KRAMER LEVIN NAFTALIS & FRANKEL LLP

MEMORANDUM

TO: The Honorable Melissa Mark-Viverito
Speaker of the New York City Council

The Honorable David G. Greenfield
Chairperson of the Committee on Land Use

The Honorable Members of the New York City
Council's Committee on Land Use

FROM: Jeffrey L. Braun and Valerie Campbell

CC: The Honorable Gail A. Brewer
Borough President of Manhattan

The Honorable Corey Johnson
Council Member for District 3

The Honorable Carl Weisbrod
Chair of the City Planning Commission

DATE: September 6, 2016

RE: **Special Permit Granted in Response to ULURP Application No. C160082 ZSM (42 West 18th Street, Manhattan – the "Adorama Special Permit")**

Introduction

The Manhattan Borough President has exercised her power under City Charter § 197-d(b)(2) to object to the decision of the City Planning Commission (the "Commission") dated August 15, 2016, to approve ULURP Application No. C160082 ZSM. The application sought a special permit pursuant to Zoning Resolution § 74-711 for the property at 42 West 18th Street in Manhattan (Block 819, Lot 15). Because of the prior recommendations of the Borough President and the affected community board, the Borough President's objection has called up the Commission's approval of the special permit for review by the City Council.

The Borough President's objection is premised entirely on her view that the Commission was obligated to apply the requirements of the recently enacted Mandatory Inclusionary Housing ("MIH") program in establishing the terms and conditions of the special permit, and that the Commission erred in refusing to do so. The owner of the affected property, 42 West 18th Realty Corp. (the "Owner"), respectfully submits this memorandum of law to demonstrate that the Borough President's position is incorrect, and that the Commission acted reasonably and properly in concluding that it would contravene the governing Zoning Resolution

provision to apply MIH to this special permit. As explained below, well established principles of law, as consistently enunciated and applied by the courts, make clear that it would be improper and illegal for the Council to interfere with the Commission's decision to issue the special permit.

Legal Analysis

I. As Recognized by the Commission, the Owner Demonstrated Its Entitlement to the Requested Special Permit

Unlike variances, special permits are a property owner's right. Special permits require no demonstration of exceptional circumstances or hardship to justify relief from zoning regulations: a property owner is entitled to a special permit if it demonstrates that it satisfies the conditions that are specified in the zoning statute. Therefore, the relevant municipal zoning agency must grant the special permit unless it can demonstrate a statutorily-based reason for denying it. *See, e.g., Texaco Refining & Marketing, Inc. v. Valente*, 174 A.D.2d 674, 675 (2d Dep't 1991) ("Unlike a variance, a special use permit does not involve a use of property forbidden by the zoning ordinance but instead constitutes a recognition of a use which the ordinance permits under stated conditions," and the zoning agency "is required to grant [the special permit] unless there are reasonable grounds for denying it"). *See also Carroll's Development Corp. v. Gibson*, 73 A.D.2d 1050, 1051 (4th Dep't 1980), *aff'd*, 53 N.Y.2d 813 (1981); *Serota v. Town Board of Oyster Bay*, 191 A.D.2d 700, 701 (2d Dep't 1993).

Decisions whether to issue special permits therefore involve little if any discretion: the relevant agency – here, the Commission – simply must determine whether the applicant is entitled to a special permit based on the criteria set forth in the statute. The courts will enforce a property owner's right to a special permit if the agency charged with issuing the special permit fails to perform its duty. *See, e.g., North Shore Steak House, Inc. v. Board of Appeals of Incorporated Village of Thomaston*, 30 N.Y.2d 238, 243 (1972) (holding that the applicant was entitled to a special permit, and directing the town's board of appeals to issue it).[1]

