

ZONING FOR AFFORDABILITY: USING THE CASE OF NEW YORK TO EXPLORE WHETHER ZONING CAN BE USED TO ACHIEVE INCOME-DIVERSE NEIGHBORHOODS

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Harnessing the strength of the real estate market in high cost cities to support the production of affordable housing can be an important strategy to maintain economically diverse neighborhoods. A leading tool for achieving this is inclusionary zoning—regulations that incentivize or require market-rate developers to create affordable units. However, linking the production of market-rate housing units to the provision of affordable units may raise a range of legal challenges, founded in both constitutional protections of property rights and state law limits on local regulation. This article considers the legal limitations on a locality’s ability to regulate land use, in order to evaluate whether mandatory inclusionary zoning can withstand legal challenge. We use New York City’s recently adopted, ambitious, mandatory inclusionary zoning policy as our case study, and consider how the city might justify the policy in the face of both constitutional and state law challenges. We conclude that New York City’s policy is likely to survive, but there are open legal questions that make it hard to predict with certainty how the policy will ultimately fare. Inclusionary zoning policies in other jurisdictions are likely to face similar challenges, and the experience of New York City will hold important lessons for other high-cost cities interested in using land use regulation to foster economically diverse neighborhoods.

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INTRODUCTION

Inclusionary zoning policies induce or require private developers to create or fund affordable residential units when they construct new market-rate residential buildings.¹ This premise presents an alluring—but controversial—strategy in cities with

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¹ See U.S. Dep't of Hous. & Urban Dev., Office of Pol'y Dev. & Research, *Inclusionary Zoning and Mixed Income Communities*, EVIDENCE MATTERS (Spring 2013), at 17, https://www.huduser.gov/portal/periodicals/em/EM_Newsletter_spring_2013_FNL.pdf.

robust real estate markets. Whether inclusionary zoning can survive legal challenge is a complex and novel question in many jurisdictions. Here we consider this question using New York City's recently adopted Mandatory Inclusionary Housing Program, the most ambitious policy of its kind in the country. Ultimately, we conclude that the city's policy is crafted well to withstand legal challenge, but there are unsettled legal questions that render this question impossible to answer definitively.

In *Housing New York*, Mayor Bill de Blasio's 2014 comprehensive ten-year housing plan, the City of New York identified a mandatory inclusionary zoning program as one of its key policies to address the city's growing affordable housing shortage.² In March 2016, the city adopted Mandatory Inclusionary Housing (MIH), an amendment to its Zoning Resolution that allows the city to require the creation of affordable units on site or nearby any time a developer is building new market-rate units in specified areas of the city.³

New York City, like many cities, has broad powers to zone for the public welfare.⁴ Courts generally follow principles of granting deference and presuming constitutionality when reviewing local government regulations, including zoning laws.⁵ However, local government authority to impose land use regulations on private property is checked by a body of state and federal law. When zoning laws look less like they are regulating the *use* of land and more like they are taking the land for a public purpose, or in some cases regulating rents, they can be vulnerable to challenge based on a range of theories, including constitutional (due process and takings) violations, *ultra vires* regulation, *ultra vires* taxation, and regulation of rents in violation of state law.⁶

² See CITY OF NEW YORK, HOUSING NEW YORK: A FIVE-BOROUGH, TEN-YEAR PLAN 8, 30–31 (2014), http://www.nyc.gov/html/housing/assets/downloads/pdf/housing_plan.pdf (last visited Feb. 14, 2017).

³ See *Mandatory Inclusionary Housing*, N.Y.C. DEP'T OF CITY PLANNING, <http://www1.nyc.gov/site/planning/plans/mih/mandatory-inclusionary-housing.page> (last updated Mar. 22, 2016).

⁴ See generally N.Y. Mun. Home Rule Law § 10 (McKinney 2016); N.Y. Town Law § 264.

⁵ *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (landmark zoning case establishing principle that “if the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control”).

⁶ See generally Tim Iglesias, *Framing Inclusionary Zoning: Exploring the Legality of Local Inclusionary Zoning and Its Potential to Meet Affordable*

Indeed, developers have proven to be competent plaintiffs with a lengthy record of litigating against inclusionary housing programs of every stripe—and in cases such as *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles*,⁷ even garnering critical victories.⁸ Assuming that development subject to inclusionary zoning requirements will often be less profitable and convenient than straight market-rate development,⁹ developers will often be rationally motivated to check any perceived or potential transgressions of state and federal law committed by local governments. Thus, New York City must build an MIH program that is doubly tasked with meaningfully addressing the city's need for affordable housing in a variety of neighborhoods and deftly maneuvering in unsettled legal terrain.

Though numerous policy studies have evaluated existing inclusionary zoning programs and produced recommendations, both for local governments in general and for New York City specifically,¹⁰ only a handful of comprehensive legal analyses of

Housing Needs, 36 No. 4 ZONING & PLAN. L. REP. 1 (2013).

⁷ See generally *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles*, 96 Cal. Rptr. 3d 875 (Ct. App. 2009).

⁸ See ROBERT HICKEY, AFTER THE DOWNTURN: NEW CHALLENGES AND OPPORTUNITIES FOR INCLUSIONARY HOUSING 2, 6 (2013) (describing *Palmer's* "prompt[ing] most of the state's jurisdictions to cease applying inclusionary housing policies to rental developments" as especially significant because almost half of all U.S. inclusionary zoning policies are Californian, and most new residential development in California is multifamily rental); see also Iglesias, *supra* note 6, at 9 (describing *Palmer* as "essentially halt[ing] rental [inclusionary zoning] in California," except where included by development agreement). In *Palmer*, the developer challenged Los Angeles's set-aside requirement on the theory that mandatory inclusionary zoning is "rent control" preempted by state statute; ordinances in Colorado and Wisconsin were invalidated on a similar theory. See *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30 (Colo. 2000); See *Apartment Ass'n of S. Cent. Wis., Inc. v. City of Madison*, 722 N.W.2d 614 (Wis. Ct. App. 2006).

⁹ See CAL. AFFORDABLE HOUS. LAW PROJECT & W. CTR. ON LAW & POVERTY, INCLUSIONARY ZONING: LEGAL ISSUES 3 (2002), http://www.pilpca.org/wp-content/uploads/2010/10/IZLEGAL__12.02.pdf ("[R]egardless of the value of the concessions and incentives offered, developers without experience developing affordable housing would just develop market-rate housing, notwithstanding the critical societal need for affordable housing.").

¹⁰ See, e.g., JOSIAH MADAR & MARK WILLIS, CREATING AFFORDABLE HOUSING OUT OF THIN AIR: THE ECONOMICS OF MANDATORY INCLUSIONARY ZONING IN NEW YORK CITY (NYU Furman Center 2015), http://furmancenter.org/files/NYUFurmanCenter_CreatingAffHousing_March2015.pdf; SETH ULLMAN, MICHAEL FREEDMAN-SCHNAPP & BRAD LANDER, INCLUSIONARY ZONING IN NEW YORK CITY (2013). For policy studies of

inclusionary zoning have been published.¹¹ No paper has explored the modern legal framework governing the imposition of inclusionary zoning in New York, as we do here.¹² In this paper, we outline the legal challenges that inclusionary zoning policies have faced, and then consider how the city might defend its policy. While we consider the case of New York, many of the legal principles we discuss will be instructive in other jurisdictions that are likely to face similar legal claims.¹³

In Section I, we describe the city's voluntary inclusionary housing program, and the purpose and parameters of its MIH program. In Section II, we consider how the constitutional protections of property rights found in the Due Process Clause and the Takings Clause apply to the city's MIH policy. In Section III, we explore the state law limits on the city's regulatory power, and consider whether the city can justify its actions within those limits, given its MIH design. Ultimately, we conclude that the city's MIH program is likely to withstand legal challenge. However, it does face complex and unsettled legal terrain.

inclusionary housing programs in other states, see generally Robert Hickey, Lisa Sturtevant, & Emily Thaden, *Achieving Lasting Affordability through Inclusionary Housing*, (Lincoln Inst. of Land Policy Working Paper, 2014); Jenny Schuetz, Vicki Been, & Rachel Meltzer, *31 Flavors of Inclusionary Zoning: Comparing Policies from San Francisco, Washington, DC, and Suburban Boston*, 75 J. AM. PLAN. ASS'N 441 (2009); Nico Calavita & Kenneth Grimes, *Inclusionary Housing in California: The Experience of Two Decades*, 64 J. AM. PLAN. ASS'N 150 (1998).

¹¹ These legal analyses have mostly focused on challenges brought in California, Maryland, New Jersey, Washington, and a few other state. *See, e.g.*, HICKEY, *supra* note 8, and Iglesias, *supra* note 6, at 1, 9 (both discussing legal challenges nationwide). The body of legal analysis on inclusionary zoning is particularly robust in California, where developers and building associations have brought numerous challenges against municipalities. *See* CAL. AFFORDABLE HOUS. LAW PROJECT & W. CTR. ON LAW & POVERTY, *supra* note 9.

¹² For a contemporaneous legal analysis of a mandatory inclusionary zoning proposal put forth by New York City in the early 1980s (given legal framework at that time), see generally Carl J. Rossi, *Zoning New York City to Provide Low and Moderate Income Housing—Can Commercial Developers Be Made to Help?*, 12 FORDHAM URB. L.J. 491 (1983).

¹³ There are, of course, additional legal claims that might arise, including claims unique to specific states. This paper does not address the entire universe of possible claims, but rather limits its analysis to some of the more common or likely legal claims in this context.

I. INCLUSIONARY ZONING IN NYC—VOLUNTARY & MANDATORY PROGRAMS

Inclusionary zoning programs attempt to harness activity and demand in the residential real estate market to generate new units of affordable housing by either requiring (in a mandatory program) or incentivizing (in a voluntary program) that developers create affordable units when they create new market-rate units.¹⁴ Various jurisdictions in the U.S. have taken different approaches to whether the policy should incentivize or mandate affordable housing.¹⁵ Until recently, New York City's foray into inclusionary zoning had included only a voluntary program. But in March 2016, the city instituted a mandatory inclusionary zoning program. We describe the city's voluntary program and its recently adopted mandatory program below.

A. *Voluntary Inclusionary Housing in New York City*

In 1987, New York City adopted the Inclusionary Housing Program into its Zoning Resolution.¹⁶ Stated most simply, the program provides a density bonus in exchange for the provision of affordable housing units. The affordable housing requirement can be met by building new units or by preserving or rehabilitating existing units, either on the same site receiving the density bonus or on another site nearby.¹⁷

The program was first applied in R10 zoning districts (the city's highest density residential zoning districts), and then, in 2005, began to expand to additional areas (known as "Designated Areas") in certain rezonings.¹⁸ The affordable units must remain affordable for as long as the project uses the density bonus to

¹⁴ See U.S. Dep't of Hous. & Urban Dev., *supra* note 1.

¹⁵ Compare, e.g., SAN JOSE, CAL., MUN. CODE §§ 5.08.010–730 (2016) (MIH ordinance), and MONTGOMERY, MD., COUNTY CODE § 25A (2016) (mandatory county directive for towns to adopt and implement inclusionary zoning ordinance), with AUSTIN, TEX., MUN. CODE ch. 25.2, subchapter B, art. 2, subpart B, § 2.5.2 (2016) (providing density bonuses for affordable housing payments or construction), and SEATTLE, WASH., MUN. CODE. § 23.58A.014 (2016) (providing "[b]onus residential floor area for affordable housing").

¹⁶ See *Inclusionary Housing Program*, N.Y.C. DEP'T OF CITY PLANNING, <http://www1.nyc.gov/site/planning/zoning/districts-tools/inclusionary-housing.page> (last visited Feb. 14, 2017).

¹⁷ See *id.*

¹⁸ See *id.*

comply with zoning.¹⁹

The city's MIH program makes no changes to the city's existing Inclusionary Housing Program; rather, it will apply in newly designated MIH areas. However, during the public review process for MIH, the city committed to considering some reforms to the voluntary program.²⁰

B. *Mandatory Inclusionary Housing (MIH) in New York City*

1. *Purpose of the Policy*

New York City published an extensive report of policy and data analysis in support of its MIH policy.²¹ In it, the city describes the existing housing market; the history of affordable housing subsidy programs in New York City; the importance and challenge of maintaining economically diverse neighborhoods and neighborhoods that give lower-income New Yorkers access to high-quality services and opportunities; and why MIH is an appropriate tool to help the city further its goal of fostering economically diverse neighborhoods.²²

The city's report discusses recent trends that "indicate that overall, a diminishing share of the city's housing stock is affordable to low- and moderate-income households even as the demand for housing by households with low and moderate incomes is rising because of employment growth."²³ The report warns of the consequences of these trends:

If current trends continue it is likely that, over time, some

¹⁹ See N.Y.C., Zoning Res. § 23-961(b)(1) ("the regulatory agreement shall provide that each affordable housing unit shall be registered . . . at the initial monthly rent established by HPD. . . and shall thereafter remain subject to rent stabilization for the entire regulatory period"); § 23-911 (defining "regulatory period").

²⁰ See Press Release, Gail A. Brewer, Manhattan Borough President, B.P. Brewer Recommends 'Yes' on Mayor's Mandatory Inclusionary Housing Plan, 'No' on Zoning for Quality & Affordability (Dec. 11, 2015), <https://madmimi.com/p/f51907>; Letter from Vicki Been, Comm'r, N.Y.C. Dep't of Hous. Pres. & Dev. and Carl Weisbrod, Chairman, N.Y.C. Dep't of City Planning, to Gale A. Brewer, Manhattan Borough President (Dec. 10, 2015), <http://manhattanbp.nyc.gov/downloads/pdf/ZQA%20MIH%20Commitment%20Letter.pdf>.

