



New York City development tools: Mandatory Inclusionary Housing - Part 4 - by Michael Smith and Patrick O'Sullivan

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The Mandatory Inclusionary Housing (MIH) program allows developers to utilize increased development rights allowed under a rezoning by creating permanently affordable housing marketable to both renters and purchasers in New York City. In 2016, following a citywide rezoning effort, mayor Bill de Blasio and the City's Department of Housing Preservation and Development

(HPD) launched the program. MIH allows the city to promote the creation of affordable housing through rezoning efforts.

The MIH program is available to sites zoned as an area designated for MIH (MIH Area). MIH Areas are located throughout the city (mainly in the Bronx, Brooklyn and Queens), and identified in Appendix F of the city's Zoning Resolution. A site can become an MIH Area either through a neighborhood-wide rezoning or an individual property up-zoning where the city determines that the site is an MIH Area. While many proposed neighborhood-wide rezonings would become MIH Areas—such as in the case of the contemplated Gowanus rezoning—HPD will not accept an MIH application for a site until the rezoning is approved.

Compliance with the MIH affordability requirements is triggered for projects in an MIH Area that exceed (x) 10 residential units or (y) 12,500 s/f of residential floor area. In such cases, a percentage of residential units must be permanently affordable depending on which HPD affordability option the developer chooses:

Option 1: 25% of units permanently affordable at 60% of average monthly income (AMI) with a minimum of 10% affordable at 40% of AMI;

Option 2: 30% of units permanently affordable at 80% of AMI;

Option 3: a/k/a the "Deep Affordability Option": 20% of units permanently affordable at an average of 40% of AMI; and

Option 4: a/k/a the "Workforce Option": 30% of units permanently affordable at 115% of AMI with a minimum of 5% of units at 70% of AMI and 5% of units at 90% of AMI

Small developments that have fewer than 25 residential units and that are under 25,000 residential s/f can pay into a city affordable housing fund in lieu of constructing affordable units. In addition, developments required to construct affordable units can seek to modify the affordable housing requirement through a special permit from the city's Board of Standards and Appeals.

MIH applicants work with HPD, which administers the MIH Program, and collaboration with HPD is critical to a successful application. The MIH application process is multi-disciplinary and involves various professionals, from attorneys to architects. To begin the process with HPD, an MIH applicant will need to submit an inclusionary housing application along with architectural plans and stacking charts and disclosure forms for the applicant, the project's general contractor and administering agent. The applicant will also need to provide financing information regarding the project, including an executed term sheet, underwriting and commitment letter. In addition, the MIH applicant will need to deliver notice to the applicable community board at least 45 days prior to the expected closing date. The application process parallels that of HPD's Voluntary Inclusionary Housing (VIH) program, which has been around since 1987.

When an application is approved, the applicant and HPD will negotiate a restrictive declaration to be recorded on the property to evidence the affordable housing requirement. HPD and the applicant will

also negotiate a subordination and non-disturbance agreement. The applicant's counsel will need to provide an opinion in connection with the restrictive declaration.

MIH is still a developing program. Should you have a project in mind, we would be pleased to discuss the MIH program.

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