

## DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT

### Notice of Adoption

**Notice is hereby given that pursuant to the authority vested in the Commissioner of the Department of Housing Preservation and Development (“HPD”) by Sections 1043 and 1802 of the New York City Charter and Section 23-961(b) of the Zoning Resolution, HPD is adopting amendments to Chapter 41 of Title 28 of the Rules of the City of New York. A notice of proposed rulemaking was published in the City Record on September 15, 2021. A public hearing was held on October 19, 2021.**

### Statement of Basis and Purpose of Adopted Rule

On March 22, 2016, the City Council approved amendments to the Zoning Resolution of the City of New York establishing a Mandatory Inclusionary Housing (“MIH”) program which requires new housing developments, enlargements or conversions of more than 10 dwelling units or more than 12,500 square feet of residential floor area constructed in areas designated for MIH in the Zoning Resolution, to provide permanently affordable housing to qualified households. MIH Areas are designated through the land use review process as part of zoning actions that increase housing capacity.

The amendments also provided that HPD may establish alternative provisions for setting the Monthly Rent for Affordable Housing Units located on MIH Sites. The rule amendments provide such alternative provisions for Affordable Housing Units in Buildings subject to a project-based Housing Assistance Payments Contract (“HAP Contract”). Such provisions would not apply to buildings participating in the Housing Choice Voucher program or any other tenant-based Section 8 program.

Affordable Housing Units in the MIH program are restricted to occupancy by Qualifying Households with an income not exceeding the applicable Income Band as specified in the Zoning Resolution or as provided by special permit of the Board of Standards and Appeals. Furthermore, the Zoning Resolution caps rents for such units at 30% of the Income Band applicable to that unit, minus the amount of any applicable utility allowance. Since MIH Affordable Housing Units must be registered as rent stabilized with the State Division of Housing and Community Renewal (“DHCR”), the legal regulated rents also cannot exceed 30% of the applicable Income Band.

Currently, Buildings that have a project-based Section 8 contract are eligible for subsidies from the United States Department of Housing and Urban Development (“HUD”) covering the difference between the tenant’s payment and the HUD Contract Rents for such unit. However, because the MIH program requires Building owners to register rents at no higher than 30% of the applicable Income Band, once such a Building becomes a participant in the MIH program, it would no longer be able to take full advantage of this subsidy. In other words, the subsidy would have otherwise equaled the difference between the tenant’s payment and HUD Contract Rents rather than the more limited difference between the tenant’s payment and 30% of the applicable Income Band.

The rule amendments would allow such MIH projects to register HUD Contract Rents as the Legal Regulated Rent, which could be above the current cap of 30% of the applicable Income

Band. This would allow owners of such projects to continue to collect the full subsidy available through the HAP Contract.

Specifically, the rule amendments authorize rents for rental Affordable Housing Units on MIH Sites that are subject to project-based HAP Contracts during the term of such contract to exceed 30% of the applicable Income Band at initial occupancy and upon lease renewals if:

- (a) such rents do not exceed HAP Contract Rents established by HUD;
- (b) the tenant portion of the rent does not exceed the lesser of:
  - (1) 30% of the applicable Income Band, OR
  - (2) the tenant's maximum payment under the HAP Contract; and
- (c) for any such MIH Site subject to a separate agreement with a federal, state or local governmental agency or instrumentality requiring a number or percentage of dwelling units to be rented to homeless households for initial occupancy and/or for re-rental upon a vacancy, the Affordable Housing Units are utilized to satisfy this requirement to the extent that there are enough Affordable Housing Units available.

The rule amendments also are part of a comprehensive rules review initiative undertaken by the NYC Mayor's Office of Operations, working with the City's rulemaking agencies, the Law Department, and the Office of Management and Budget. The initiative identified rules that will be repealed or modified to reduce regulatory burdens, increase equity, support small businesses, and simplify and update content to help support public understanding and compliance. The rule amendments advance this initiative by simplifying the language of existing Inclusionary Housing Rules. Furthermore, the rule amendments correct an inaccurate citation to the Zoning Resolution.

HPD's authority for these rules is found in section 1802 of the New York City Charter and section 23-961(b) of the Zoning Resolution.

New material is underlined.  
[Deleted material is in brackets.]

"Shall" and "must" denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Section 1. Section 41-01 of Chapter 41 of Title 28 of the Rules of the City of New York is amended to read as follows:

§ 41-01. **Definitions.** As used in this chapter, the following terms shall have the following meanings. Capitalized terms not specifically defined in this chapter[,] shall have the meanings set forth in the Zoning Resolution.

**Administering Agent Agreement.** "Administering Agent Agreement" [shall mean] means an agreement between HPD and an Administering Agent concerning the rights, responsibilities and compensation of such Administering Agent.