²¹ See generally N.Y.C. DEP'T OF CITY PLANNING & N.Y.C. DEP'T OF Hous. PRES. & DEV., NEW YORK CITY MANDATORY INCLUSIONARY HOUSING: PROMOTING ECONOMICALLY DIVERSE NEIGHBORHOODS (2015), http://www1.nyc.gov/assets/planning/download/pdf/plans-studies/mih/mih_report.pdf.

²² See *id.*

²³ *Id.* at 63.

neighborhoods that are more economically diverse today will have fewer low- and moderate income [sic] households in the future and the number of very low-income households will rise in the areas that already have high concentrations of poverty. In short, the city's neighborhoods will become even less economically diverse as the population sorts by socioeconomic status.²⁴

As a result, lower-income households are likely to end up living in rent burdened, overcrowded, or otherwise sub-optimal housing situations that can have negative effects on children, other household members, and ultimately neighborhoods.²⁵

According to the report, MIH will benefit residents by developing affordable units in "more desirable, higher opportunity" neighborhoods that traditionally tend not to produce housing for lower-income New Yorkers.²⁶ At the same time, however, the policy will ensure some residents stay in their current neighborhoods by acting "as a cushion against potential gentrification" and protecting "lower-income families from displacement" as their own neighborhood changes.²⁷ In both instances, the policy will further the city's interest in fostering income diversity across its neighborhoods:

Creating more housing opportunities for households at a range of incomes can enhance the city's overall economic diversity, alleviating the effects of rent burden, overcrowding, and illegal housing and providing opportunities to attract and maintain a diverse workforce. At the same time, increasing economic diversity at the neighborhood level is important for improving households' access to the "package" of services and amenities that a neighborhood provides and for creating options for families outside of areas of highly concentrated poverty.²⁸

By requiring a link between affordable and market-rate units in neighborhoods that have traditionally failed to produce affordable units, MIH will ensure that residents with a range of

²⁴ *Id.* at 64.

²⁵ *See id.* at 64–67.

²⁶ *Id.* at 42.

²⁷ Press Release, N.Y.C. Dep't of City Planning, City Planning Commission Chairman Carl Weisbrod Made the Following Remarks at Today's CPC Vote to Approve the City's Mandatory Inclusionary Housing (Feb. 3, 2016), <http://www1.nyc.gov/site/planning/about/press-releases/pr-20160203.page>.

²⁸ N.Y.C. DEP'T OF CITY PLANNING & N.Y.C. DEP'T OF HOUS. PRES. & DEV., *supra* note 21, at 75.

incomes can access a “‘package’ of services and amenities.”²⁹ These services include better schools, healthcare, transportation networks that reduce commute times, public amenities and decreased “exposure to crime or pollution.”³⁰ For households that benefit from the program, “[a]ll of these factors affect well-being and quality of life in profound ways, according to the growing consensus within a large body of economic, sociological, medical and public policy research conducted over the course of several decades.”³¹

In addition, the city as a whole benefits from these moves. The city explains and documents, “a rich body of research explores the neighborhood conditions that determine the success of households and benefit to communities, regardless of whether they were directly affected by these housing programs, providing important insight into how cities benefit from economic diversity.”³²

Thus, in this lengthy exposition of its justification for the policy, the city establishes that creating income-diverse neighborhoods is its objective, and explains how this objective is linked to the city’s interest in assisting low- and moderate-income households and the city as a whole.

2. *Design of the Policy*

The city’s Mandatory Inclusionary Housing zoning text states that for zoning lots in areas that the city designates as MIH areas, “no residential development, enlargement, or conversion from non-residential to residential use shall be permitted unless affordable housing . . . is provided or a contribution is made to the affordable housing fund.”³³ We refer to the triggering development activities—“residential development, enlargement, or conversion from non-residential to residential use”—collectively as “New Development” below. The affordable units may be either rental or

²⁹ *Id.* at 41.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 48.

³³ N.Y.C. DEP’T OF CITY PLANNING, APPROVED ZONING TEXT § 23-154(d)(1) at 6 (Mar. 24, 2016), <http://www1.nyc.gov/assets/planning/download/pdf/plans-studies/mih/approved-text-032216.pdf> (hashtags omitted that indicate terms defined in §§ 12-10, 23-911) [hereinafter MIH Text].

owner-occupied units.³⁴

There are three instances in which New Development in an MIH area is not required to comply with MIH: where the Board of Standards and Appeals grants a hardship waiver, where the new development has no more than 10 dwelling units and no more than 12,500 square feet of residential floor area, or where the New Development contains only affordable senior housing.³⁵

In addition to applying MIH in designated areas, the city will also impose the MIH requirements where a special permit allows “a significant increase in residential floor area.”³⁶

Where the city imposes MIH, it must apply one of two compliance options.³⁷ Option 1 requires that 25 percent of the newly developed residential floor area be set aside for affordable units. The units must on average be affordable to households earning 60 percent of the area median income (AMI) (with 10 percent of the floor area affordable to households at 40 percent of AMI and no affordable unit exceeding a level affordable at 130 percent of AMI).³⁸ Option 2 requires that 30 percent of the newly developed residential floor area be set aside for affordable units. In this Option, the units must on average be affordable to households earning 80 percent of AMI, and no affordable unit can exceed a level affordable at 130 percent of AMI.³⁹

In addition to one of these two compliance options, the city may also decide to permit two additional means of complying with MIH—the Workforce Option or the Deep Affordability Option.⁴⁰

The Workforce Option requires that 30 percent of the newly developed residential floor area be set aside for affordable units. The affordable units must on average be affordable to households

³⁴ See, e.g., MIH Text, *supra* note 33, § 23-961 (“Additional requirements for rental affordable housing”) at 45–52; § 23-962 (“Additional requirements for homeownership affordable housing”) at 52–57.

³⁵ See MIH Text, *supra* note 33, § 23-154(d) at 6–9.

³⁶ MIH Text, *supra* note 33, § 23-934 at 31 (hashtags omitted that indicate terms defined in §§ 12-10, 23-911).

³⁷ See MIH Text, *supra* note 33, § 23-154(d)(3) at 7–9; N.Y.C. DEP’T OF CITY PLANNING, *supra* note 16 (explaining that the applicable options for compliance will be determined by the City Planning Commission and the City Council).

³⁸ See MIH Text, *supra* note 33, § 23-154(d)(3)(i) at 7. Area median income (AMI) is referred to as “income index” in the city’s law.

³⁹ See MIH Text, *supra* note 33, § 23-154(d)(3)(ii) at 7–8.

⁴⁰ See MIH Text, *supra* note 33, § 23-154(d)(3) at 7.

earning 115 percent of AMI (with at least 5 percent of the units at 70 percent of AMI and at least 5 percent of the units at 90 percent of AMI); and no affordable unit can exceed a level affordable to a household earning 135 percent of AMI. Owners using this option are not eligible for city subsidies to support the creation of these units, and the option is not available for developments located in the central part of Manhattan (“the Manhattan Core”).⁴¹

The Deep Affordability Option requires that 20 percent of newly developed residential floor area be set aside for affordable units. The units must be affordable on average to a household making no more than 40 percent of AMI; and no affordable unit can exceed a level affordable to a household earning 130 percent of AMI. No subsidy can be used unless additional affordable housing is provided.⁴²

These four options assume that affordable units are being provided on the site subject to MIH. With any of these options, however, a property owner may choose to provide affordable units off-site, which is defined as within the same community district, or in a neighboring community district and within a half mile of the MIH lot.⁴³ In that case, she must provide additional affordable housing.⁴⁴

The law provides an additional option for compliance for construction activity that adds relatively little residential capacity to a zoning lot. If new development in an MIH area increases the number of units on the lot by no more than 25 and increases the residential floor area by less than 25,000 square feet, the property owner may comply with the MIH requirements by contributing to an affordable housing fund.⁴⁵

⁴¹ See MIH Text, *supra* note 33, § 23-154(d)(3)(iv) at 8–9.

⁴² See MIH Text, *supra* note 33, § 23-154(d)(3)(iii) at 8.

⁴³ See MIH Text, *supra* note 33, § 23-96 at 39.

⁴⁴ See MIH Text, *supra* note 33, § 23-154(d)(5) at 9–10.

⁴⁵ See MIH Text, *supra* note 33, § 23-154(d)(3)(v) at 9.

Table 1: Summary of MIH Compliance Options

Compliance Options	Affordability Requirement	Affordability Level
<i>In MIH Areas, the city shall impose one or both of these options:</i>		
Option 1	25% of new development	Average unit affordable at 60% AMI 10% of units affordable at 40% AMI Maximum unit price or rent affordable at 130% AMI
Option 2	30% of new development	Average 80% AMI Maximum 130% AMI
<i>The city may add one or both of the following options:</i>		
Deep Affordability Option	20% of new development	Average 40% AMI Maximum 130% AMI
Workforce Option (not in Manhattan Core)	30% of new development	Average 115% AMI 5% of units at 70% AMI 5% of units at 90% AMI Maximum 135% AMI
<i>Alternative Compliance Options:</i>		
Affordable Housing Fund Option (Small Redevelopment Projects Only)		
Off-Site Option		

The policy requires that the MIH zoning requirements be recorded for each development in a regulatory agreement between the landowner and the city.⁴⁶ The regulatory agreement is to remain in effect for as long as the site satisfies the MIH requirements; retains a permit, temporary certificate of occupancy, permanent certificate of occupancy; or is otherwise under construction or in use.⁴⁷

In addition to requiring the provision of affordable housing in compliance with the regulations described above, the policy also subjects affordable housing units in MIH developments to rent stabilization for so long as the regulatory agreement remains in effect, unless the owner and the city reach an alternative agreement for a particular project.⁴⁸

⁴⁶ See MIH Text, *supra* note 33, § 23-96(f) at 43–44.

⁴⁷ See MIH Text, *supra* note 33, § 23-911 at 21 (“General definitions: Regulatory period”).

⁴⁸ See MIH Text, *supra* note 33, § 23-961(b)(1) at 46.

II. CONSTITUTIONAL LIMITS ON THE REGULATION OF PROPERTY

The federal constitution protects the property rights of individual citizens from undue government interference through the Due Process Clause and the Takings Clause, applied to the federal government through the Fifth Amendment and to state governments through the Fourteenth Amendment.⁴⁹ The Due Process Clause guarantees that the government will not “deprive any person of . . . property, without due process of law.”⁵⁰ The Takings Clause guarantees that the government will not take “private property . . . for public use, without just compensation.”⁵¹ A valid regulation that effects a taking of private property for public use (the standard for which we will discuss below) is justified as long as it provides just compensation to affected property owners. Like many other states, the New York State Constitution contains identical protections.⁵² Because state governments delegate the power to regulate (including the power to zone) to local governments, local government actions are bound by the same limitations that apply to state government actions.

The Due Process Clause is a protection against illegitimate government infringements on property.⁵³ A regulation of property that exceeds the government’s authority to regulate (the standard for which will be discussed below) is impermissible and must be struck down.⁵⁴ Unlike a taking, the government cannot save a due

⁴⁹ Both the Fifth and Fourteenth Amendments contain Due Process Clauses. The Takings Clause only appears in the Fifth Amendment, but is applied to the states through the Fourteenth Amendment. *See* U.S. CONST. amend. V; *id.* amend. XIV, § 1; *Kelo v. City of New London*, 545 U.S. 469, 472 n.1 (2005).

⁵⁰ U.S. CONST. amend. XIV; *see also id.* amend V.

⁵¹ U.S. CONST. amend. V.

⁵² *See* N.Y. CONST. art. I, § 7. The due process and takings clauses of the New York State constitution are typically interpreted as being coterminous with their federal constitution counterparts. *See* *Watanabe Realty Corp. v. City of New York*, 315 F. Supp. 2d 375, 401 (S.D.N.Y. 2003) (addressing due process, equal protection, and takings clauses); *Uhlfelder v. Weinshall*, 810 N.Y.S.2d 275, 289 n.12 (Sup. Ct. 2005), *aff’d*, 845 N.Y.S.2d 41 (App. Div. 2007) (addressing the Takings Clause); *Gangemi v. City of New York*, 827 N.Y.S.2d 498, 506 n.3 (Sup. Ct. 2006) (addressing the Takings Clause).

⁵³ *See* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005) (The Takings Clause “expressly requires compensation where government takes private property ‘for public use.’ . . . Conversely, if a government action is found to be impermissible . . . [because it] is so arbitrary as to violate due process – that is the end of the inquiry. No amount of compensation can authorize such action.”).

⁵⁴ *See id.*

process-violating regulation by compensating the property owner. The Takings Clause applies to the subset of legitimate property regulations that take property for public use. Of course, there are also legitimate property regulations that do not qualify as takings, for which no compensation is required.⁵⁵

Often inclusionary zoning regulations are challenged as due process violations, and in the alternative as illegal takings, because of the burdens these regulations impose on private property.⁵⁶ In the following sections we analyze the legal theories underlying

⁵⁵ See *id.* at 541–42 (2005) (discussing the distinction between a substantive due process inquiry and a regulatory taking inquiry); see also *Lutheran Church in Am. v. City of New York*, 316 N.E.2d 305, 310 (N.Y. 1974) (“Government interference with an owner’s use of private property under the police power runs the gamut from outright condemnation for which compensation is expressly provided to the regulation of the general use of land remaining in private ownership so that the use might harmonize with other uses in the vicinity. No compensation is awarded in the latter situation since there is no taking.”).