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[1] The broad language in *Liska NY, Inc. v. City Council*, 134 A.D.3d 461 (1st Dep't 2015), *lv. to app. denied*, __ N.Y.3d ___ (Aug. 30, 2016), is not applicable here and is limited to situations comparable to the facts in *Liska*. In that case, unlike here, the necessary special permit findings set forth in the relevant Zoning Resolution provision, § 74-902, required an inherently discretionary evaluation of the proposed facility's likely effect on the neighborhood in multiple respects. By contrast, a municipality's legislative body does not have the power to disregard or go beyond standards set forth in the zoning ordinance where, as here, "the standards expressed" in the ordinance are "so complete or exclusive as to preclude the [legislative body] from considering other factors without amendment of the zoning ordinance." *Cummings v. Town Board of North Castle*, 62 N.Y.2d 833, 834-35 (1984) (citations omitted). In *Liska*, moreover, the record contained evidence that the applicant had acted in bad faith to provoke the circumstances that it relied upon to justify the special permit application. And in *Cummings*, the earlier decision on which the court in *Liska* relied, the Court of Appeals upheld the town board's *issuance* of a special permit. Therefore, *Cummings* does not support the denial or modification of the Commission's approval of the special permit in this case.

Here, the relevant statute, Zoning Resolution § 74-711, empowers the Commission to issue special permits that allow "modification of the *use* and *bulk* regulations, except *floor area ratio* regulations," on a zoning lot containing a designated landmark (italics in original), "provided that" specified conditions and findings are satisfied, including the establishment of a maintenance program for the landmarked building that has been approved by the Landmarks Preservation Commission. In its August 15, 2016 report approving the Owner's special permit application, the Commission set forth in comprehensive detail the basis for its conclusion that the Owner satisfied each of the statutory prerequisites set forth in § 74-711 for the issuance of the requested special permit. Therefore, the Commission approved the Owner's application and allowed limited bulk modifications in connection the Owner's proposed development, on the site of what is now an open-air parking lot, of a mixed-use commercial and residential building, 17 stories in height at its tallest point, designed by the distinguished architect Morris Adjmi, FAIA.

II. The MIH Program Does Not Apply to This Special Permit, Because the Special Permit Does Not Increase Allowable Floor Area

In her August 16, 2016 letter objecting to the Commission's determination, the Borough President expressed the position that "it is clear from the language of the Zoning Resolution that the Mandatory Inclusionary Housing Program applies to this application for a special permit which will result in an increase of 25,450 square feet of residential floor area," because, supposedly, "[t]he MIH text is clear that 'where a special permit application would allow a significant increase in #residential floor area#,'" the Commission "shall apply" the requirements of the MIH program in establishing the terms and conditions of the special permit.

This analysis is incorrect. The characterization of the statutory language as "clear" is a ploy to induce the Council to disregard the statute's legislative history, on the theory that if "the terms of a statute are plain," there is no need to consider anything outside the language of the statute. *See, e.g., Finger Lake Racing Ass'n v. N.Y.S. Racing & Wagering Board*, 45 N.Y.2d 471, 480 (1978).

We understand that the Department of City Planning also views the statutory language as clear, but – contrary to the position of the Borough President – as not susceptible of being understood by a reasonable zoning and land-use practitioner as meaning what the Borough President claims that it means. In our view, the relevant statutory language is not "clear," and the legislative history of the MIH program – including but not limited to the administrative record of the proceedings before the Commission leading to approval of the MIH legislation – conclusively refutes the contention that the MIH program's requirements can properly be applied to this special permit. Indeed, the Borough President's present contention that the statutory language is "clear" in support of her position on this issue is difficult to reconcile with the Borough President's prior criticism of the statute, when it was pending before the Commission, as inadequate insofar as it addressed the "application of the program to future applications for City Planning Commission special permits that increase permitted residential floor area" (CPC Report No. N 160051 ZRY (Feb. 3, 2016), at 25). Similarly, the Manhattan Borough Board's resolution recommending conditional disapproval of the MIH legislation, which was signed by the Borough President, complained that "[t]he proposal needs more specifics on how and when

the MIH requirements would be triggered and enforced" (resolution adopted Nov. 30, 2015, at 3 (appendix to CPC Report No. N 160051 ZRY)).[2]

The relevant statutory provision is Zoning Resolution § 74-32, which pertains to special permits issued by the Commission. It provides in its entirety as follows:

> Where a special permit application would allow a significant increase in *residential floor area* and the special *floor area* requirements in *Mandatory Inclusionary Housing areas* of paragraph (d) of Section 23-154 (Inclusionary Housing) are not otherwise applicable, the City Planning Commission, in establishing the appropriate terms and conditions for the granting of such special permit, shall apply such requirements where consistent with the objectives of the Mandatory Inclusionary Housing program as are set forth in Section 23-92 (General Provisions). However, where the Commission finds that such special permit application would facilitate significant public infrastructure or public facilities addressing needs that are not created by the proposed *development*, *enlargement* or *conversion*, the Commission may modify the requirements of such paragraph (d).