**Administering Agent Reserve Account.** "Administering Agent Reserve Account" [shall mean] means an account that is separate from a Building's reserve accounts and is held as

determined by HPD, and which shall be used, with HPD approval, to pay the Building's Administering Agent for services rendered in accordance with the Program.

**Annual Household Income.** "Annual Household Income" [shall mean] means the total income as specified by HUD in 24 CFR 5.609, including all net income from Assets with a cash value in excess of \$5,000, to be received by the Household, from all sources for the twelve month period prior to the Income Qualification Date.

**Application Deadline.** "Application Deadline" [shall mean] means the date by which HPD must receive an application to purchase a Homeownership Affordable Housing Unit.

**Appreciation Index At Resale.** "Appreciation Index At Resale" [shall mean] means the quotient of the Appreciation Index on the Contract Date and the Appreciation Index on the previous Sale Date.

**Asset.** "Asset" [shall mean] means property real or personal, tangible or intangible, which may produce financial gain.

**Assisted Affordable Unit.** "Assisted Affordable Unit" [shall have] has the meaning set forth for "Affordable Housing Unit" in Section 421-a(16)(a)(xv) of the Real Property Tax Law.

**Capital Reserve Account.** "Capital Reserve Account" [shall mean] means an account that is separate from a Building's capital reserve account(s) and held as determined by HPD and shall be used, with HPD approval, to pay for all or part of a Homeownership Affordable Housing Unit's proportionate share of such Building's capital expenses.

**Commissioner.** "Commissioner" [shall mean] means the Commissioner of HPD or his or her designee.

**Common Expenses.** "Common Expenses" [shall mean] means and include for a Condominium Association, all expenses of operation thereof and all sums designated common expenses in accordance with Article 9-B, Section 339-e of the Real Property Law and for a Cooperative Corporation all expenses of operation thereof and all sums designated common expenses pursuant to the provisions of the by-laws and proprietary lease for such Cooperative Corporation.

**Community Board.** "Community Board" [shall mean] means a local district advisory board created pursuant to Section 2800 of the New York City Charter that, in part, consults, assists and advises legislative bodies or borough presidents with respect to any matter relating to the welfare of the district and its residents.

**Contract Date.** "Contract Date" [shall mean] means the date a contract to purchase a Homeownership Affordable Housing Unit is executed.

**Council Member.** "Council Member" [shall mean] means an elected member of the New York City Council.

**CPI.** "CPI" [shall mean] means the Consumer Price Index for all urban consumers, as defined by the United States Bureau of Labor Statistics, for the twelve months ended on June 30th.

**Department of Finance** or **DOF**. "Department of Finance" or "DOF" [shall mean] means the Department of Finance of the City of New York or any successor agency or department thereto.

**DHCR**. "DHCR" [shall mean] means the Division of Housing and Community Renewal of the State of New York or any successor agency.

**Family Member**. "Family Member" [shall have] has the meaning set forth by DHCR in 9 NYCRR §2520.6.

**First Time Homebuyer Preference**. "First Time Homebuyer Preference" [shall mean] means a priority to purchase a Homeownership Affordable Housing Unit which is provided to an Eligible Buyer who is purchasing a Dwelling Unit for the first time.

**Flip Tax**. "Flip Tax" [shall mean] means 7% of net profits from the sale of a Homeownership Affordable Housing Unit.

**HAP Contract**. "HAP Contract" means any project-based Section 8 housing assistance payments contract, as may be amended or renewed, that covers all rental Affordable Housing Units in a Building.

**HAP Contract Rents**. "HAP Contract Rents" means the rent approved by HUD for a Dwelling Unit in an MIH Site with a HAP Contract.

**HDC**. "HDC" [shall mean] means the New York City Housing Development Corporation.

**HHF**. "HHF" [shall mean] means the Household Factor established by HPD, based on the family size adjustment percentages established by HUD.

**Homeless Regulatory Agreement**. "Homeless Regulatory Agreement" means an agreement with a federal, state or local governmental agency or instrumentality requiring a number or percentage of Dwelling Units to be rented to homeless households at initial occupancy and/or upon re-rental at vacancy.

**HUD**. "HUD" [shall mean] means the United States Department of Housing and Urban Development or any successor agency.

**Income Marketing Band**. "Income Marketing Band" [shall mean] means that, except as permitted in the Zoning Resolution, the Monthly Housing Costs of a particular Homeownership Affordable Housing Unit represents not less than 25% and not more than 35% of such Household's Annual Household Income.