⁵⁶ See, e.g., 2910 Ga. Ave. LLC v. Dist. of Columbia, 983 F. Supp. 2d 127 (D.D.C. 2013) (denying in part a motion to dismiss claims that D.C.’s Inclusionary Zoning Program violated owner’s substantive due process rights and constituted an illegal taking); *Home Builders Ass’n of N. Cal. v. City of Napa*, 108 Cal. Rptr. 2d 60 (Ct. App. 2001) (upholding inclusionary zoning regulation against due process and takings claims). It is also possible that MIH could face an equal protection challenge, but we do not spend time analyzing such a claim here because it is very likely to fail. The Fourteenth Amendment to the U.S. Constitution states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. The Equal Protection Clause is concerned with laws that treat similarly situated people differently. But, if the law in question does not burden a fundamental right or a suspect class, courts apply a deferential rational basis analysis—i.e., a regulation is valid so long as it bears a rational relationship to a legitimate government interest. See, e.g., *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 319–20 (1993). Equal protection claims brought by differing classes of property owners and developers challenging inclusionary housing regulations have only received rational basis review, and those claims have failed. See, e.g., *In re Egg Harbor Assocs.*, 449 A.2d 1324 (N.J. App. Div. 1982) (finding that conditioning waterfront development permits on the building of inclusionary housing units, pursuant to a state statute that applied only to certain coastal areas, did not amount to depriving coastal area landowners of equal protection); *Home Builders Ass’n v. City of West Des Moines*, 644 N.W.2d 339 (Iowa 2002) (holding mandatory inclusionary housing fee ordinance that classified homebuilders on basis of anticipated occupancy—single-family versus multifamily—as valid against equal protection challenge, since it was within the municipality’s economic power to encourage one type of property usage over another by differentiating the fees imposed on different usages); *Holmdel Builders Ass’n v. Twp. of Holmdel*, 583 A.2d 277, 292 (N.J. 1990) (finding no violation of equal protection “[b]ecause plaintiffs do not allege that they are a member of a suspect class,” and the mandatory inclusionary fee ordinance at issue was an otherwise reasonable exercise of local zoning power).

both kinds of claims, the standards that courts have applied in evaluating these claims, and their potential application to the city's MIH policy. Notably, zoning laws, because they are legislative, "enjoy a strong presumption of constitutionality and the burden rests on the party attacking them to overcome that presumption beyond a reasonable doubt."⁵⁷ Ultimately, we conclude that the policy is likely to survive constitutional challenge. The standards and precedent for due process and regulatory takings claims are well settled and support upholding MIH. The area of land use exactions (another type of takings claim) is murkier. If a court were to conclude that MIH is an exaction, the policy could be vulnerable because it was not designed to meet the exactions standard. But, while this outcome is possible because the law governing exactions is somewhat unsettled, it is unlikely that MIH would be considered an exaction.

A. *Does MIH Deprive Owners of Property
Without Due Process of Law?*

Regulation of private property is permissible, but "unreasonable" regulation can run afoul of the constitutional protection against deprivation of private property by the government.⁵⁸ This prohibition on substantively improper government action is often termed a "substantive due process right," and is distinct from the procedural due process protection that is also imposed by the Due Process Clause.⁵⁹ Courts have held that, "[i]n the zoning context, a government decision regulating a landowner's use of his property offends substantive due process if the government action is arbitrary or irrational" meaning the government "acts with no legitimate reason for its decision."⁶⁰

⁵⁷ *Asian Ams. for Equal. v. Koch*, 527 N.E.2d 265, 270 (N.Y. 1988).

⁵⁸ *See Charles v. Diamond*, 360 N.E.2d 1295, 1300 (N.Y. 1977) ("We have held that police power enactments must be reasonable and that unreasonable exercises of the police power result in a deprivation of property without due process.").

⁵⁹ *See Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J. dissenting) ("Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three.").

⁶⁰ *Soundview Assocs. v. Town of Riverhead*, 893 F. Supp. 2d 416, 435 (E.D.N.Y. 2012) (citing *Southview Assocs. v. Bongartz*, 980 F.2d 84, 102 (2d Cir. 1992)); *see also Gregory v. Inc. Vill. of Ctr. Island*, No. 14-CV-2889, 2015

Courts in New York analyze local zoning regulations challenged on due process grounds using a two-part test. First, plaintiffs “must establish a cognizable property interest.”⁶¹ Second, plaintiffs must show “the governmental action was wholly without legal justification,”⁶² defined as an official action that is “arbitrary in the constitutional sense.”⁶³ Importantly, where a municipality acts “in accordance with a legitimate concern” or “legitimate state interests,” the action is not “unconstitutionally arbitrary” and, therefore, will survive a substantive due process challenge.⁶⁴

New York City has argued extensively that the households that are able to access affordable housing provided by MIH, the neighborhoods where MIH is applied, and the city as a whole will benefit from the policy’s creation of economically diverse neighborhoods over time, and that MIH will create such neighborhoods by linking the development of market-rate housing to the development of new affordable units.⁶⁵

In California, inclusionary housing ordinances based on similar policy rationales have survived facial substantive due process challenges.⁶⁶ Most recently and notably, in a case addressing the legality of the City of San Jose’s mandatory inclusionary housing ordinance, the California Supreme Court noted that the city’s interest in fostering economic diversity was a

U.S. Dist. LEXIS 114749, at *29 (E.D.N.Y. Aug. 28, 2015) (finding that a violation of substantive due process is found only when “the government’s infringement was arbitrary, conscience shocking, or oppressive in a constitutional sense, not merely incorrect, or ill-advised”) (internal quotation marks omitted) (citing *Ferran v. Town of Nassau*, 471 F.3d 363, 369–70 (2d Cir. 2006); *Ahmed v. Town of Oyster Bay*, 7 F. Supp. 3d 245, 260 (E.D.N.Y. 2014) (denying motion to dismiss and finding there was a “plausible claim for denial of substantive due process”).

⁶¹ *Id.*; see also *Glacial Aggregates LLC v. Town of Yorkshire*, 924 N.E.2d 785, 789–90 (N.Y. 2010); *Upstate Land & Props., LLC v. Town of Bethel*, 905 N.Y.S.2d 284, 286 (App. Div. 2010); *Ken Mar Dev., Inc. v. Dep’t of Pub. Works*, 862 N.Y.S.2d 202, 206 (App. Div. 2008).

⁶² *Bower Assoc. v. Town of Pleasant Valley*, 814 N.E. 410, 415 (N.Y. 2004).

⁶³ *Id.* at 416 (citing *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198 (2003)).

⁶⁴ *Id.* (citing *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 501 (2d Cir. 2001), and *Lisa’s Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 17 (2d Cir. 1999)).

⁶⁵ See N.Y.C. DEP’T OF CITY PLANNING & N.Y.C. DEP’T OF HOUS. PRES. & DEV., *supra* note 21, at 75–76.

⁶⁶ See cases cited *infra* notes 67, 68.

legitimate governmental interest:

The legislative history of the ordinance in question establishes that the City of San Jose found there was a significant and increasing need for affordable housing in the city to meet the city's regional share of housing needs under the California Housing Element Law and that the public interest would best be served if new affordable housing were integrated into economically diverse development projects, and that it enacted the challenged ordinance in order to further these objectives. The objective[] . . . of locating such housing in economically diverse developments [is] unquestionably [a] constitutionally permissible purpose[].⁶⁷

In a 2002 case also addressing the legality of an inclusionary housing policy, a California appellate court found that the challenged ordinance withstood a substantive due process challenge. In that case, the City of Napa justified its inclusionary housing ordinance on similar grounds, citing the need for affordable housing within its jurisdiction. The California Court of Appeal held that there was little question that creation of affordable housing was “a legitimate state interest,” and that by requiring the creation of affordable units “it is beyond question” that the policy would advance that interest.⁶⁸

The California Court of Appeal also held that the existence of a procedure by which the city could “reduce, modify or waive” the requirement saves it from a facial due process challenge:

‘A claim that a regulation is *facially* invalid is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional *application* to the complaining parties. . . .’ When an ordinance contains provisions that allow for administrative relief, we must presume the implementing authorities will exercise their authority in conformity with the Constitution.⁶⁹

⁶⁷ Cal. Bldg. Indus. Ass’n. v. City of San Jose, 351 P.3d 974, 992 (Cal. 2015). That the city’s interest in fostering economic diversity qualified as a legitimate governmental interest was not disputed by the parties in this case. *Id.*

⁶⁸ See Home Builders Ass’n v. City of Napa, 108 Cal. Rptr. 2d 60, 65 (Ct. App. 2001), *cert. denied*, 535 U.S. 954 (2002). In its discussion, the Court of Appeals applied the “substantially advances” standard in adjudication of the plaintiff’s takings claim; subsequently, however, in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), the U.S. Supreme Court clarified that the test is actually a due process inquiry.

⁶⁹ *Home Builders Ass’n*, 108 Cal. Rptr. 2d. at 67 (internal citations omitted). *But see* *Sintra, Inc. v. City of Seattle*, 829 P.2d 765, 777 (Wash. 1992) (holding,

Like the ordinance at issue in the City of Napa case, New York City's policy also contains a mechanism for waiver or modification of the requirement,⁷⁰ making a facial due process challenge more difficult.

Though New York State courts have yet to directly rule on the validity of inclusionary zoning programs, precedent involving incentive zoning and residential zoning suggests that the city has some latitude in designing its MIH zoning regulations. While often not framed as due process challenges, New York courts have considered claims attacking the legitimacy of zoning regulations, and deferentially reviewed the justifications for the policies and the link between the policies' means and goals. For example, the New York Court of Appeals has held that zoning designed to increase the provision of housing for populations lacking access to housing (in that case, the elderly) had a rational basis.⁷¹ The Court of Appeals has also upheld an incentive zoning scheme intended to produce more housing, finding that the goal (production of more housing) was rational and the means (the incentive zoning scheme) was reasonably related to that goal.⁷² New York courts have also held that municipalities have some measure of authority to regulate the composition of residents in a particular zone. For example, a town regulation creating a unique zoning designation for residential neighborhoods to be occupied only by "families" and functional equivalents of "families" (as defined in the town's zoning code), was upheld as a valid zoning regulation.⁷³

even where variance procedure existed, charge of \$218,000 fee to develop a \$670,000 property was "a regulation with such an unbalanced impact [that it] violates due process").

⁷⁰ MIH Text, *supra* note 33, § 23-154(d)(1) at 6, § 73-624 at 58–59.

⁷¹ See *Maldini v. Ambro*, 330 N.E.2d 403, 405–06 (N.Y. 1975). The court reasoned that "[c]ertainly, when a community is impelled, consistent with such criteria, to move to correct social and historical patterns of housing deprivation, it is acting well within its delegated 'general welfare' power." *Id.* Note however that in dicta, the court expressly distinguished age, as a stage in life that is common to all people, from "unalterable or obstinate classification like race, religion or *economic status*." *Id.* at 408 (emphasis added) (citations omitted).

⁷² See *Asian Ams. for Equal. v. Koch*, 527 N.E.2d 265, 271 (N.Y. 1988).

⁷³ See *Atlas Henrietta, LLC v. Town of Henrietta Zoning Bd. of Appeals*, 995 N.Y.S.2d 659, 672 (Sup. Ct. 2013) (quoting *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974)) ("A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion

Given the very deferential standard that courts use in evaluating a legislative body's assessment of the governmental interest embodied in a zoning amendment,⁷⁴ it is likely that the city's interest in creating economically diverse neighborhoods would be upheld as a legitimate governmental interest and survive a substantive due process challenge.

B. *Does MIH Constitute Taking of Property for Public Use Without Just Compensation?*

The Fifth Amendment to the United States Constitution states "nor shall private property be taken for public use, without just compensation," and through the Fourteenth Amendment this prohibition applies to state and local governments.⁷⁵ Challenges to inclusionary zoning programs often include a claim that the local government's regulation deprives private land owners of their property for public use without offering just compensation, in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution.⁷⁶ The U.S. Supreme Court has recognized three types of government actions that can result in a taking: physical occupation or invasion of property, government regulation of property, and land-use exactions.⁷⁷ As we discuss in detail below, MIH is not likely to be struck down on takings grounds, though a recent Supreme Court decision about exactions has created uncertainty that makes a successful challenge to MIH slightly more likely than it may have been before.

A permanent physical occupation of property by the government for public use is the axiomatic example of a taking. This type of government action requires compensation.⁷⁸

and clean air make the area a sanctuary for people."). The court reasoned that the regulation still permitted reasonable rental situations for non-families in other zones.

⁷⁴ See *Asian Ams. for Equal.*, 527 N.E.2d at 265 ("Because zoning is a legislative act, zoning ordinances and amendments enjoy a strong presumption of constitutionality and the burden rests on the party attacking them to overcome that presumption beyond a reasonable doubt.").

⁷⁵ U.S. CONST. amends. V & XIV.

⁷⁶ See, e.g., *Holmdel Builders Ass'n v. Twp. of Holmdel*, 583 A.2d 277, 280 (N.J. 1990); *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 351 P.3d 974, 988 (Cal. 2015); *2910 Ga. Ave. LLC v. Dist. of Columbia*, 983 F. Supp. 2d 127, 130 (D.D.C. 2013).

⁷⁷ See generally Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGY L.Q.* 307 (2007).

⁷⁸ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427

Regulation of property can also amount to a taking in violation of the Fifth Amendment. It is well established that local governments have the power to regulate property and land use in furtherance of the general welfare. And, of course, government regulation of property can have the effect of reducing the property's value without offending the Constitution.⁷⁹ However, when regulations go "too far" in diminishing the value of private property, they can trigger an owner's right to compensation.⁸⁰ A regulation that "deprives land of all economically beneficial use" constitutes a *per se* taking, though the Supreme Court has characterized such a "total taking" as "relatively rare" and an "extraordinary circumstance."⁸¹ To prevail on such a challenge, landowners must show by "dollars and cents" evidence that a regulation so restricts their property's uses that it destroys "all but a bare residue of" the property's economic value.⁸²

Where a regulation falls short of achieving a total taking, it is still possible that it runs afoul of the Takings Clause if it perpetrates a "partial" regulatory taking, as defined by the three-part test set forth by the Supreme Court in *Penn Central Transportation Co. v. City of New York*.⁸³ Noting that this test involves "ad hoc, factual inquiries," the court identified the following three factors for this partial regulatory takings test: (i) "the economic impact of the regulation;" (ii) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (iii) "the character of the government action."⁸⁴

(1982) ("We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention."); *see also* *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015) ("The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.").

