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*How New York's
Next Mayor can Shape
Land Use and Planning*



Inclusionary Zoning

Inclusionary housing (or “inclusionary zoning”) is an important and popular tool used by many cities, including New York City, to produce long-term affordable housing. Inclusionary housing programs encourage or require certain new housing developments to include a certain share of below-market-rate units. New York City currently operates two inclusionary housing programs. Each program plays a role in the city’s broader affordable housing strategy and many policy proposals call for reforming these programs to better promote affordability. The next mayor will have to assess what is working with inclusionary housing, what is not, and how to build on and adjust them moving forward.



Background

Inclusionary housing programs create affordable housing by tying the production of below-market-rate homes to new market-rate construction. Inclusionary housing programs are intended to leverage private development to build affordable housing and to promote economic diversity within or near new developments.

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The details of inclusionary housing programs vary immensely across jurisdictions. Perhaps the most important distinction between inclusionary housing programs is whether they are “voluntary” or “mandatory.” Voluntary programs offer developers incentives and offsets in exchange for affordability; these may include increases in permitted density or other regulatory benefits like reductions in parking requirements.² However, developments can proceed without the affordable units and without the incentives. Mandatory programs, in contrast, require that any new construction covered by the policy include affordable units. Many mandatory programs still provide offsets, but developers’ choice is between not building and building subject to the inclusionary housing program’s requirements.

Across inclusionary housing programs, there are also significant differences in 1) what developments are covered, including whether rentals and/or condos are covered and whether small developments are exempted; 2) how many affordable units are required, and at what affordability levels; and 3) whether alternatives to on-site set-asides are provided, such as the payment of fees into a housing fund or the construction of affordable housing

¹ *Inclusionary Zoning*. Local Housing Solutions, NYU Furman Center, www.localhousingsolutions.org/act/housing-policy-library/inclusionary-zoning-overview/inclusionary-zoning/

² In other cities, tax incentives are sometimes included under the framework of “inclusionary housing” as well; in New York City, these are generally treated as separate types of policy.



at a different location.³ It is critical to these programs' success to properly calibrate these program details. All inclusionary housing programs involve a trade-off. The more affordability demanded, the costlier development and long-term maintenance will be for developers. Allow loose off-site development options for meeting requirements, and risk losing an important tool to promote racial and economic diversity. Ask too little and the programs will generate little new affordability. Ask too much and developers will opt out of participation. Inclusionary programs will be ineffective—or even reduce housing affordability—if they increase the cost of housing production so much that little new housing (affordable or market-rate) actually gets built.