(Italics in original but underscoring added.)

The language of this provision that defines when a special permit application may trigger the applicability of the MIH program – *i.e.*, "[w]here" the application "would allow a significant increase in *residential floor area*" – is inherently ambiguous, because it is susceptible to multiple reasonable interpretations. *See, e.g., Golf v. N.Y.S. Dep't of Social Services*, 91 N.Y.2d 656, 662 (1998) (statutes are not "clear" and "unambiguous" if they "lend themselves to two acceptable interpretations").

The ambiguity in Zoning Resolution § 74-32 primarily results from the fact that nothing in this provision (or elsewhere in the statute) defines the baseline from which "a significant increase in *residential floor area*" is to be gauged. Is the language intended to compare a proposed project's residential floor area to the maximum as-of-right residential floor area allowable at the site under the Zoning Resolution's applicable floor area ratio (or "FAR") provisions? Or is the language intended to compare the project's residential floor area to the residential floor area currently existing at the site? Or is the language intended to compare the project's residential floor area to the residential floor area of what the Commission finds to be

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[2] While the Owner's special permit application was pending before the Commission, the Urban Justice Center, which described itself as "longtime advocates for affordable housing in New York City," sent the Commission a 10-page letter dated July 22, 2016, the bulk of which consisted of argumentation as to why the language of the Zoning Resolution supposedly is unambiguous in requiring application of the MIH program to the Owner's application. The lengthy and complex theories put forth in that letter themselves serve to demonstrate that the relevant statutory language is not clear and not free from ambiguity.

the most feasible project that could be built without the requested special permit? There is no answer in the statute.[3]

However, there is a clear answer in the legislative history, because the issue was specifically addressed during the ULURP process leading to enactment of the MIH legislation. The Commission's February 3, 2016 report on the legislation makes clear that the MIH program's requirements would not be triggered by a special permit application that – like the Owner's application – did not seek to increase the maximum residential FAR legally allowable at a site. In its report, the Commission acknowledged that testimony had "raised questions about how the Commission will decide whether or not to apply MIH in conjunction with future land use applications," and the Commission specifically recognized the view of "[t]he Manhattan Borough President" favoring "the application of MIH within future special permit projects in Manhattan" (CPC Report No. N 160051 ZRY, at 37). After addressing the anticipated application of the MIH program to future rezonings, the Commission made clear that special permits would be treated differently:

> However, it [*i.e.*, the Commission] also recognizes that the program should not discourage types of actions with a valid land use rationale that may facilitate residential development but would not themselves increase residential capacity. The program is not expected to be applied in conjunction with special permit applications that would reconfigure residential floor area that is already permitted under zoning, without increasing the amount of residential floor area permitted. Under this policy, for instance, a special permit that facilitates the transfer of floor area from one zoning lot to another without increasing FAR would not be subjected to an MIH requirement, while a special permit that converts non-residential floor area to residential floor area would be.

(*Id.* at 38) (underscoring added).

Six days after the Commission's adoption of this report, on February 9, 2016, the Commission's Chair appeared at a hearing of the Council's Zoning Subcommittee and reiterated the same basic point. He testified, in relevant part, as follows:

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[3] The Borough President's letter of objection states conclusorily, without any further explanation, that the special permit "will result in an increase of 25,450 square feet of residential floor area." This assertion is disingenuous. It appears to be based on a comparison of the Owner's proposed building with a hypothetical as-of-right project that theoretically could be built at the site without a special permit, and that was used as a basis of comparison for purposes of identifying and analyzing, in the Owner's Environmental Assessment Statement, the potential adverse effects of the requested special permit. This hypothetical project was merely "a conceptual project using the maximum allowable square feet" that enabled the Owner's environmental consultants to perform an environmental analysis that assessed potential "'worst case' scenarios." *Neville v. Koch*, 79 N.Y.2d 416, 422 (1992).

> When a special permit is reshaping a building – not creating new floor area, but moving around floor area that is already permitted – we would not apply MIH. But where the special permit is creating substantial new floor area, we would apply MIH.