⁷⁹ *See* *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power.").

⁸⁰ *See id.* at 415.

⁸¹ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017–18, 1027 (1992).

⁸² *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 681 N.Y.S.2d 329, 330 (App. Div. 1998), *aff'd*, 721 N.E.2d 971 (N.Y. 1999).

⁸³ *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124–28 (1978).

⁸⁴ *Id.* at 124.

The third category of government action that can qualify as a taking is a land use exaction, which is when a local government places a condition that amounts to a taking on the right to develop land. Valid land use exactions are aimed at mitigating the harm caused by development, and they are permissible as long as the condition is closely related and proportional to the harm.⁸⁵ When the connection between the condition and the harm of the development is insufficient, the condition burdens the constitutional right to just compensation and is, thus, an unconstitutional condition.

The test for whether an exaction is constitutional derives from three Supreme Court cases: *Nollan v. California Coastal Commission*, *Dolan v. the City of Tigard*, and *Koontz v. St. Johns River Water Management District*. In *Nollan*, the U.S. Supreme Court established that an exaction condition must “serv[e] the same governmental purpose that would justify denial of the permit”—that is, there must be an “essential nexus” between the purpose of the regulation and the condition it imposes.⁸⁶ Building on *Nollan*, the court emphasized in *Dolan* that a development condition must demonstrate “rough proportionality” to the proposed development’s impact.⁸⁷ While “no precise mathematical calculation” is required, “some sort of individualized determination” is necessary.⁸⁸ The court in *Koontz* reaffirmed the standards from *Nollan* and *Dolan*, and went further to hold that the nexus and rough proportionality standards apply “even when the government denies the [land use] permit and even when its demand is for money.”⁸⁹

1. *Takings Analysis Applied to Inclusionary Zoning*

In the case of New York City’s MIH policy, simply stated, when a property owner chooses to create new residential units, some portion of those units must be rented or sold at affordable prices. The property owner maintains possession and control over

⁸⁵ In this section, we use the terms “illegal exaction claim” or “exaction analysis,” but courts also talk about such a claim using the terms “unconstitutional conditions” claim or analysis.

⁸⁶ *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

⁸⁷ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

⁸⁸ *Id.* at 391.

⁸⁹ *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (2013).

the use of her property. In other words, the MIH policy regulates the private use of property; it does not seize that property, or any portion of it, for public use. Holding that a rent control regulation did not qualify as a physical taking, the U.S. Supreme Court explained that “[w]hen a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge, or require the landowner to accept tenants he does not like, without automatically having to pay compensation.”⁹⁰ Indeed, inclusionary zoning policies are not typically challenged as physical takings,⁹¹ and any such challenge against New York City’s MIH policy seems unlikely.

It is also unlikely that the MIH policy could be successfully challenged as a regulatory taking. It would be very hard to establish that the policy is a total regulatory taking, depriving an owner of all economically beneficial use of a property. First of all, MIH only applies when a property is being developed or significantly rehabilitated for residential use.⁹² It has no bearing on the existing use of the property or any non-residential uses. And, the policy does not apply at all to developments with 10 units or fewer.⁹³ Thus, there is always a development option to which the policy would not apply. Most critically, there is also the Board of Standards and Appeals hardship waiver, through which owners can obtain relief from the MIH requirements if the requirements are too onerous in a particular circumstance.⁹⁴

Moreover, where MIH does apply, it only partially reduces the income from a relatively small subset of units in the property.

⁹⁰ *Yee v. City of Escondido*, 503 U.S. 519, 530 (1992) (citations omitted); *see also Seawall Assocs. v. City of New York*, 542 N.E.2d 1059, 1064–65 (N.Y. 1989) (“The rent-control and other landlord-tenant regulations that have been upheld by the Supreme Court and this court merely involved restrictions imposed on existing tenancies where the landlords had voluntarily put their properties to use for residential housing. Unlike Local Law No. 9, however, those regulations did not force the owners, in the first instance, to subject their properties to a use which they neither planned nor desired.”).

⁹¹ *See, e.g., Cal. Bldg. Indus. Ass’n v. City of San Jose*, 351 P.3d 974, 991–92 (Cal. 2015) (differentiating regulatory from physical takings and conducting only regulatory takings analysis); *Bd. of Supervisors v. DeGroff Enters.*, 198 S.E.2d 600, 602 (Va. 1973) (holding inclusionary zoning ordinance violates Virginia state constitution takings clause after “depriving the owner of beneficial use,” not physical occupation).

⁹² *See* MIH Text, *supra* note 33, § 23-154(d)(4) at 9.

⁹³ *See* MIH Text, *supra* note 33, § 23-154(d)(4)(i) at 9.

⁹⁴ *See* MIH Text, *supra* note 33, § 73-624 at 58–59.

In a takings analysis, the relevant inquiry analyzes the “parcel as a whole” being regulated—not just the affected portion of the land or rights at issue.⁹⁵ In the case of MIH, at most 30 percent of the newly built residential floor area on the affected zoning lot will be subject to the affordability requirement.⁹⁶ It is well established that reduction of profits does not necessarily qualify as a regulatory taking.⁹⁷

For similar reasons, it is also unlikely that the policy amounts to a partial regulatory taking under the *Penn Central* test. Considering the first prong of the partial regulatory takings test, the economic impact of the policy on any potential plaintiff only equates to the difference between the market value and the regulated value of at most 30 percent of any newly built residential units. If an owner chooses to continue to operate her property without adding additional units, develops a non-residential property, or builds a small residential building, the regulation has no impact. And, if the MIH requirements are triggered, only a fraction of the value generated by those units is lost due to the regulation. Indeed, if in any particular instance the city’s MIH policy threatens an owner’s ability to “realize a reasonable return,” the policy includes a procedure through which the MIH requirement can be reduced.⁹⁸ The impact, therefore, is not likely to support a finding that the policy is a regulatory taking.⁹⁹

⁹⁵ *Penn Central*, 438 U.S. at 130–31 (“‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the ‘landmark site.’”).

⁹⁶ See MIH Text, *supra* note 33, § 23-154(d)(3) at 7–8.

⁹⁷ See, e.g., *Fed. Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45, 48 (2d Cir. 1996) (holding rent stabilization was not a regulatory taking because “[a]lthough FHLMC will not profit as much as it would under a market-based system, it may still rent apartments and collect the regulated rents”) (collecting cases); see also *Park Ave. Tower Assoc. v. City of New York*, 746 F.2d 135, 138 (2d Cir. 1984) (holding “inability of appellants to receive a reasonable return on their investment by itself does not, as a matter of law, amount to an unconstitutional taking”).

⁹⁸ See MIH Text, *supra* note 33, § 73-624 at 58–59.

⁹⁹ See *First English Evangelical Lutheran Church v. Cty. of Los Angeles*, 482 U.S. 304, 329 (1987) (“A regulatory program that adversely affects property values does not constitute a taking unless it destroys a *major portion* of the property’s value.”) (emphasis added); *Concrete Pipe & Prods. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 645 (1993) (finding that “mere diminution

Moving to the second *Penn Central* factor, the MIH policy itself would do little to interfere with reasonable investment-backed expectations because it would not interfere with landowners' existing use of property. Rather, it applies new conditions on use. There may be instances when it is coupled with a rezoning that changes the underlying use of the land (for example, a rezoning of a manufacturing zone to a residential zone), but that change in permitted use is not accomplished through the MIH policy. The *Penn Central* Court noted that landowners' "primary expectation concerning the use of the parcel" would be the "present uses of the Terminal;" and, because the landmarks regulation in that case did not interfere with the reasonable returns from that expected, present use, the regulation was constitutional.¹⁰⁰

Landowners may also claim a land use decision interferes with their reasonably expected future use of a property.¹⁰¹ However, MIH does not define the use of the property—that is done through the underlying zoning, and MIH places conditions on use. Generally, if a regulation is only "readjusting rights and burdens" in fields or businesses that "had long been subject" to regulation, the plaintiff "cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."¹⁰²

Finally, addressing the third *Penn Central* factor, the "character of the governmental action" generally requires distinguishing between "whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'"¹⁰³ New York City has established a firm justification for its actions as being well within its authority to regulate land use under state law, as discussed in Section III.A below. For these reasons, the city's policy is well insulated from

in the value of property, however serious, is insufficient to demonstrate a taking," citing the approximately 75% diminution in value in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926), and the 92.5% diminution in *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915)).

¹⁰⁰ *Penn Central*, 438 U.S. at 136.

¹⁰¹ See *Consumers Union v. State*, 840 N.E.2d 68, 103 (N.Y. 2005).

¹⁰² *Concrete Pipe & Prods.*, 508 U.S. at 645–46.

¹⁰³ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (citing *Penn Central*, 438 U.S. at 124).

regulatory takings claims.

The city's MIH policy (and inclusionary zoning in general) is most vulnerable to takings claims formulated on the grounds that the requirements constitute illegal land use exactions. New York City has plainly tried to avoid this characterization and deliberately did not support its policy as a constitutional exaction.¹⁰⁴ However, plaintiffs often argue that inclusionary housing laws should be treated as exactions.¹⁰⁵ The remainder of this section will consider whether New York courts are likely to subject the city's MIH policy to review as a land use exaction, if such a challenge were to arise. Ultimately, we doubt that a court would consider the MIH policy an exaction, so we think it unlikely that the policy would be subject to *Nollan/Dolan* analysis. However, as we address briefly at the end of the section below, if it were subject to this analysis, it is unlikely that the policy would survive challenge in its current form.

2. *Will Courts Apply Exactions Analysis to MIH?*

The first question to consider when evaluating an illegal exaction claim is, of course, whether the challenged government action constitutes an exaction. Until the 2013 U.S. Supreme Court decision in *Koontz* suggested that the definition of an exaction might be broader, it was well established that an exaction is a condition on development that, if directly imposed, would constitute a taking.¹⁰⁶ Based on the pre-*Koontz* understanding of the law, MIH would not amount to an exaction for the same reasons why it is not a physical or regulatory taking, addressed above.

Moreover, there is also case law (predating *Koontz*) that supports the argument that, because MIH is a legislative enactment, it is not subject to the *Nollan/Dolan* standard. Courts have held that legislative conditions on development are less suspect and therefore not subject to the more onerous nexus and proportionality standards.¹⁰⁷ Indeed, the U.S. Supreme Court in

¹⁰⁴ See *supra* Section I.B.1.

¹⁰⁵ See Iglesias, *supra* note 6, at 8.

¹⁰⁶ See *Lingle*, 544 U.S. at 546–47 (“The question was whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny.”).

¹⁰⁷ See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2608

Dolan limited its holding to adjudicative exactions, and distinguished such exactions from generally applicable land use regulations.¹⁰⁸ The *Koontz* court did not address the distinction between legislative and adjudicative conditions on development; however, the dissent suggests that the legal significance of this distinction has not yet been decided by the high court.¹⁰⁹ There is at least one justice on the court, however, who has expressed skepticism that this often-cited distinction is valid.¹¹⁰ But even if *Nollan/Dolan* were applied to legislative acts deemed exactions, the city's MIH policy would still be exempt from that analysis because the MIH policy does not perpetrate a taking.

In the preeminent New York State case addressing the illegal exactions standard, *Smith v. Town of Mendon*,¹¹¹ the New York

(2013) (Kagan, J., dissenting). Justice Kagan writes, "The majority might, for example, approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable. *Dolan* itself suggested that limitation by underscoring that there 'the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel,' instead of imposing an 'essentially legislative determination[] classifying entire areas of the city.' Maybe today's majority accepts that distinction; or then again, maybe not." *Id.* (internal citations omitted) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)) (citing *Ehrlich v. Culver City*, 911 P.2d 429 (Cal. 1996)). See also *Parking Ass'n v. City of Atlanta*, 450 S.E.2d 200, 203 (Ga. 1994).

¹⁰⁸ See *Dolan v. City of Tigard*, 512 U.S. 374, 385; see also *Lingle*, 544 U.S. at 547 (noting that *Dolan*'s holding is limited to adjudicative exactions).

¹⁰⁹ See *Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting) ("The majority might, for example, approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable. *Dolan* itself suggested that limitation by underscoring that there 'the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel,' instead of imposing an 'essentially legislative determination [] classifying entire areas of the city.' Maybe today's majority accepts that distinction; or then again, maybe not.") (internal citations omitted).

¹¹⁰ See *Cal. Bldg. Indust. Ass'n v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in the denial of certiorari) ("For at least two decades, however, lower courts have divided over whether the *Nollan/Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one. That division shows no signs of abating. The decision below, for example, reiterated the California Supreme Court's position that a legislative land-use measure is not a taking and survives a constitutional challenge so long as the measure bears 'a reasonable relationship to the public welfare.' I continue to doubt that 'the existence of a taking should turn on the type of governmental entity responsible for the taking.'") (internal citations omitted).

¹¹¹ See generally *Smith v. Town of Mendon*, 822 N.E.2d 1214, 1219 (N.Y. 2004).

Court of Appeals held that *Nollan/Dolan* analysis applies only to “exactions” that are administratively imposed.¹¹² Moreover, the court defined an “exaction” narrowly as a “dedication of property to public use”—that is, dedications that implicate a property owner’s “right to exclude others” from her private property.¹¹³ The Court of Appeals in *Smith* also allowed that a fee imposed “in lieu of the physical dedication of property to public use” is an exaction.¹¹⁴ The *Smith* court’s narrow definition of “exactions” seems to exclude the city’s MIH set-aside conditions, wherein developers allocate a number of residential units to be rented at certain affordability levels, but in no manner transfer any claim of title to the city.¹¹⁵

In the decade since *Smith*, however, the land use exactions landscape has shifted with the U.S. Supreme Court’s 2013 decision in *Koontz v. St. Johns River Water Management District*, a wetlands environmental mitigation case.¹¹⁶ *Koontz* might be read

¹¹² See *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 721 N.E.2d 971, 975 (N.Y. 1999) (interpreting *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702 (1999), as rejecting *Nollan/Dolan*’s applicability to generally applicable zoning regulations).

