable housing is the quid pro quo for the city's approved rezoning for residential development. In the case of VIH, developers provide affordable housing in exchange for

additional permissible floor area on a project. VIH and MIH are programmatically very similar with similar application and closing procedures. The New York City Department of Housing Preservation and Development (HPD) is charged with implementing and enforcing the Inclusionary Housing Program and applications for both MIH and VIH must be submitted to HPD.

MIH Eligibility

Participation in MIH is required for all residential development projects in rezoned neighborhoods such as Gowanus and SoHo. MIH is also required for a private rezoning seeking to build an apartment building on a particular site that is otherwise zoned for nonresidential use. Thus, developers cannot escape MIH if they wish to build on a rezoned site or a rezoned neighborhood. There are some limited exceptions where a project on a rezoned site is not required to participate in MIH and eligibility requirements for such MIH exemptions are discussed below.

MIH Requirements

Each MIH project must select an MIH Option which dictates the amount and level of affordability provided to a project to satisfy MIH requirements. The [NYC Zoning Resolution](#) provides up to four different MIH Options. They are:

- Option 1
- Option 2
- Deep Affordability Option
- Workforce Option

These options differ in the amount of affordable floor area that must be provided. They also differ in the level of required affordability and in other, more minor ways. The MIH Options range from 20% to 30% of required affordable floor area that require an average weighted Area Median Income (AMI) ranging between 40% to 115%, depending on the MIH Option. However, the available MIH Options for a project site is neighborhood specific as determined by the New York City Council. Refer to the [NYC Zoning Resolution](#) to determine which MIH Options are available for a project site. In addition, a 5% increase is added to the required amount of affordable floor area if the developer chooses to provide affordable units off-site.

Exemption from MIH Requirements

The [NYC Zoning Resolution](#) allows smaller projects to be exempt from MIH requirements. Small projects that contain no more than 10 units or no more than 12,500 square feet of residential floor area are exempt from MIH. Smaller projects containing 11–25 units or with between 12,501 and 25,000 square feet of residential floor area are eligible to make a payment to the Affordable Housing Fund in lieu of providing affordable floor area. The payment amount is calculated by multiplying the amount of affordable floor area the project would have been required to provide by a dollar amount determined annually by HPD. This dollar amount is neighborhood specific.

Additionally, a developer can file an appeal with the Board of Standards and Appeals (BSA) to reduce the amount of affordable floor area required or the amount of payment into the Affordable Housing Fund. The developer must show, and the BSA must find, that the current MIH requirements pose an “unnecessary hardship” on the developer, with no reasonable possibility that the current existing MIH requirements would bring a “reasonable return.”

VIH Eligibility and Requirements

As mentioned earlier, VIH and MIH have very similar programmatic and application requirements. However, there are a few important distinctions to note. VIH is only eligible for sites zoned R10 or R10 equivalent (the highest density zones in the city). As its name infers, in VIH, the developer volunteers (rather than being mandated) to provide affordable housing at a generating site in exchange

for additional floor area at the compensated development. The generating site (loosely defined as the building where the affordable housing is located) does not have to be the same as the compensated development (loosely defined as the building where the zoning benefit is utilized). The “zoning bonus” of increased floor area generated by affordable housing can be purchased from another developer of VIH affordable units, commonly referred to as “certificates.” Bonus floor area can be transferred from the generating site to a different compensated site, provided the generating site and compensated site are in the same community board or in adjacent community boards within a half mile radius from one another. The amount of additional floor area generated by the affordable housing is determined by an applicable ratio. The ratio range is 1.25 to 3.5, dependent upon several determining factors including location, public or private financing, and new construction or rehabilitation.

Application Process

As noted above, MIH and VIH applications are submitted to HPD. The application requires the developer provide information to HPD and the local community board about the developer and the proposed project. HPD reviews the building plans in detail to ensure compliance with MIH requirements. In addition, the developer must submit the project’s financial information to HPD. This allows HPD to confirm that the developer has the financial wherewithal to complete the project and that the project will be financially sustainable after construction completion. Once HPD is satisfied with its due diligence, there is a closing where the applicant enters into a VIH regulatory agreement or an MIH restrictive declaration. The closing document outlines the requirements that the developer (and subsequent owners) agrees to abide by. At the closing, HPD issues a Permit Notice to the developer applicant. The Permit Notice is presented to Department of Buildings (DOB) to clear relevant zoning objections. The developer cannot obtain a building permit until they have received the Permit Notice from HPD at the VIH or MIH closing. And thus, the developer cannot begin worthwhile construction on their project until HPD has approved the developer’s VIH or MIH application.

The VIH or MIH application is submitted to HPD when the applicant has DOB-ready plans. Those plans must also be submitted to HPD for review and approval. The timeline for each application is dictated by different factors unique to each project. However, the application process generally takes 6–12 months from application submission. The HPD closing is often simultaneous with the construction closing

because both HPD and the construction lender seek confirmation that the project is being properly funded and can obtain the proper building permit.

As both New York City officials and developers continue seeking new sites and neighborhoods to rezone in order to spur residential development, the Inclusionary Housing Program, particularly MIH, will become a mainstay in New York City development.

VIH/MIH + 421-a Projects

Overlapping dual programs of 421-a and VIH/MIH on a single project is permissible and often expected of a developer. The affordable units required under each program can simultaneously satisfy the affordability requirements of both programs. When one program requirement differs from another (e.g., AMI level, minimum unit size), the stricter requirement prevails. For example, a 421-a Option C project, which requires 130% AMI, overlapping with VIH, which requires 80% AMI, is required to provide 80% AMI for the affordable units due to VIH's comparatively stricter requirement.

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YuhTyng ("Tyng") Patka is chair of the NYC Real Estate Tax and Incentives Practice Group and Co-chair of the firm's NYC Climate Mobilization Act Task Force.

Tyng provides a road map to her clients for the optimal way to minimize their property tax burden. Tyng represents owners in challenging their property taxes (*certiorari*) and is one of New York City's top experts on building tax classifications, having successfully argued and litigated on matters relating to building misclassifications which have led to significant tax refunds.

For Tyng's developer clients, she advises on strategies to reduce a project's tax liability and represents developers on NYC tax incentive programs such as 421-a, ICAP, and IDA benefits such as FRESH. Tyng also counsels not-for-profit organizations on how to qualify for property tax exemptions for space that they own and occupy and advises nonprofits on leasehold condominium formation as one popular strategy for successfully obtaining property tax exemptions.

Tyng's practice also includes representing developers on matters relating to Inclusionary Housing zoning benefits before the New York City Department of Housing Preservation and Development ("HPD"). She regularly represents developers on inclusionary housing applications (VIH, MIH, PFASH/AIRS) and provides her developer clients advice on preserving their project's rights to property tax and zoning benefits simultaneously. Tyng also regularly represents developers in their acquisition or disposition of inclusionary air rights.

Additionally, Tyng co-chairs the Firm's NYC Climate Mobilization Task Force where she has become New York City's leading legal expert on Local Law 97 of 2019 ("LL97") and its impact on the NYC real estate industry. Tyng has been invited to speak on numerous panels and authored many articles on LL97. Tyng is sought after by New York City's owners and lenders to advise on how LL97 will impact their real estate portfolio and how to protect against LL97's financial impact. Tyng regularly advises on LL97 matters relating to due diligence, leasing provisions, and financing. Tyng's practice also includes counseling clients on PACE financing and PACE's interconnection with property taxes.

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