(Underscoring added.)

In the face of these clear statements of the Commission's intent and understanding as set forth in the Commission's February 3, 2016 report and the Chair's February 9, 2016 testimony, the Council adopted the MIH legislation without modifying in any way the operative language of Zoning Resolution § 74-32. Therefore, the legislative history of the MIH program makes it crystal-clear that the MIH program is not intended to apply to special permits that do not increase the residential floor area that is legally permissible at the affected site under the Zoning Resolution's applicable FAR provisions. Application of the MIH requirements to this project would be particularly unreasonable given that the approved special permit limits the development to 120,257 square feet of zoning floor area (8.71 FAR) even though 138,000 square feet of zoning floor area (10 FAR) is permissible on the zoning lot.

The special permit that has been approved by the Commission in this case is one that does precisely what the Chair described in his Council testimony – it is, to quote the Chair's testimony, "reshaping a building" and "moving around floor area that is already permitted," but is "not creating new floor area." Indeed, the Zoning Resolution provision pursuant to which this special permit was approved, § 74-711, specifically allows "modification of the *use* and *bulk* regulations, except *floor area ratio* regulations," on a zoning lot that, like the Owner's zoning lot, is improved with a landmark (italics in original, but underscoring added). Therefore, the Owner's special permit application manifestly is one to which the MIH program was not intended to apply when the MIH program was enacted. As the Commission itself pointed out in its report on the approval of this special permit, "Department [of City Planning] staff and the Commission were clear and consistent throughout public review that MIH would not apply to special permits of this type" (CPC Report No. C 160082 ZSM (Aug. 15, 2016), at 12) (underscoring added). After recapitulating both the relevant portion of its February 3, 2016 report on the MIH legislation and the prior testimony before the Council, the Commission's report on the special permit concluded as follows:

> Given that a CPC Report is the representation to the public and to the City Council of the scope of the law, and given that the City Council did not modify this aspect of the law, the Commission does not now have the discretion to act in a way that contradicts these representations or that goes beyond the law's explicit scope.

(*Id.* at 12.) And if the statute does not empower the Commission to apply the MIH program to the Owner's special permit application, then *a fortiori* the Council also is not empowered by the statute to do so.

The primary goal of statutory interpretation is to ascertain and implement the legislative intent. Where, as here, the legislative intent is not clear from the face of a statute, the courts look to other factors to clarify the intent. *See, e.g., Allstate Ins. Co. v. Libow*, 106 A.D.2d

110, 117 (2d Dep't 1984), *aff'd*, 65 N.Y.2d 807 (1985). *See also* McKinney's Consolidated Laws of New York Annotated, *Statutes* § 92 ("All available aids to statutory construction should be explored in determining the meaning and intendment of statutes," because "no statute may be construed so strictly as to result in perversion of the legislative intent"); *People ex rel. Onondaga County Sav. Bank v. Butler*, 147 N.Y. 164, 175 (1895); *Cummings v. Board of Education of City of New York*, 275 App. Div. 577, 585 (1st Dep't), *aff'd*, 300 N.Y. 611 (1949).

In interpreting a statute that is not clear and unambiguous on its face, the enactment's legislative history is a primary source for ascertaining the legislative intent. In the words of the New York Court of Appeals, "the purpose and applicability of a statute cannot be considered without first discussing its legislative history." *Williams v. Williams*, 23 N.Y.2d 592, 600 (1969). As shown above, the legislative history of the MIH program, as revealed in the Commission's reports and Council testimony, demonstrates a clear intention not to apply the program to special permits that, like the one at issue here, do not increase the allowable residential FAR at a site. The Commission plays a unique role in the enactment of zoning legislation. While in general the Council is the legislative organ of City government, the Charter establishes one exception. It explicitly provides, in § 28, that "[t]he power of the council to act with respect to" land use matters is "limited by" the procedural requirements of Charter § 197-d – *i.e.*, ULURP. In turn, Charter § 200 provides that the Zoning Resolution "may be amended, repealed or added to only in the ... manner" set forth in the succeeding subdivisions of § 200 (underscoring added), which require that amendments to the Zoning Resolution be initiated in the Commission and reviewed in accordance with ULURP. Therefore, when interpreting a provision of the Zoning Resolution, "[t]he views of the CPC are entitled to considerable weight since it is the agency responsible for regulation of uses and bulk with regard to zoning districts and for over-all city development." *Soho Alliance v. N.Y.C. Bd. of Standards and Appeals*, 264 A.D.2d 59, 63-64 (1st Dep't 2000) (citation omitted).