¹¹³ See *Smith v. Town of Mendon*, 822 N.E.2d 1214, 1219 (N.Y. 2004) (required dedications of property amount to exactions only when they are for public use) (interpreting *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702 (1999), and applying *Nollan* and *Dolan* narrowly). The dissent in *Smith* criticized the majority’s interpretation of “public use,” doubting that the U.S. Supreme Court has intended to limit the definition of exactions to those dedications of property that “entail public access or otherwise restrict the landowner’s right to exclude,” and reasoning that “of course, the phrase ‘public use’ does not unambiguously equate with public access. Indeed, in takings jurisprudence ‘public use’ has come to mean something more akin to a public purpose or public benefit.” *Smith*, 822 N.E.2d at 1226–27.

¹¹⁴ See *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d 821 (N.Y. 2003). Judge Read, dissenting in *Smith*, disagreed with what he considered the majority’s narrow reading of *Twin Lakes*: “In *Twin Lakes*, the parties agreed that *Nollan/Dolan* applied to the exaction, but there is no indication that [the application] hinged on the fact that the fees were exacted in lieu of a land dedication.” *Smith*, 822 N.E.2d at 1228 (Read, J., dissenting).

¹¹⁵ *But cf.* *Sterling Park v. Palo Alto*, 310 P.3d 925, 934 (Cal. 2013) (defining a requirement to grant a purchase option on affordable set-aside units to government as an “exaction” under California Mitigation Fee Act, on theory that purchase option requirement qualified as a possessory interest in property). See also *Seawall Assocs. v. City of New York*, 542 N.E.2d 1059, 1064 (N.Y. 1989) (finding government-coerced set-asides imply a loss of possessory interest in the right to exclude, amounting to physical takings) (impliedly abrogated on related but distinct grounds by *Bonnie Briar Syndicate v. Town of Mamaroneck*, 721 N.E.2d 971 (N.Y. 1999), *cert. denied*, 529 U.S. 1094 (2000)).

¹¹⁶ See generally *Koontz v. St. Johns River Water Mgmt. District*, 133 S. Ct.

to expand the types of conditions to which *Nollan/Dolan* analysis applies. In *Koontz*, the court held that *Nollan/Dolan* analysis applied to the government's condition that a landowner hire contractors to make improvements to off-site wetlands.¹¹⁷ The majority reasoned that requiring the petitioner to restore wetlands was a "monetary obligation burden[ing] petitioner's ownership of a specific parcel of land."¹¹⁸ And, such an obligation is only permissible if passes the tests delineated in *Nollan* and *Dolan*.¹¹⁹

An expansive reading of *Koontz* could mean that regulations that require an owner to spend money as a condition of development qualify as exactions subject to the nexus and rough proportionality tests. This reading would significantly broaden the set of land use decisions subject to *Nollan/Dolan* analysis. The *Koontz* dissent argues that this is a problem:

The majority's approach, on top of its analytic flaws, threatens significant practical harm. By applying *Nollan* and *Dolan* to permit conditions requiring monetary payments—with no express limitation except as to taxes—the majority extends the Takings Clause, with its notoriously "difficult" and "perplexing" standards, into the very heart of local land-use regulation and service delivery.¹²⁰

However, it is also possible that *Koontz* will be read more narrowly, as it has recently been interpreted by the California Supreme Court. In its 2015 decision addressing San Jose's inclusionary housing policy, the California Supreme Court considered whether the policy was subject to the standard for exactions under *Koontz*, and held that the policy was not an exaction.¹²¹ San Jose's policy required that "all new residential development projects of 20 or more units to sell at least 15 percent of the for-sale units at a price that is affordable to low or moderate

2586 (2013).

¹¹⁷ *See id.*

¹¹⁸ *See id.* at 2599; *but see id.* at 2606 (Kagan, J., dissenting) ("[A] requirement that a person pay money to repair public wetlands is not a taking. . . . [I]t simply 'imposes an obligation to perform an act' (the improvement of wetlands) that costs money.") (quoting *E. Enters. v. Apfel*, 524 U.S. 498, 540–41 (1998) (opinion of Kennedy, J.)).

¹¹⁹ *Id.* at 2599 (majority opinion).

¹²⁰ *Id.* at 2607 (Kagan, J., dissenting).

¹²¹ *Cal. Bldg. Indus. Ass'n. v. City of San Jose*, 351 P.3d 974, 979 (Cal. 2015), *cert. denied*, 136 S. Ct. 928 (2016).

income households.”¹²² The court explained that this requirement “is an example of a municipality’s permissible regulation of the use of land under its broad police power,” and does not constitute “a government exaction of property.”¹²³ As such, the court held that *Koontz* is inapplicable.

The California Supreme Court explained:

Nothing in *Koontz* suggests that the unconstitutional conditions doctrine under *Nollan* and *Dolan* would apply where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval. . . . This condition does not require the developer to dedicate any portion of its property to the public or to pay any money to the public. Instead, like many other land use regulations, this condition simply places a restriction on the way the developer may use its property by limiting the price for which the developer may offer some of its units for sale.¹²⁴

The court also concluded that because the set-aside was permissible, “it follows that the affordable housing requirement of the San Jose ordinance as a whole—including the voluntary off-site options and in-lieu fee that the ordinance makes available to a developer—does not impose an unconstitutional condition in violation of the takings clause.”¹²⁵

The California Supreme Court’s reasoning is in line with that of the pre-*Koontz* New York Court of Appeals.¹²⁶ But the Court of Appeals has not yet addressed an exactions or development conditions claim post-*Koontz*, so it remains to be seen how *Koontz* might re-align *Smith*’s treatment of *Nollan* and *Dolan*. In one case post-*Koontz*, however, an Appellate Division court indicated in dicta that the *Smith* court’s narrow application of *Nollan* and *Dolan* remains intact, noting that petitioners had failed to “clai[m] that the conservation fee falls within the narrow category of

¹²² *Id.* at 978.

¹²³ *Id.* at 988.

¹²⁴ *Id.* at 990.

¹²⁵ *Id.* at 996.

¹²⁶ See *Smith v. Town of Mendon*, 822 N.E.2d 1214, 1219 (N.Y. 2004); *Consumers Union v. State*, 840 N.E.2d 68, 83 (N.Y. 2005) (“We have confined our exaction analysis to those cases where the condition affects a property owner’s ‘right to exclude others,’ and where a fee is imposed ‘in lieu of the physical dedication of property to public use.’”) (internal citations omitted).

exactions to which the rough proportionality test is applicable,”¹²⁷ citing to *Smith*’s “dedication of property to public use” analysis.¹²⁸

However, if a court were to conclude that the city’s MIH policy was subject to evaluation under the standard for the constitutionality of exactions, it is likely that the current version of the policy would fail. The city has not completed or relied upon the kind of nexus study, now common as a precursor to exaction regulation, that would establish the impacts of the development on the municipality. And without such a study, it would be very hard—maybe impossible—for the city to establish that its set-aside requirement was necessary to address the harm caused by any specific new development project and proportional to that harm.¹²⁹ The city has not attempted to justify the policy as mitigation for any particular harm stemming from new development, nor is the set-aside requirement linked to the magnitude of any particular development-specific harm. Rather, the city has gone to great lengths to document and justify its policy as necessary to meet a public policy goal of fostering economically diverse neighborhoods.¹³⁰ While it may be possible for the city to justify the existing policy as an exaction, it would need to present a wholly distinct set of rationales for the policy in order to meet the *Nollan/Dolan* standard, if it were found to apply.

III. STATE LAW RESTRICTIONS ON REGULATION OF PROPERTY

In addition to the constitutional limits on a city’s ability to regulate property, there are also state law limits on this power that cities must consider as they design land use policies. Below we

¹²⁷ *Gabrielli v. Town of New Paltz*, 984 N.Y.S.2d 468, 477 n.4 (App. Div. 2014).

¹²⁸ *See id.* (citing *Smith*, 822 N.E.2d at 1218–20).

¹²⁹ *See, e.g.*, Josephine L. Ennis, Comment, *Making Room: Why Inclusionary Zoning is Permissible Under Washington’s Tax Preemption Statute and Takings Framework*, 88 WASH. L. REV. 591, 632 (“A city that produces findings showing the nexus between development and the need for set-asides will have a much easier time overcoming the *Nollan* and *Dolan* tests”); ADAM F. CRAY, THE USE OF RESIDENTIAL NEXUS ANALYSIS IN SUPPORT OF CALIFORNIA’S INCLUSIONARY HOUSING ORDINANCES: A CRITICAL EVALUATION (2011), http://www.cbia.org/uploads/5/1/2/6/51268865/residential_nexus_analysis_in_support_of_california_complete.pdf. *See also* CITY AND COUNTY OF S.F., RESIDENTIAL NEXUS ANALYSIS (2007); CITY OF FREMONT, RESIDENTIAL NEXUS ANALYSIS INCLUSIONARY HOUSING ORDINANCE (2010); CITY OF SAN JOSE, RESIDENTIAL NEXUS ANALYSIS (2014).

¹³⁰ *See supra* Section I.B.1.

consider the three major areas of state law that could pose impediments to the imposition of an inclusionary zoning policy.¹³¹ We conclude that the policy is a valid exercise of the zoning power, and not likely to be successfully challenged as an illegal tax. However, the policy may be vulnerable to challenge based on the state's prohibition on local imposition of rent regulations. Indeed, this may be the most significant hurdle for the city if it is sued over its MIH policy. The city may be able to defend itself—there is helpful law on its side that we discuss below—but the law is unsettled enough that it is hard to predict with certainty how a court would rule.

A. *Does MIH Exceed the Authority Granted to New York City by the State to Zone?*

In 1916, New York City was the first American city to enact a comprehensive zoning ordinance.¹³² The ordinance separated uses into different districts, creating residential, business, and unrestricted districts.¹³³ In 1920, the New York Court of Appeals upheld the zoning ordinance as constitutional and as a “proper exercise of the police power.”¹³⁴ Thereafter, municipalities in other states followed New York, and the U.S. Department of Commerce published a Standard State Zoning Enabling Act.¹³⁵ By early 1926, over 425 municipalities had adopted zoning ordinances¹³⁶—a practice that the U.S. Supreme Court deemed constitutional later that year in *Village of Euclid v. Ambler Realty*.¹³⁷ *Euclid* established that zoning power must be “asserted for the public

¹³¹ See Iglesias, *supra* note 6.

¹³² KEITH D. REVELL, *BUILDING GOTHAM: CIVIC CULTURE AND PUBLIC POLICY IN NEW YORK CITY, 1898-1938*, at 112 (2003). See also JOHN R. NOLON, *WELL GROUNDED: USING LOCAL LAND USE AUTHORITY TO ACHIEVE SMART GROWTH 90* (2001).

¹³³ See N.Y.C. BD. OF ESTIMATE & APPORTIONMENT, *N.Y.C. BUILDING ZONE RESOLUTION §§ 2-5* (1916), <http://www1.nyc.gov/assets/planning/download/pdf/about/city-planning-history/zr1916.pdf>.

¹³⁴ See *Lincoln Tr. Co. v. Williams Bldg. Corp.*, 128 N.E. 209 (N.Y. 1920).

¹³⁵ See *Standard State Zoning Enabling Act and Standard City Planning Enabling Act*, AM. PLANNING ASS'N, <https://www.planning.org/growingsmart/enablingacts.htm> (last visited Feb. 15, 2017).

¹³⁶ U.S. DEP'T OF COMMERCE, *ADVISORY COMM. ON ZONING, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS* (rev. ed. 1926), https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/SZENablingAct1926.pdf.

¹³⁷ See generally *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

welfare,” and that a local government’s use of zoning power should generally be granted a broad measure of judicial deference.¹³⁸ The Supreme Court also affirmed in *Euclid* that a local government derives its zoning power through state allocation of that power (along with more general police power) to municipalities—either through state enabling legislation or by a state grant of home-rule authority.¹³⁹

The New York State legislature¹⁴⁰ grants municipalities their zoning power through Article 2-A of the New York General City Law¹⁴¹ and by the broader grant of home rule authority from the state to municipalities in New York Municipal Home Rule Law § 10.¹⁴² New York City has also further delineated its own zoning authority¹⁴³ through its City Charter and enabled a consortium of city land-use entities to exercise elements of that authority as

¹³⁸ *Euclid*, 272 U.S. at 388 (“If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control”); see also *McMinn v. Town of Oyster Bay*, 488 N.E.2d 1240, 1242 (N.Y. 1985) (“Zoning ordinances, like other legislative enactments, are presumed constitutional and the burden is on the party challenging the ordinance to prove its unconstitutionality beyond a reasonable doubt.”) (internal citations omitted).

¹³⁹ See *Euclid*, 272 U.S. at 387.

¹⁴⁰ New York State courts have explicitly rejected reading Article IX, §2(c) of the New York Constitution as directly conferring local zoning power on local governments. See *Kamhi v. Planning Bd.*, 452 N.E.2d 1193, 1195 (N.Y. 1983) (“Towns and other municipal authorities have no inherent power to enact or enforce zoning or land use regulations. They exercise such authority solely by legislative grant . . .”).

¹⁴¹ See N.Y. GEN. CITY LAW § 20 (McKinney 2016).

¹⁴² See N.Y. CONST. art. IX, § 2; N.Y. MUN. HOME RULE LAW § 10.1(ii)(a)(12) (McKinney 2016) (giving local governments the police power to adopt local laws relating to “the government, protection, order, conduct, safety, health and well-being of persons or property therein”); N.Y. MUN. HOME RULE LAW § 10.1(ii)(a)(14) (giving each local government the “powers granted to it in the statute of local governments”); N.Y. STAT. LOC. GOV’TS LAW § 10.6 (giving local governments the “power to adopt, amend and repeal zoning regulations”). Article IX of the New York Constitution permits the Legislature to grant such home rule authority. See generally Joe Stinson, *The Home Rule Authority of New York Municipalities in the Land Use Context* (Pace Law Sch. Land Use Ctr. 1997) (on file with author).