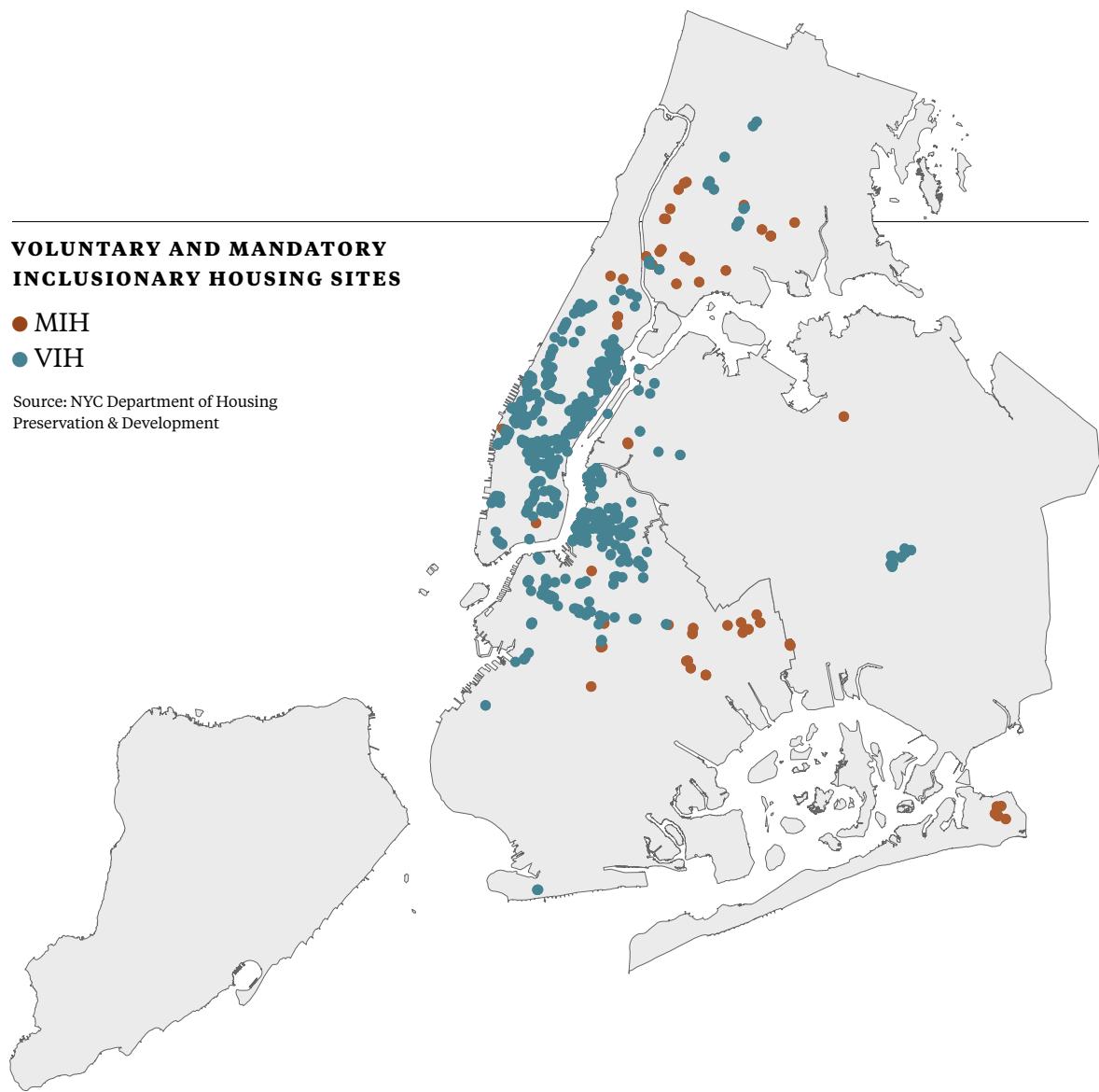
Inclusionary Housing in New York City

In New York City, both kinds of inclusionary housing programs currently exist. The City's Voluntary Inclusionary Housing (VIH) program was first enacted in 1987 and amended into its current form during the Bloomberg Administration. It offers developers in certain neighborhoods the ability to build bigger buildings—i.e., a density bonus—for providing units permanently affordable to residents at or below 80% of Area Median Income (AMI).⁴ VIH units are also eligible for tax incentives provided by the state. The de Blasio Administration supplemented VIH with a Mandatory Inclusionary Housing (MIH) program in 2016. MIH applies in any medium- or high-density area rezoned for additional housing production (whether that rezoning was publicly or privately-initiated), though developments which would result in 10 or fewer units and smaller than 12,500 square feet of floor area are exempt. MIH offers a menu of different affordability requirements for covered projects.⁵ As with VIH, MIH buildings remain eligible for state tax incentives and other preexisting forms of subsidy.

³ Vicki Been and Rachel Meltzer, *31 Flavors of Inclusionary Zoning: Comparing Policies From San Francisco, Washington, DC, and Suburban Boston*. NYU Furman Center, (September, 2009). www.furmancenter.org/research/publication/31-flavors-of-inclusionary-zoning-comparing-policies-from-san-francisco-was. Emily Thaden and Ruoniu Wang, *Inclusionary Housing in the United States*. Lincoln Institute of Land Policy, (September, 2017). www.lincolninst.edu/publications/working-papers/inclusionary-housing-united-states

⁴ *Voluntary Inclusionary Housing*. NYC Department of Housing Preservation and Development, City of New York, www1.nyc.gov/assets/hpd/downloads/pdfs/services/vih-fact-sheet.pdf

⁵ *Mandatory Inclusionary Housing*. NYC Department of Housing Preservation and Development, City of New York, (March, 2016). www1.nyc.gov/assets/hpd/downloads/pdfs/services/mih-fact-sheet.pdf



In recent years, MIH and VIH have functioned quite differently. Since 2014, developers have committed to producing 8,476 affordable units through VIH, largely in higher-rent neighborhoods in Manhattan and Northern Brooklyn. Since the enactment of MIH in 2016, developers have committed to producing 2,065 affordable units, largely located in low-income neighborhoods such as East New York. All MIH projects have been heavily subsidized, and the vast majority have been 100% affordable projects rather than including market-rate units.⁶ These MIH commitments largely track the location of neighborhood-level rezonings under the de Blasio administration, which have so far been concentrated in low-income neighborhoods. They may also suggest that the various affordability requirements of MIH are difficult for developers to achieve through cross-subsidy from market-rate units alone, given the high cost of limited development sites in New York City.