In addition, it is a well-established principle of statutory interpretation that technical ambiguities in statutes are best clarified by the expert agencies charged with implementing the statutes. *See, e.g., Burger King, Inc. v. State Tax Comm'n*, 51 N.Y.2d 614, 621 (1980) ("we recognize that where the interpretation of a statute or its application involves a special knowledge, courts regularly defer to administrative expertise"); *N.Y.S. Ass'n of Life Underwriters v. N.Y.S. Banking Dep't*, 83 N.Y.2d 353, 360 (1994) (courts should defer to agencies "where the language used in a statute is special or technical and does not consist of common words of clear import"); *Kurcsics v. Merchants Mutual Ins. Co.*, 49 N.Y.2d 451, 459 (1980) (deference to an agency is essential "[w]here the interpretation of a statute or its application involves knowledge or understanding of underlying operational practices").

This basic principle has been applied consistently to interpretation of the Zoning Resolution and other local zoning statutes. *See, e.g., Toys "R" Us v. Silva*, 89 N.Y.2d 411, 418-19 (1996); *Beekman Hill Ass'n v. Chin*, 274 A.D.2d 161, 175-76 (1st Dep't 2000).

As a general principle, moreover, even in the absence of technical language in the relevant statute, "the interpretation given a statute by the agency charged with its enforcement will be respected by the courts if not irrational or unreasonable." *Fineway Supermarkets, Inc. v. State Liquor Authority*, 48 N.Y.2d 464, 468 (1979). *See also, e.g., Mounting & Finishing Co. v. McGoldrick*, 294 N.Y. 104, 108 (1945) ("statutory construction is the function of the courts, 'but

where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited,'" quoting *NLRB v. Hearst Publications*, 322 U.S. 111 (1944)). Here, the Commission is not only the agency responsible for drafting Zoning Resolution § 74-32, but it also is the agency with primary responsibility for its implementation. Therefore, its interpretation of the provision's applicability to the Owner's application for a special permit only can be set aside if shown to be "irrational or unreasonable." *Fineway Supermarkets*, 48 N.Y.2d at 468.

At least one further principle of statutory interpretation also applies here. The Court of Appeals has held on multiple occasions that zoning ordinances are in derogation of the common law and therefore must be interpreted narrowly, with any ambiguities "resolved in favor of the property owner," and against the municipality that enacted the ordinance. *Allen v. Adami*, 39 N.Y.2d 275, 277 (1976). *See also, e.g., DeTroia v. Schweitzer*, 87 N.Y.2d 338, 342-43 (1996) ("the ZBA's interpretation violates the rule of construing zoning ordinances enunciated by this Court," which is that "'[a]ny ambiguity in the language used ... must be resolved in favor of the property owner,'" quoting *Allen*, 39 N.Y.2d at 277); *Ellington Constr. Corp. v. Zoning Bd. of Appeals of Incorporated Village of New Hempstead*, 77 N.Y.2d 114, 123 (1990) (it is "the established rule of construction that zoning legislation ... which is 'in derogation of the common law ... must be strictly construed against the municipality ... ,'" quoting *Allen*, 39 N.Y.2d at 277); *FGL&L Property Corp. v. City of Rye*, 66 N.Y.2d 111, 115 (1985) ("Zoning laws are to be given a strict construction because they are in derogation of common-law rights").

Given this oft-repeated fundamental principle, Zoning Resolution § 74-32 must be interpreted to exclude application of the MIH program to the Owner's special permit application.

III. Application of the MIH Program to This Special Permit Application Would Raise Serious Constitutional Issues and Jeopardize the Future Viability of the MIH Program

The application of MIH requirements to the Owner's special permit application not only would violate the Owner's constitutional rights, but it would expose the MIH program itself to serious jeopardy in a constitutional attack. In conceptualizing and drafting the MIH legislation, the Commission was cognizant of this risk and endeavored to insulate the legislation from such an attack. A reversal or modification of the Commission's determination in the present special permit case could undo the Commission's efforts.