¹⁴³ Article 5-A (Buildings and Use Districts) of the New York General City Law further describes the municipal zoning power of New York State municipalities. However, cities with populations over one million (i.e. the City of New York) are excluded from Article 5-A. N.Y. GEN. CITY LAW § 81-E (Consol. 1994). See generally, e.g., NOLON, *supra* note 132, at 89–94; Stuart Beckerman, *Zoning in New York City: An Overview*, 6 No. 4 N.Y. ZONING L. & PRAC. REP. 1 (Jan.–Feb. 2006).

provided in its Administrative Code and Zoning Resolution.¹⁴⁴

These various state and city enabling provisions permit the city to regulate the use of land in furtherance of the health, safety, and welfare of its inhabitants.¹⁴⁵ The state zoning enabling law also requires that zoning regulations be “in accord with a well considered plan.”¹⁴⁶ Failure to meet this requirement could open a city up to claims of *ultra vires* regulation.

It is possible, however, for a zoning regulation to go too far when it becomes unmoored from the regulation of land.¹⁴⁷ Zoning is distinct from the general police power because it specifically implicates the use of land.¹⁴⁸ In review of a zoning regulation prohibiting check-cashing businesses in the business district, the New York Court of Appeals noted that the town failed to argue that the targeted businesses were a negative externality for the community or that the regulation was linked to the “legitimate objects of the zoning power.”¹⁴⁹ The court explained this conclusion:

[T]he zoning power is not a general police power, but a power to regulate land use The provision at issue here contradicts this principle. [It] was directed at the perceived social evil of check-cashing services Whatever the merits of this view as a policy matter, it cannot be implemented through zoning. [The regulation] is obviously concerned not with the use of the land but with the business done by those who occupy it.¹⁵⁰

While this case highlights the boundaries of the zoning power,

¹⁴⁴ N.Y.C., ADMIN. CODE tit. 25 (2016); N.Y.C., CHARTER chs. 8, 27 (2016); N.Y.C., ZONING RESOLUTION (2016).

¹⁴⁵ See, e.g., N.Y. Mun. Home Rule Law § 10.1(ii)(a)(12); N.Y. GEN. CITY LAW § 20(25); N.Y.C., CHARTER § 192-d.

¹⁴⁶ N.Y. GEN. CITY LAW § 20(25). The Court of Appeals has explained that this requirement of the General City Law is also linked to a constitutional limit imposed by the Due Process Clause. The court has explained that land use regulations are “constitutional only if the restrictions are necessary to protect the public health, safety or welfare. The requirement of a comprehensive or well-considered plan not only insures that local authorities act for the benefit of the community as a whole but protects individuals from arbitrary restrictions on the use of their land.” *Asian Ams. for Equal. v. Koch*, 527 N.E.2d 265, 270 (N.Y. 1988).

¹⁴⁷ *Sunrise Check Cashing & Payroll Servs. v. Town of Hempstead*, 986 N.E.2d 898, 899 (N.Y. 2013).

¹⁴⁸ *Id.* at 900 (“Our cases make clear that the zoning power is not a general police power, but a power to regulate land use.”).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

courts review zoning regulations deferentially. If MIH were to be challenged as *ultra vires* zoning, *Asian Americans for Equality v. Koch* would be a helpful case for the city. In that case, the Court of Appeals upheld the validity of an incentive-based affordable housing zoning ordinance, finding that it had been enacted according to a well-considered plan to achieve a legitimate purpose because it had been enacted after careful study, preparation, and consideration.¹⁵¹ The Court of Appeals thus condoned the city's zoning ordinance as a valid "attemp[t] to use incentive zoning to provide realistic housing opportunities which include new apartments for the poor."¹⁵² This decision could protect the city's MIH program against *ultra vires* regulation challenges.

The court specifically addressed when a zoning regulation is in "accord with a well-considered plan":

A well-considered plan need not be contained in a single document; indeed, it need not be written at all. The court may satisfy itself that the municipality has a well-considered plan and that authorities are acting in the public interest to further it by examining all available and relevant evidence of the municipality's land use policies. Zoning legislation is tested not by whether it defines a well-considered plan but by whether it accords with a well-considered plan for the development of the community. When a zoning ordinance is amended, the court decides whether it accords with a well-considered plan in much the same way, by determining whether the original plan required amendment because of the community's change and growth and whether the amendment is calculated to benefit the community as a whole as opposed to benefiting individuals or a group of individuals.¹⁵³

Because the zoning amendment at issue "was enacted after study and consideration," "there was no allegation that it was not consistent with the City's general planning," and because the "legislation was reasonably related to its goals," the court held that

¹⁵¹ See *Asian Ams. for Equal.*, 527 N.E.2d at 271.

¹⁵² *Id.* at 273. Though it has declined to *require* local governments to provide for affordable housing, the legislature has at least opted to enact an enabling statute that *permits* local governments to include housing goals in their statutorily required comprehensive plans. Note that the legislature leaves the City of New York to articulate its own comprehensive plan.

¹⁵³ *Id.* at 270 (internal citations omitted).

it was in accord with a well-considered plan.¹⁵⁴

In an earlier case, the Court of Appeals upheld a zoning regulation intended to create housing opportunities for the elderly. In that case, *Maldini v. Ambro*, the Court cited with approval the town's intention to craft an "inclusionary" policy intended to meet the needs of residents "who otherwise would be likely to be excluded from enjoyment of adequate dwellings within the community."¹⁵⁵ And, noting the deferential standard of review for zoning enactments, the court concluded that "even if the validity of that zoning classification were 'fairly debatable, [the town board's] legislative judgment must be allowed to control.'"¹⁵⁶

As with the zoning ordinance at issue in *Asian Americans for Equality*, the city has created an extensive record to document its consideration of the MIH policy and how it fits in with the existing zoning and affordable housing policies of the city.¹⁵⁷ It is also hard to see how the MIH policy would be in conflict with the existing zoning regime because it will be imposed based on neighborhood-level assessments in areas where the city is adding additional capacity for density. Moreover, each application will require affirmative city action and will trigger an extensive public review, which will presumably result in careful consideration of whether it is in keeping with the other zoning regulations and planning principles at work in a neighborhood. Based on these facts and the Court of Appeals precedent, it seems unlikely that MIH is at risk of being invalidated as an improper use of the zoning power.

B. *Does MIH Run Afoul of the State's Prohibition on Regulating Rents?*

The Urstadt Law, New York State's prohibition on city-imposed rent regulation, is another source of state law that might be used to challenge MIH.¹⁵⁸

Inclusionary zoning has the effect of regulating housing prices. New York City's MIH program is no exception—it seeks to limit the price that can be charged for the affordable units created

¹⁵⁴ *Id.* at 271.

¹⁵⁵ *Maldini v. Ambro*, 330 N.E.2d 403, 406 (N.Y. 1975).

¹⁵⁶ *Id.* at 408 (internal citations omitted).

¹⁵⁷ *See supra* Section I.B.

¹⁵⁸ Notably, this issue only applies to the regulation of rents in rental units. There is no prohibition applicable in New York that says anything about the restriction of sale prices in for-sale properties.

in regulated properties.¹⁵⁹ The affordable rental units created pursuant to the MIH zoning will also be subject to New York State's rent stabilization laws.¹⁶⁰ The MIH program would apply to both owner-occupied and rental properties.¹⁶¹

Some states, including New York, have laws that limit the ability of local jurisdictions to restrict rents in privately owned housing, and these laws have posed a challenge to the imposition of mandatory inclusionary zoning in rental units.¹⁶² In California, Colorado, and Wisconsin, state laws have invalidated local attempts to regulate rents (though not sale prices) through inclusionary housing policies.¹⁶³

The decisions in these states do not control the outcome in New York State. The question of how MIH will fare in light of the state's prohibition is a matter of first impression in New York State. Here we consider how a court might evaluate the question, and conclude that there is substantial support for finding that Urstadt does not prohibit MIH, though the complexity and opacity of the law in this area make it difficult to predict how a court might rule.

1. *New York State's Rent Laws and the Prohibition on Regulating Rents*

Rent stabilization in New York State is a system of state laws that restrict rent increases and impose other tenant protections in certain rental units.¹⁶⁴ Unlike government subsidy programs, rent stabilization does not dictate a particular rent level or tenant income, but instead restricts rent increases. Rent stabilization typically applies to units that rent for less than \$2,700 per month,

¹⁵⁹ See MIH Text, *supra* note 33, § 23-154(d)(1) at 6.

¹⁶⁰ See MIH Text, *supra* note 33, § 23-961(b) at 46.

¹⁶¹ See MIH Text, *supra* note 33, § 23-961 ("Additional requirements for rental affordable housing") at 45-52, § 23-962 ("Additional requirements for homeownership affordable housing") at 52-57.

¹⁶² See, e.g., CAL. CIV. CODE § 1954.52 (West 2016); COLO. REV. STAT. § 38-12-301 (1999); N.Y. UNCONSOL. LAW § 8605 (McKinney 2016); WIS. STAT. § 66.1015 (2015).

¹⁶³ See *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 35 (Colo. 2000); *Apartment Ass'n v. City of Madison*, 722 N.W.2d 614, 625 (Wis. 2006); *Palmer/Sixth St. Properties, L.P. v. City of L.A.*, 96 Cal. Rptr. 3d 875 (Ct. App. 2009).

¹⁶⁴ See N.Y. UNCONSOL. LAW §§ 26-501 to -520 (McKinney 1985).

in buildings with six or more units built before 1974.¹⁶⁵ Units may also become rent stabilized by participating in some government subsidy programs. While rent stabilization is created and controlled by state law, New York City retains the authority to administer the program.¹⁶⁶

In 1971, an amendment to the rent stabilization law was passed that limited the ability of the city to strengthen the obligations or reach of rent stabilization. Found in the section of the rent laws entitled “Authority for local rent control legislation,” the law, commonly known as the Urstadt Law, imposes two restrictions on New York City.¹⁶⁷ First, the law prohibits the passage of a local law or ordinance that “provide[s] for the regulation and control of residential rents and eviction in respect of any housing accommodations which are (1) presently exempt from such regulation and control or (2) hereafter decontrolled”¹⁶⁸ The law further limited the ability of the city to impose a local law or ordinance that would subject currently stabilized or controlled units “to more stringent or restrictive provisions of regulation and control than those presently in effect,” without approval of the commissioner of housing and community renewal.¹⁶⁹ The relevant portion of the Urstadt Law for this discussion is the first prong—i.e., its prohibition on the passage of laws that regulate rents or evictions in units that were “presently exempt” from regulation in 1971 or that were thereafter decontrolled.

In 2003, the law was amended to add a slightly modified restatement of the prohibition found in the original Urstadt Law. The 2003 addition to the law provides that New York City shall not

adopt or amend local laws or ordinances with respect to the

¹⁶⁵ Units are subject to the rent stabilization rules until they become decontrolled, which typically happens because (i) the existing tenant moves out and the legal rent for the unit reaches the decontrol threshold (currently \$2,700 per month) or, less frequently, (ii) because the rent reaches the decontrol threshold and the existing tenant has an income of more than \$200,000 per year. *Rent Control and Rent Stabilization: Which Apartments Are Covered?*, N.Y. STATE HOMES AND CMTY. RENEWAL, <http://www.nyshcr.org/rent/about.htm#decontrol> (last visited Sept. 14, 2016).

¹⁶⁶ See N.Y. UNCONSOL. LAW § 8605 (McKinney 1962).

¹⁶⁷ While it does not name New York City, the Urstadt Law’s application is limited to “[e]ach city having a population of one million or more.” *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

regulation and control of residential rents and eviction . . . or otherwise adopt laws or ordinances pursuant to the provisions of this act . . . except to the extent that such city for the purpose of reviewing the continued need for existing regulation and control of residential rents or to remove a classification of housing accommodation from such regulation and control adopts or amends local laws or ordinances pursuant to [specific provisions of the rent laws].¹⁷⁰

Notably, the original language was not repealed or revised at the time of the 2003 amendment. The publically available legislative history about the 2003 addendum to the law includes only a brief excerpt from the Senate Debate Transcripts from June 19, 2003.¹⁷¹ During the debate, Senator Bonacic stated that the new wording just “reconfirmed and clarified” the Urstadt Law.¹⁷² Essentially, New York State would continue to have “sole jurisdiction over housing and rent in the state of New York, including New York City.”¹⁷³

2. *Can MIH Survive an Urstadt Law Challenge?*

Under New York State law, local governments have broad and well-protected authority to regulate land use. The Court of Appeals has recognized “the regulation of land use through the adoption of zoning ordinances as one of the core powers of local governance.”¹⁷⁴ The state legislature may limit the home rule authority to zone, but such a limitation must be explicit. As the court has explained,

Under the preemption doctrine, a local law promulgated under a municipality’s home rule authority must yield to an inconsistent state law as a consequence of “the untrammelled primacy of the Legislature to act with respect to matters of State concern.” But we do not lightly presume preemption where the preeminent power of a locality to regulate land use is at stake. Rather, we will invalidate a zoning law only where there is a “clear

¹⁷⁰ N.Y. UNCONSOL. LAW § 8605 (McKinney 2016).

¹⁷¹ See Excerpt of Senate Debate Transcripts: June 19, 2003, in NEW YORK STATE LEGISLATIVE ANNUAL – 2003, at 59–60 (2004).

¹⁷² *Id.* at 60.