**Income Qualification Date**. "Income Qualification Date" [shall mean] means the date upon which the Administering Agent verifies that a potential Homeowner's Annual Household Income complies with the Eligible Buyer requirements for a particular Homeownership Affordable Housing Unit.

**Internal Transfer Preference**. "Internal Transfer Preference" [shall mean] means a priority to purchase a Homeownership Affordable Housing Unit which is provided to an Eligible Buyer who (i) already owns a Homeownership Affordable Housing Unit in the same Building or in the development containing such Building, and (ii) agrees to sell his or her existing Homeownership

Affordable Housing Unit on or before the date upon which he or she acquires the new Homeownership Affordable Housing Unit.

**Minimum Quality Standards.** "Minimum Quality Standards" [shall mean] means livability standards that are in compliance with 24 CFR 982.401 or any superseding regulations established by HUD.

**Monthly Housing Costs.** "Monthly Housing Costs" [shall mean] means, for a Household, the sum of Monthly Fees, monthly utility allowances, Mortgage Payments and monthly property taxes, if applicable.

**Operating Reserve Account.** "Operating Reserve Account" [shall mean] means an account that is separate from a Building's operating account(s) and is held as determined by HPD, and which shall be used, with HPD approval, to pay for all or part of a Homeownership Affordable Housing Unit's proportionate share of such Building's Common Expenses, in the form of Monthly Fees.

**Partial Inclusionary Building.** "Partial Inclusionary Building" [shall mean] means a Building that consists of both Affordable Housing and Dwelling Units that are not restricted, in accordance with the Program, to occupancy by Low Income Households, Moderate Income Households or Middle Income Households.

**Prevailing Interest Rate.** "Prevailing Interest Rate" [shall mean] means the single family mortgage rate for a thirty-year fixed rate loan established by the Federal Home Loan Mortgage Association and the Federal National Mortgage Association that is quoted, for Sale or Resale, in the month that the Homeownership Affordable Housing Unit is marketed for Sale or Resale.

**Program.** "Program" [shall mean] means the Zoning Resolution, Regulatory Agreement and this Chapter.

**Public Funding.** "Public Funding" [shall have] has the meaning set forth in Section 23-90 of the Zoning Resolution, except that, in accordance with the authority granted therein with respect to these guidelines, for Regulatory Agreements executed on or after December 1, 2011, "Public Funding" shall not include an exemption of real property taxes pursuant to Article II of the Private Housing Finance Law.

**Rent Guidelines Board.** "Rent Guidelines Board" [shall mean] means the New York City Rent Guidelines Board established pursuant to Chapter 4 of Title 26 of the New York City Administrative Code.

**Reserve Accounts.** "Reserve Accounts" [shall mean] means, for Generating Sites containing at least one Homeownership Affordable Housing Unit, an Operating Reserve Account, a Capital Reserve Account and an Administering Agent Reserve Account.

**Section 8 assistance.** "Section 8 assistance" means a federal rental subsidy pursuant to the Section 8 project-based rental assistance program, or any successor programs, under the United States Housing Act of 1937, as amended.

**Successor.** "Successor" [shall mean] means a Family Member that inherits, by either intestate succession or testamentary disposition, a Homeownership Affordable Housing Unit.

**Zoning Resolution.** "Zoning Resolution" [shall mean] means the Zoning Resolution of the City of New York.

§ 2. Subdivision (b) of section 41-03 of Chapter 6 of Title 28 of the Rules of the City of New York is amended to read as follows:

(b) Except as otherwise provided in Section 23-962(f)[(3)] of the Zoning Resolution, the Appreciated Price is calculated by multiplying the Resale price of a Homeownership Affordable Housing Unit on the previous Sale Date by the Appreciation Index At Resale.

§ 3. Chapter 41 of Title 28 of the Rules of the City of New York is amended by adding a new Section 41-26 to read as follows:

§ 41-26 MIH HAP Contract Rents.

For rental Affordable Housing Units in MIH Sites that are subject to a HAP Contract, the Regulatory Agreement shall provide that, during the term of such HAP Contract, the Monthly Rent may exceed the Maximum Monthly Rent at initial occupancy and upon renewal of leases, if

(a) such Monthly Rent does not exceed the HAP Contract Rents for such rental Affordable Housing Unit,

(b) such Monthly Rent, less any Section 8 assistance, does not exceed the lesser of the Maximum Monthly Rent or the Legal Regulated Rent, and

(c) for any such MIH Site that is subject to a Homeless Regulatory Agreement, such rental Affordable Housing Units are to the extent possible utilized to satisfy the requirement of such agreement that a specified number or percentage of Dwelling Units are rented to homeless households at initial occupancy and/or upon re-rental at vacancy.

Commissioner Louise Carroll  
November 19, 2021