Proposals for Modifications to Inclusionary Housing

Many have called for changes to New York City's inclusionary housing policies. One prominent set of proposals calls for expanding inclusionary zoning to apply citywide, not only in designated neighborhoods or areas that were recently rezoned. These proposals for a citywide inclusionary housing program vary in (or have not yet addressed) important details, such as whether the citywide program would be voluntary or mandatory, what offsets it would include (if any), what levels of affordability would be required, and whether the program would be coupled with an extension of the property tax exemption for new rental housing. Citywide inclusionary housing policies, including mandatory ones, are not uncommon across the country, and advocates often point to cities like San Jose or Portland as models. However, there is some evidence that in Portland, the adoption of a mandatory, citywide inclusionary housing policy has reduced overall housing production, thereby exacerbating affordability programs, and shifted production into smaller buildings that are exempt from the affordability requirement.⁷

Other suggestions call for reforming New York City's existing inclusionary housing programs. Rezoning high-income neighborhoods—something that has not yet happened since the adoption of MIH—would bring MIH into stronger housing markets where the program could likely generate more affordable units and rely less on public subsidy.⁸ At the same time, some observers have suggested that MIH's affordability requirements may need to be better tailored across geographies and development models—and in some cases reduced—in order to ensure that developers actually build under the program.⁹ This could involve, according to some proposals, supplementing the existing menu of affordability options available under MIH with additional variation for stronger or weaker housing markets and for scenarios like the conversion of non-residential buildings to housing or the development of smaller buildings. Any reassessment of the MIH affordability framework would have to be considered alongside the state's 421-a tax incentive program, as MIH was developed in reliance on that program's framework and tax benefits.

⁷ Noel Johnson and Mike Kingsella, *The Cautionary Tale of Portland's Inclusionary Housing Policy*. Up for Growth, (April 25, 2019). www.upforgrowth.org/news/cautionary-tale-portlands-inclusionary-housing-policy

⁸ Alicia Glen and Carl Weisbrod, *De Blasio's Housing Policy Works: Attacks on Mandatory Inclusionary Housing Program Are off-Base*, New York Daily News, (January 23, 2020). www.nydailynews.com/opinion/ny-oped-the-right-way-to-produce-housing-20200123-5d2ys2aeovgt5p5riuf3eni3ti-story.html

⁹ Eric Kober, *De Blasio's Mandatory Inclusionary Housing Program: What Is Wrong, and How It Can Be Made Right*. Manhattan Institute, (January, 2020). media4.manhattan-institute.org/sites/default/files/deblasios-mandatory-inclusionary-housing-program.pdf



Any reform to inclusionary housing should be made cognizant of potential legal risks to such programs. Conservative legal organizations have made inclusionary zoning a target of litigation in recent years, arguing in particular that mandatory programs constitute uncompensated “takings” or “exactions” and thereby violate the Constitution (other issues involve questions of state law).¹⁰ So far, inclusionary housing programs have consistently been upheld against constitutional challenges.¹¹ Still, there are some open legal questions in this area,¹² and given the rightward swing of the judiciary in recent years and the targeting of inclusionary housing programs by litigators, care should be taken to design these programs to minimize legal risk.

Conclusion

Inclusionary housing policies have been intended to play a significant role in New York City’s affordable housing strategy. These policies were created to incentivize and require the private market to provide affordable housing in areas where there is new housing development, something the market does not have an incentive to do on its own, and to combat displacement in areas where local residents may be unable to afford new market rate housing. Through MIH, inclusionary zoning also plays a significant role in New York City’s land use policies generally—all significant rezonings now require an inclusionary housing component. Given the significance of inclusionary housing to New York City’s affordable housing and land use policies, the next mayor will need to assess how these programs are working and if they could be improved. Inclusionary housing policies require difficult balancing acts and regular updating to housing market conditions to ensure that balance is maintained a matter of particular concern in the wake of COVID-19’s market upheaval. Evaluating how best to achieve those balances and update the city’s approach to inclusionary housing is an important task moving forward.

¹⁰ Rachel M. Cohen, *Conservatives Are Nudging the Supreme Court to Dismantle Affordable Housing Policies*. The Intercept, (June 25, 2019). theintercept.com/2019/06/25/supreme-court-inclusionary-zoning-constitutional/

¹¹ E.g. Cal. Bldg. Indus. Ass’n v. City of San Jose, 351 P.3d 974 (Cal. 2015).

¹² Cal. Bldg. Indus. Ass’n v. City of San Jose, 136 S. Ct. 928 (2016) (Thomas, J., concurring in denial of certiorari).