¹⁷³ *Id.*

¹⁷⁴ Wallach v. Town of Dryden, 16 N.E.3d 1188, 1194 (N.Y. 2014); see also DJL Rest. Corp. v. City of New York, 749 N.E.2d 186, 191 (N.Y. 2001) (“One of the most significant functions of a local government is to foster productive land use within its borders by enacting zoning ordinances.”).

expression of legislative intent to preempt local control over land use.”¹⁷⁵

Even where a supersession clause exists in a state statute, the state’s high court “[does] not examine the preemptive sweep of this supersession clause on a blank slate.”¹⁷⁶ Rather, it considers three factors when it determines whether the legislature intended to preempt local zoning regulation: “(1) the plain language of the supersession clause; (2) the statutory scheme as a whole; and (3) the relevant legislative history.”¹⁷⁷

Below we consider these three factors, and conclude that the Urstadt Law was not intended to supersede the ability of the city to enact zoning, even if that zoning touches on the regulation of rents. The language of the law, the statutory scheme, and the legislative history support a finding that the Urstadt Law was, instead, intended to limit the city’s power in implementing the state rent regulation laws. And, there is certainly no “clear expression of legislative intent” to interfere with the city’s control over land use.

a. *The Plain Language of the Urstadt Law and the Statutory Scheme*

The Urstadt Law’s language, the case law interpreting it, and the statutory scheme support a narrow reading that limits its application to actions taken under the city’s administration of the rent regulation laws, rather than a restriction on city zoning authority.

The Urstadt Law is located in a subsection of the rent laws entitled “Authority for local rent control legislation” that defines the city’s power to administer the rent laws, and can be read narrowly to simply limit that power:

Each city having a population of one million or more, acting through its local legislative body, may adopt and amend local laws or ordinances in respect of the establishment or designation of a city housing rent agency. When it deems such action to be desirable or necessitated by local conditions in order to carry out the purposes of this section,¹ such city, except as hereinafter provided, acting through its local legislative body and not otherwise, may adopt and amend local laws or ordinances in respect of the regulation and control of residential

¹⁷⁵ *Wallach*, 16 N.E.3d at 1195 (citations omitted).

¹⁷⁶ *Id.* at 1195.

¹⁷⁷ *Id.*

rents, including but not limited to provision for the establishment and adjustment of maximum rents, the classification of housing accommodations, the regulation of evictions, and the enforcement of such local laws or ordinances. . . . Notwithstanding the foregoing, no local law or ordinance shall hereafter provide for the regulation and control of residential rents and eviction in respect of any housing accommodations which are (1) presently exempt from such regulation and control or (2) hereafter decontrolled either by operation of law or by a city housing rent agency, by order or otherwise.¹⁷⁸

A court may find support for this interpretation of the Urstadt Law in the language and legislative history of the 2003 amendment to the law. While the language of the 2003 amendment is largely similar to that of the original Urstadt Law, it links the prohibition more clearly to the powers the state legislature confers under the rent laws themselves. The law states that New York City shall not

adopt or amend local laws or ordinances with respect to the regulation and control of residential rents and eviction . . . *or otherwise adopt laws or ordinances pursuant to the provisions of this act* . . . except to the extent that such city for the purpose of reviewing the continued need for existing regulation and control of residential rents or to remove a classification of housing accommodation from such regulation and control adopts or amends local laws or ordinances pursuant to [specific provisions of the rent laws].¹⁷⁹

This 2003 language appears to limit its prohibition to the powers exercised “pursuant to the provisions of this act.” And while the original Urstadt Law did not have this detail, the 2003 legislative history states that this amendment was intended to clarify (rather than modify) the original prohibition. Thus, the language of the law and its statutory scheme support the position that the Urstadt Law prohibits the city—in the administration of rent regulation—from making the laws more extensive or stricter, but has no bearing on the ability of the city to regulate rents as part of a larger zoning scheme.

In addition, the Court of Appeals has held that that Urstadt Law does not curtail the city’s power to act in furtherance of its broader mandate to legislate for the public welfare.

¹⁷⁸ N.Y. UNCONSOL. LAW § 8605 (McKinney 2016).

¹⁷⁹ *Id.* (emphasis added).

The Court of Appeals in *City of New York v. New York State Division of Housing & Community Renewal* considered a substantially different fact pattern, but held that the Urstadt Law does not prevent the city from achieving a goal that has the attendant effect of reducing financial returns.¹⁸⁰ In that case, landlords challenged a determination by the city to use one measure of equalized assessed valuation, rather than another valuation measure.¹⁸¹ The Court held that, even though the new valuation method would result in lower return on capital, the law did not violate the Urstadt Law: “Here, accuracy in capital valuation was the goal of Local Law 73. The Urstadt Law does not prohibit City Legislation aimed at achieving that goal.”¹⁸² The court explained that “the Urstadt Law was intended to check City attempts, whether by local law or regulation, to expand the set of buildings subject to rent control or stabilization, and particularly to do so in the teeth of State enactment aimed at achieving the opposite effect.”¹⁸³ The court’s holding and narrow interpretation of the Urstadt Law in this case suggests that when the city acts in furtherance of a goal unrelated to administration of rent regulation, it does not violate the Urstadt Law.

Indeed, all of the cases where the Court of Appeals has held that the Urstadt Law invalidated local legislation involved local attempts to change the rent regulation laws themselves.¹⁸⁴ In those cases, the city was doing what the Urstadt Law directly addresses (administering the rent laws), which can be distinguished from cases where the city uses its zoning power.

Two of the trial courts that have interpreted the Urstadt Law had similarly narrow readings of the prohibition.

In *Bryant Westchester Realty Corp. v. Board of Health*, a landlord challenged a local regulation requiring the installation of window guards, arguing that the rule was a form of rent control regulation more stringent than that in effect in 1971 and a violation

¹⁸⁰ See *City of New York v. N.Y. State Div. Hous. & Cmty. Renewal*, 765 N.E.2d 829 (N.Y. 2001).

¹⁸¹ See *id.* at 830.

¹⁸² *Id.* at 837.

¹⁸³ *Id.* at 835.

¹⁸⁴ See, e.g., *Mayer v. City Rent Agency*, 385 N.E.2d 605 (N.Y. 1978); *210 E. 68th St. Corp. v. City Rent Agency*, 310 N.E.2d 538 (N.Y. 1974); *241 E. 22nd St. Corp. v. City Rent Agency*, 305 N.E.2d 760 (N.Y. 1973).

of the Urstadt Law.¹⁸⁵ The court rejected the plaintiff's argument, holding that the Urstadt Law's provisions "apply only to rent control regulation. They were not intended to restrict a municipality in adopting public safety legislation or regulations for purposes other than rent regulation even though more stringent than those in effect prior to 1971, and even though they may affect rent controlled housing."¹⁸⁶

In *Seawall Associates v. City of New York*, a trial court again interpreted the Urstadt Law narrowly.¹⁸⁷ In this case, the plaintiffs challenged a local law that placed a moratorium on the demolition of single room occupancy units (SROs). The law also required that landlords rent their SRO units and that they rent them at rates listed in the law. Despite the fact that the local law in fact regulated rents, among other things, the court ruled that "[t]he Urstadt Law does not apply to this type of regulatory scheme. . . . Local Law No. 22 goes beyond the mere regulation of rental amounts and creates a broader scheme to preserve SRO units."¹⁸⁸ The court then distinguished between the SRO regulation, which it held was not invalidated by Urstadt, and examples of local laws that modified the regulation of rents under rent stabilization itself, which ran afoul of the law.¹⁸⁹

Like the regulation of SROs at issue in *Seawall*, the regulation of rents under MIH is part of a larger regulatory scheme that furthers a legitimate planning interest—the maintenance of economically diverse neighborhoods.¹⁹⁰ The regulation of rents is one mechanism used in this "broader scheme" to foster diversity (along with regulation of affordable sales prices, the share of new units regulated, applicability of in-lieu fees and provision of affordable units offsite, regulation to come about where MIH will apply, and so on). This is not just an expansion of rent

¹⁸⁵ See *Bryant Westchester Realty Corp. v. Bd. of Health*, 397 N.Y.S.2d 322 (Sup. Ct. 1977).

¹⁸⁶ *Id.* at 323.

¹⁸⁷ *Seawall Assocs. v. City of New York*, 510 N.Y.S.2d 435 (Sup. Ct. 1986). While the trial court held that the local law was not in conflict with the Urstadt Law, it did invalidate the law on constitutional grounds. Ultimately, a subsequent version of the law was also held unconstitutional on takings grounds by the New York Court of Appeals; that court did not address the Urstadt Law question. See *Seawall Assocs. v. City of New York*, 542 N.E.2d 1059, 1070–71 (N.Y. 1989).

¹⁸⁸ *Seawall Assocs.*, 510 N.Y.S.2d at 446.

¹⁸⁹ *Id.*

¹⁹⁰ See discussion *supra* Section III.A.

stabilization; it is an intricate effort to ensure that newly built units in targeted areas of the city serve a range of incomes, using regulation of rents in a subset of those units as one mechanism to achieve this goal.

Thus, the plain language, place in the statutory scheme, and relevant case law addressing the Urstadt Law all suggest that the law was intended to limit local expansion of the rent stabilization laws. It was not intended to circumscribe the city's ability to enact a zoning policy like MIH.

b. *The Relevant Legislative History*

In assessing a preemption claim, courts will also look at the relevant legislative history for indication of intent to supersede a locality's authority to zone. Here, there is nothing in the legislative history for the Urstadt Law to suggest such an intent. Indeed, even the broad statements about the law's purpose in the legislative history address the city's powers to apply the rent regulation laws. For example, the opening paragraph addressing the bill in the Governor's Memoranda states, "The purpose of this bill is to encourage the construction of private housing in New York City by assuring that new housing will not be placed under rent regulation and control, and to assure that housing presently under such regulation and control will not be subject to more stringent provision that those presently in effect . . ." ¹⁹¹ The legislative history repeatedly describes the law as limiting the power of the city under the rent control laws, explaining that the law will "[t]erminate New York City's authority to extend rent controls" and "remov[e] the City's power to take such action [under the rent laws] in the future." ¹⁹²

The legislative history also suggests that it was concern about changing the rules that apply to existing buildings that was the motivation for the law; policies like MIH that only apply to development occurring after the enactment of the law—and thus minimize uncertainty for owners or developers—are at least arguably not the intended target of the Urstadt Law. The lawmakers who passed the Urstadt Law were concerned with preventing a reoccurrence of the application of rent stabilization to

¹⁹¹ Governor's Memoranda, in NEW YORK LEGISLATIVE ANNUAL – 1971, at 312 (1972).

¹⁹² *Id.* at 313; Governor's Memoranda on Bills Approved, in NEW YORK LEGISLATIVE ANNUAL – 1971, *supra* note 191, at 560.

existing, unregulated buildings that took place in 1969, when the city imposed rent stabilization on all units built after 1947. Multiple statements in the Governor's Memoranda link the Urstadt Law's prohibition to concern about applying stricter rules to existing buildings and thereby undermining the investment-backed expectations of owners:

The bill has become a necessity to help recreate the investor confidence that is a prerequisite to private sector investment of new funds in housing construction and maintenance. After 1947, when controls were removed for new construction, there was a surge of new building. The implicit agreement that post 1947 housing would remain uncontrolled was breached by the City of New York in 1969, contributing to the severe decline of new housing starts in the City. . . . Removal of the threat of rent control will eliminate a major obstacle to new housing starts in the City.¹⁹³

Again, the legislative history cites the city's ability to change the rules for existing buildings (like the city's 1969 law did) as the target of the Urstadt Law:

Since the enactment of the [1969 law], virtually all new private housing construction in the City has ceased. A major cause of this is the fear on the part of investors and builders that new housing may *in the future* be made subject to rent regulation and control, as occurred in 1969 with respect to post-1947 housing. By removing the City's power to take such action in the future, this bill will greatly encourage the construction of new housing in the City by the private sector¹⁹⁴

The legislative history also cites concern that permitting the city to change the rules for existing buildings could undermine maintenance of those buildings: "By limiting the fear of more stringent control, the bill would also encourage owners to invest in the maintenance and improvement of existing housing units and thereby help to stem the tide of abandonment of sound buildings in the City."¹⁹⁵

The meaning of the Urstadt Law is far from clear. While it is possible that a court could read the language of the law and its

¹⁹³ Governor's Memoranda on Bills Approved, *in* NEW YORK LEGISLATIVE ANNUAL – 1971, *supra* note 191, at 561.

¹⁹⁴ Governor's Memoranda, *in* NEW YORK LEGISLATIVE ANNUAL – 1971, *supra* note 191, at 312–13 (emphasis added).

¹⁹⁵ *Id.* at 313.

legislative history to prohibit any expansion of the rent regulation rules, much of the legislative history supports the conclusion that the legislature's primary aim was to deprive the city of the power to impose new rules, and costs, on owners after a building was built—thereby upsetting financial transactions that were made based on a different set of rules. But ultimately, even if a court rejects the argument that Urstadt was meant to address the regulation of existing buildings only, MIH is defensible because it is not promulgated pursuant to the city's authority under the rent regulation rules.¹⁹⁶ Rather, it is an exercise of the city's zoning power. In addition, the Urstadt Law's legislative history is devoid of any clear statement that its purpose was to supersede the city's ability to zone.

MIH's regulation of rents is not an effort to subject more units to rent regulation; instead, the regulation of rents under MIH is one part of a larger zoning plan intended to foster mixed-income communities. There is strong support for the position that the Urstadt Law was not intended to interfere with the city's ability to enact zoning. The plain language of the Urstadt Law, its statutory scheme, and the legislative history of the law are devoid of any "clear expression of legislative intent" to limit the city's zoning power. The language of the law says nothing about the city's power to zone; and the law itself is located in the section of the rent laws delineating the city's power under those laws. Moreover, the legislative history supports a narrow reading of the Urstadt Law's intended prohibition.