In its report on the enactment of the MIH legislation, the Commission was careful to articulate a sound land use planning rationale (CRC Report No. N 160051 ZRY (Feb. 3, 2016), at 3). The Commission specifically rejected "exaction or value capture" as the justification for MIH, and also rejected a program "that relies on ad hoc or negotiated requirements that differ for individual projects, or that is premised on an evaluation of the economic returns being realized by a specific development" (*id.*). As the Commission recognized, such a program "may be characterized as an exaction, and thereby subject to a strict standard of judicial scrutiny" (*id.*).

An improper land use exaction constitutes a regulatory taking of property without the constitutionally required payment of just compensation. In general, the courts have struggled to identify the parameters of what constitutes an exaction, but it basically means the imposition of a condition on a land use action that requires the subject property owner to dedicate a portion of its property to the public. The leading cases on the subject are two decisions of the United States Supreme Court – *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Together, these two decisions establish that an exaction is constitutionally permissible only if (1) there is a "nexus" between the public access that the land use agency requires and the impact of the approval that the property owner seeks, and (2) there is at least "rough proportionality" between the impact of the requested land use approval and required public access. In *Nollan*, the Court held that the diminution of an ocean view from the street in front of the property owners' larger house did not justify conditioning approval of the new house on the grant of an easement across the beach at the rear of the house. And in *Dolan*, the Court held that the expansion of a plumbing store and the paving of its parking lot did not justify conditioning approval of these improvements on the dedication of 10% of the owner's land for a drainage system and a hiking and biking trail. Furthermore, while "[n]o precise mathematical calculation is required" to determine whether there is "rough proportionality," the municipality "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391.

More recently, the Supreme Court has broadened its exactions jurisprudence by holding that a land use agency's demand for public access as a condition to an approval must satisfy the *Nollan* and *Dolan* requirements even if the owner's application is denied, and even if the agency's demand is for money rather than physical access. *Koontz v. St. Johns River Mgmt. District*, 570 U.S. ___, 133 S.Ct. 2586 (2013). There, the Court stated that the doctrine that it had enunciated in *Nollan* and *Dolan* reflected the reality that "land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take." 133 S.Ct. at 2594. The Court identified "the central concern" of *Nollan* and *Dolan* as "the risk that the government may use its substantial power and discretion in land-use permitting to pursue government ends that lack an essential nexus and rough proportionality to the effects of the proposed new use" of the property. *Id.* at 2600. Significantly, the New York State courts also have relied on the doctrine of *Nollan* and *Dolan* in reviewing the constitutionality of land use exactions. *See, e.g., Twin Lakes Dev. Corp. v. Town of Monroe*, 1 N.Y.3d 98, 101 (2003) (applying *Nollan* and *Dolan*, but upholding a statute that required subdivision applicants to dedicate part of their property to recreational uses or pay an in-lieu fee).

Furthermore, in a context that is analogous to the situation that would be presented if the Owner's special permit were to be subjected to MIH requirements, the New York Court of Appeals has struck down a statutory provision that required property owners to make vacant single-room occupancy units available to new tenants. *Seawall Associates v. City of New York*, 74 N.Y.2d 92 (1989). There, in an effort to reduce homelessness, the Council enacted Local Law 9 of 1987, which imposed a five-year moratorium on the demolition, alteration or conversion of most SRO units. The law also contained anti-warehousing provisions that mandated that vacant SRO units be restored to habitable condition and rented out to new tenants

unless the property owner exercised a buy-out option or demonstrated an entitlement to exemption on the basis of hardship. The Court of Appeals acknowledged that the alleviation of homelessness "is of the greatest social importance" (74 N.Y.2d at 111), but it nevertheless struck down the law on ground that the requirement that a property owner rent out its vacant SRO units to new tenants was an unconstitutional taking of property.

It would be extremely difficult if not impossible for the City to persuade the courts that there is a genuine nexus between the purportedly adverse effects of the special permit that the Commission has approved in this case and imposition of MIH requirements on this project. It would be even more difficult for the City to persuade the courts that the relationship between the project's purportedly adverse effects and the imposition of MIH requirements was roughly proportionate.