C. *Is MIH an Ultra Vires Tax?*

Although the city's MIH policy would generally require the provision of affordable housing units, it would also permit residential development, enlargements, or conversions of fewer than 25 units and 25,000 square feet alternatively to satisfy the requirements by paying an in-lieu contribution into an affordable housing fund.¹⁹⁷ Both the in-lieu fee included in the law, and the affordable housing set-aside itself, might make the policy

¹⁹⁶ Moreover, the city might also distinguish MIH on the grounds that it is not an expansion of rent stabilization to a new class of buildings citywide (like the action that prompted the Urstadt Law itself); it is a much more targeted regulation of only a share of units in some buildings in limited areas of the city.

¹⁹⁷ See MIH Text, *supra* note 33, § 23-154(d)(3)(v) at 8.

vulnerable to challenge as an illegal (or *ultra vires*) tax.¹⁹⁸

The New York State General City Law and Municipal Home Rule Law impose strict statutory limits on New York City's power to levy taxes. Unlike the power to zone, in New York (and many other states) the power to levy taxes is not delegated to the city by the state. The only tax-related action that New York City may take without state level approval is setting its annual Real Property Tax rates.¹⁹⁹ Aside from that exception, the "levy and administration of local taxes" must be specifically authorized by the state legislature, and assessments for local improvements levied as "local non-property taxes" must be consistent with laws enacted by the legislature.²⁰⁰ Without such express authorization from the state, any MIH policy found to be a "tax" would be patently *ultra vires*.

New York State courts have declined to *expressly* rule on the question of whether General City Law Sections 20(24) and 20(25) permit local governments to enact development impact fees—"a question that has been the subject of considerable comment and litigation in other jurisdictions."²⁰¹ However, they have at least recognized that municipalities do have some measure of (implied) authority to impose general fees so long as they are "reasonable in amount and necessary to the accomplishment of the municipality's legitimate functions."²⁰² Such a fee likely "need not exactly reflect

¹⁹⁸ See Iglesias, *supra* note 6.

¹⁹⁹ See generally MARILYN MARKS RUBIN, A GUIDE TO NEW YORK CITY TAXES: HISTORY, ISSUES AND CONCERNS 1-1 (2010), <http://pjsc.magikcms.com/tax%20guides/CityGuideWeb.pdf> ("New York City has imposed the Real Property Tax (RPT) in its current format since 1983 under the NYS Real Property Tax Law, as amended by Chapter 1057 of the Laws of 1981 – generally referred to as S.7000A."). The city imposes four classes of real property tax: single-family residential; multifamily residential; utilities and special franchise; and all other buildings including office, industrial, retail, and hospitality. Real property tax revenues are collected in the city's general fund, along with revenues from other taxes that the state has specifically authorized the city to levy.

²⁰⁰ See N.Y. MUN. HOME RULE LAW § 10.1(ii)(a)(8) (McKinney 2016).

²⁰¹ Albany Area Builders Ass'n v. Guilderland, 546 N.E.2d 920, 923 (N.Y. 1989).

²⁰² Twin Lakes Dev. Corp. v. City of Monroe, 752 N.Y.S.2d 546, 547 (App. Div. 2002), *aff'd*, 801 N.E.2d 821 (N.Y. 2003). See also Suffolk Cnty. Builders Ass'n, Inc. v. Suffolk Cnty., 389 N.E.2d 133, 135 (N.Y. 1979) (citing Jewish Reconstructionist Synagogue v. Inc. Vill. of Roslyn Harbor, 352 N.E.2d 115, 117–19 (N.Y. 1976), and City of Buffalo v. Stevenson, 100 N.E. 798, 800 (N.Y. 1913)). Fees imposed pursuant to such authority must be "imposed as a means of regulation, and not of raising revenue" for general government use. See *City of Buffalo*, 100 N.E. at 800; see generally 12 N.Y. Jur. 2d *Buildings* § 45, Westlaw

the cost of providing a service, so long as it is reasonably related to the provision of the service and is not a subterfuge for raising general revenue.”²⁰³ Without much certainty on the matter, however, local governments in New York State have largely shied away from enacting impact fees, for fear that such fees would be invalidated as *ultra vires* regulation or taxation.²⁰⁴

Thus, a successful characterization of the MIH policy as a “tax” would almost certainly be fatal. And if a court characterized MIH as an impact fee, this would also pose problems for the city both because of the unclear precedent for this specific type of action and because such a designation would likely trigger problems for the city on constitutional takings grounds, addressed above. However, if the city is able to sustain MIH as a legitimate exercise of its zoning power (see Section III.A above), it will likely overcome any challenge related to its authority to levy taxes or fees.

While courts in other states have occasionally found attempts by local governments to impose in-lieu fees as *ultra vires* taxation, New York State courts have held that such in-lieu fees are analogous to set-aside requirements.²⁰⁵ Generally, if a particular set-aside requirement would be a valid exercise of local government power, then its corresponding in-lieu fee likewise would be valid. New York State courts have not found any constitutional bars to a local government’s collection of such cash payments, and have distinguished in-lieu fees from an impermissible tax when the moneys collected as fees are put into a separate fund to be used for a specific purpose.

For example, in *Jenad, Inc. v. Scarsdale*, the Court of Appeals considered Scarsdale’s requirement of a cash payment in lieu of a park dedication from subdivision developers, which funded

(database updated Feb. 2017) (“Fees charged for building permit”).

²⁰³ RUBIN, *supra* note 199, at vi n.3 (quoting Letter from Ronnie Lowenstein, Director, N.Y.C. Indep. Budget Office, to Archie Springer, Chairman, N.Y. City Council (Oct. 20, 2000), <http://www.ibo.nyc.ny.us/iboreports/spignerletter.pdf>).

²⁰⁴ WILLIAM X. WEED, *WARREN’S WEED NEW YORK REAL PROPERTY* ch. 157, § 19 (Matthew Bender 2016).

²⁰⁵ *See* *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d 821, 826 (N.Y. 2003); *Jenad, Inc. v. Vill. of Scarsdale*, 218 N.E.2d 673, 676 (N.Y. 1966). *Accord* *Holmdel Builders Ass’n v. Twp. of Holmdel*, 583 A.2d 277, 294 (N.J. 1990) (finding that the development fees at issue were not taxes because the development fees performed the same functions as valid set-asides).

“acquisition and improvement of recreation and park lands.”²⁰⁶
The court held that the payment was

not a tax at all but a reasonable form of village planning for the general community good This was merely a kind of zoning, like set-back and side-yard regulations, minimum size of lots, etc., and akin also to other reasonable requirements for necessary sewers, water mains, lights, sidewalks, etc.²⁰⁷

Recognizing “in some instances, that the separate subdivisions were too small to permit substantial park lands to be set off, yet the creation of such subdivisions, too, enlarged the demand for more recreational space in the community,” the *Jenad* court found that “[i]n such cases it was just as reasonable to assess the subdividers an amount per lot to go into a fund for more park lands for the village or town. One arrangement is no more of a ‘tax’ or ‘illegal taking’ than the other.”²⁰⁸ Like the village of Scarsdale’s park in-lieu fee, the city’s MIH in-lieu option for smaller residential developments states a specific fund destination and purpose of fund expenditures, and is offered as a pragmatic alternative for smaller developers.²⁰⁹

Similarly, in *Twin Lakes Development Corporation v. Town of Monroe*, the Court of Appeals held that a Monroe \$1,500 per lot non-optional in-lieu recreation fee for subdivisions with fewer than five lots was neither a general tax nor a special assessment.²¹⁰ Like the per lot recreation fee in *Twin Lakes*, New York City’s MIH requirement (whether collected as a set-aside or in-lieu fee) is *generally applicable* to all developers who seek to develop their property in a certain way, which would remove the fee from consideration as a “special assessment.”²¹¹ Developers who qualify

²⁰⁶ Local governments are authorized to request park dedications in conjunction with subdivision approvals. N.Y. VILLAGE LAW § 7-730(4)(c) (McKinney 2016).

²⁰⁷ *Twin Lakes*, 801 N.E.2d at 826 (citing *Jenad*, 218 N.E.2d at 676, while also acknowledging *Jenad* as partially abrogated on other grounds by *Dolan v. City of Tigard*, 512 U.S. 374, 389 (1994)).

²⁰⁸ *Jenad*, 218 N.E.2d at 676.

²⁰⁹ In fact, the in-lieu fees are to be collected into a city affordable housing fund, in contrast to most of the city’s tax revenues, which are collected into the city’s general fund (with two main exceptions dedicating tax revenues to the police and fire departments). See RUBIN, *supra* note 199, at vi n.2.

²¹⁰ *Twin Lakes*, 801 N.E.2d at 826.

²¹¹ *Id.* (distinguishing the fact that the town’s “recreation fee is generally applicable to any Town property owner seeking to divide its property” from the special assessments imposed on a group of property owners within a street

to pay the in-lieu fee retain the option of either paying the fee or providing affordable housing set-asides per the general MIH set-aside requirements.²¹²

Affordable housing set-asides (rather than only the in-lieu cash fee component of an inclusionary housing policy) have also been challenged as *ultra vires* taxes in Washington and New Jersey. In New Jersey, the court side-stepped a substantive analysis of whether a requirement to build housing could be understood as an attempt to levy a tax, and simply found that because the set-aside in question had been previously upheld as a legitimate zoning regulation, it could not then be construed as an invalid tax.²¹³

The Supreme Court of Washington in *San Telmo Associates v. Seattle*²¹⁴ invalidated a set-aside requirement under a “tax preemption” statute, though the result is unique to the state and to the facts of the case.²¹⁵ Under the statute, RCW 82.02.020, which precludes cities from levying “any tax, fee, or charge, either direct or indirect . . . on the development, subdivision, classification, or reclassification of land,” Washington courts have found that

[r]equiring a developer either to construct low income housing or ‘contribute’ to a fund for such housing gives the developer the option of paying a tax in kind or in money The City is instead shifting the public responsibility of providing such housing to a limited segment of the population. This shifting is a tax, and pursuant to RCW 82.02.020, it cannot be allowed.²¹⁶

However, though the *San Telmo* court characterized the set-aside requirement as an “in-kind” tax, a subsequent Washington case seemed to demonstrate a broader understanding of RCW 82.02.020 as preempting not only “taxes” but also other “fees or

improvement project’s improvement district area in *Garden Homes Woodlands Co. v. Town of Dover*, 742 N.E.2d 593 (N.Y. 2000)).

²¹² See MIH Text, *supra* note 33, § 23-154(d)(3) at 7–9.

²¹³ See *Holmdel Builders Ass’n v. Twp. of Holmdel*, 583 A.2d 277, 294 (N.J. 1990) (relying on the holding in *Mt. Laurel II*, 456 A.2d 390 (N.J. 1983)).

²¹⁴ See generally *San Telmo Assocs. v. Seattle*, 735 P.2d 673 (Wash. 1987).

²¹⁵ The *San Telmo* court applied a test from *Hillis Homes, Inc. v. Snohomish Cty.*, 650 P.2d 193, 195 (Wash. 1982) to distinguish a regulation from a tax: if “the primary purpose of the [ordinance] is to accomplish desired public benefits which cost money,” the ordinance is a tax. *Id.* If “the primary purpose is to regulate” then it is a regulation. *Id.* However, the *Hillis* test has not been applied to find any other nonmonetary (non-fee) ordinances as “taxes” aside from that in *San Telmo*.

²¹⁶ *San Telmo*, 735 P.2d at 675.

charges,” and in fact construed the result in *San Telmo* as a finding of an invalid “charge.”²¹⁷ In this case, the Washington Supreme Court invalidated an open space set-aside requirement as a violation of RCW 82.02.020 because the “open space set aside condition is an in kind, indirect ‘tax, fee, or charge’ on new development.”²¹⁸

In short, tax challenges to inclusionary housing policies have failed when courts have been able to conclude based on state law that the set-aside (or equivalent in-lieu fee) is an otherwise valid exercise of local government authority (such as a permissible zoning regulation). As against an *ultra vires* tax challenge, then, the city’s MIH policy would likely be upheld, assuming the policy is found to be a valid local zoning regulation. As we discuss above, a court is likely to conclude that, under New York State law, MIH is a legitimate exercise of the city’s power to zone. However, if a court held otherwise, the city may have difficulty sustaining its MIH policy for a number of reasons, including its lack of authority to impose a tax.

CONCLUSION

Exploring the legal framework that shapes New York City’s ability to implement mandatory inclusionary zoning provides insight into the limits the city faces as it designs its policy. It also highlights the challenges for other high-cost jurisdictions seeking to use the zoning power to address the challenges of a hot housing market. Many of the legal limits on the ability to regulate property at play in New York are relevant in other jurisdictions.

Despite the legitimate need in New York City and other high-cost cities for effective tools to foster economically diverse neighborhoods, whether inclusionary zoning can withstand legal challenge is a complicated question. In this paper we have examined some of the possible lines of attack on the policy, and conclude that New York City is well positioned to defend against potential legal challengers. However, these legal questions are far from settled, and have become somewhat less certain in light of the recent Supreme Court decision in *Koontz v. St. Johns River Water*

²¹⁷ *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 49 P.3d 867, 878 (Wash. 2002) (explaining that set-aside requirements at issue in *San Telmo* “violated RCW 82.02.020 as indirect charge on development”).

²¹⁸ *Id.* at 877–78 (emphasis added).

Management District, which further complicated an already messy area of law. It is also uncertain how a court would consider a claim that the MIH policy violates the state's prohibition on the city's regulation of rents. While there is strong reason to conclude that the Urstadt Law was not intended to impede the city's ability to enact zoning regulations, this would be a case of first impression in New York and similar laws have spelled the end of inclusionary housing policies in other jurisdictions.

In its crafting of the MIH policy and its careful and well-documented consideration of the need for the policy, the city has armed itself well to face these challenges. Indeed, both the city's policy design and supporting documentation, as well as the courts' treatment of these issues if a legal challenge arises, will likely be models for other jurisdictions facing similar imbalances between the supply and demand for housing in dense urban areas.