The statute authorizing the special permit here at issue, Zoning Resolution § 74-711, is one of a number of Zoning Resolution provisions that are intended to provide a measure of economic relief to owners of landmarked properties. The earliest of these provisions is Zoning Resolution § 74-79, which pertains to the transfer of development rights from landmark sites. When it was enacted, the Commission's report on the legislation clearly articulated its ameliorative purpose. After reviewing the tax relief available to non-tax-exempt property owners under the Landmarks Law itself (*see* N.Y.C. Admin. Code §§ 25-302(v), 25-309), the Commission's report continued as follows:

> These amendments are intended to make possible some economic relief to such organizations [*i.e.*, tax-exempt organizations] as well as further to assist other owners of landmark structures in meeting their obligation to maintain them in good condition.
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> A number of the City's designated landmarks are located on lots where the Zoning Resolution would permit much larger buildings to be constructed. Such zoning quite properly reflects the fact that these particular lots are located in part of New York where intensive development is not only generally appropriate but also economically desirable. The City Planning Commission has realistically faced the fact that quite a few of the landmarks most valuable to preserve for aesthetic and historic reasons are also located on lots whose economic potential greatly exceeds their present use. The proposed amendments would permit the owners of designated landmarks to realize some of this potential value without destroying their landmarks.

(CPC Report No. 20253 (Board of Estimate Cal. No. 132, May 22, 1968), at 3039.)

Shortly thereafter, the predecessor of Zoning Resolution § 74-711 was added to the statute. In its report on that legislation, the City Planning Commission echoed the considerations underlying the prior enactment of § 74-79.

> The amendment is designed to provide an additional tool in the retention and maintenance of those landmark buildings which the City has designated as worthy of preservation in the public interest. The amendment will provide economic relief to the owners of landmark buildings by permitting certain use and bulk modifications of such building in a manner intended to enhance the character of such landmark without adverse effect on surrounding development.

(CPC Report No. 20639 (Board of Estimate Cal. No. 39, Oct. 9, 1969) (underscoring added).

Here, the Owner's special permit merely provides it with a modicum of relief from strictures resulting from the presence of a landmarked building by allowing the Owner to rearrange the residential floor area that, under the Zoning Resolution, is allowable at this site; the special permit does not increase the amount of residential floor area that is allowable at the site. Therefore, there is no nexus – let alone a roughly proportional one – between the effect of the special permit and a requirement that some of the project's dwelling units be dedicated to affordable housing. The special permit merely facilitates the Owner's ability to use the residential development rights that the Zoning Resolution already provides. To impose an MIH obligation on this grant of relief would no doubt constitute an impermissible exaction.

The imposition of MIH requirements also would expose the City to a claim that it had denied the owner the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution and Article I, § 11, of the New York State Constitution. Basically, the doctrine of equal protection requires that all persons who are similarly situated be treated alike. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216 (1982). To withstand an equal protection challenge, a classification or distinction must be rationally related to a legitimate governmental interest. *See, e.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 445-46 (1985) (holding that a city ordinance that required a special use permit for group homes for the developmentally disabled, but not for other types of residences in the same zoning district, was invalid as a denial of equal protection).

In the present case, the imposition of MIH requirements on the Owner's special permit would create a remarkable anomaly. An owner in the same zoning district that does not have a landmarked building on its zoning lot may develop all of the residential floor area on the zoning lot on an as-of-right basis, without being subject to any MIH requirements. By contrast, an owner whose ability to exploit all of its available residential development rights is constrained by the presence of a landmarked building but shows an entitlement to the limited relief that is afforded by Zoning Resolution § 74-711 would be subjected to the MIH program's requirements – a burden that vitiates at least some of the relief that § 74-11 is intended to provide. There is no rational basis for burdening the owner who needs relief under § 74-711 due to the presence of a landmarked building, when an owner with the same amount of residential floor area rights is able to develop those rights free and clear of MIH requirements. Therefore, the owner who needs relief under § 74-711 is being denied the equal protection of the laws that are guaranteed by the federal and state constitutions.

Conclusion

The Owner is entitled to the special permit. It would be unlawful and wholly improper to annul or modify the Commission's determination.

Respectfully submitted,

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