

July 22, 2016

MEMO

To: The City Planning Commission
From: Counsel Division, Department of City Planning
Re: MIH Applicability to Adorama Special Permit

At the City Planning Commission Review Session on July 11, 2016, the General Counsel of the Department of City Planning offered to provide a supplemental memo on the applicability of MIH to the Adorama 74-711 Special Permit. This memo will address the three points that arose at the follow up session.

First: MIH applicability to special permits and the meaning of “significant increase in #residential floor area#” in ZR 74-32 were explicitly and consistently represented at certification, in the CPC Report, and in testimony by the Chairman of the City Planning Commission before City Council.¹ In the context of the Charter-mandated land use review procedure, this constitutes a binding administrative record that defines and delimits the scope of the law; it is not mere legislative history. The Commission does not have the discretion to apply the law in a way contrary to explicit and consistent representations of the law to the City Council and the public during public review.

Second: An increment identified by environmental review cannot serve as the basis for a threshold determination for MIH because an increment can vary widely depending on bulk assumptions embedded in the no- and with-action scenarios and the range of uses permitted within a project area. Neither the assumptions made in environmental review nor the terms of the special permit will commit the Adorama applicant team to particular uses within the C6-4A district. If the Commission approves the proposed envelopes, the applicant can fill those envelopes with any permitted uses it chooses. Similarly, and consistent with CEQR, the Adorama applicant team could have presented the Commission with reasonable no-action and with-action scenarios with a mix of uses that produced a very low or even negative residential increment. The indefiniteness of such an increment makes it unsuitable for MIH applicability determinations, even if using the increment in that way were permitted by the MIH law.

Third: Section 74-32 requires the Commission to apply MIH “[w]here a special permit application would allow a significant increase in #residential floor area#”. The Commission has asked whether the use of #floor area# (rather than #floor area ratio#) in ZR 74-32 denotes or implies that increases in practically buildable #floor area# are enough to trigger this requirement, or whether such requirements are triggered only by increases in permitted #floor area#.

As outlined above, the Department has consistently stated that only increases in permitted #floor area# trigger the requirement. The following discussion of #floor area# and #floor area ratio# will address the arguments that the plain language of 74-32 denotes or implies otherwise.

The concepts of #floor area# and #floor area ratio# are used in multiple ways throughout the zoning resolution, including:

1. To denote regulatory limits on building size – that is, “permitted floor area” or “permitted FAR”
2. To describe the size of existing buildings – that is, “built floor area” or “built FAR”.

It is not the case that #floor area ratio# always refers to regulatory limits on building size (or some other more abstract usage) and that #floor area# always refers to the size of existing buildings (or some other more concrete usage). Usage is typically made clear by context.ⁱⁱ

The definition of #floor area# begins with the assumption that any area within a building constitutes floor area and goes on to specify abstract categories of area within a building that are specifically included or specifically excluded from the definition of #floor area#. The definition of #floor area ratio# by necessity incorporates the definition of #floor area#, because FAR is simply #floor area# divided by the #lot area# of a #zoning lot#. Neither definition is necessarily more concrete or abstract than the other.

With respect to regulatory limits to building size: Use of #Floor area ratio# is appropriate when specifying regulatory limits to building size over geographies containing multiple zoning lots of varying size. This, for instance, is why zoning districts use FAR to denote regulatory limits on building size – maximum FAR remains constant even as lot size varies. Use of #floor area# is more appropriate when denoting regulatory limits on building size when such limits refer to individual projects on an identifiable zoning lot or lots, as is the case with special permits.

Because both #floor area# and #floor area ratio# can denote regulatory limits on building size – that is, permitted floor area or permitted FAR – and because ZR 74-32 is a section pertaining to special permits, the use of #floor area# in 74-32 should not be taken as evidence that MIH requirements are triggered by anything other than increases in permitted floor area.

ⁱ At certification of the MIH special permit on September 21, 2015, City Planning Deputy Executive Director Howard Slatkin said:

Sometimes there’s a...standalone special permit application that comes before the Commission. So for instance an application under 74-711 to modify use regulations to facilitate the preservation of a landmarked building – that type of special permit application, where it creates residential floor area where none existed previously, we would anticipate applying this policy to it. There are other types of special permits that might just modify height and setback, that apply to the existing floor area that’s already allowed – we’re not anticipating applying this policy where you’re essentially reconfiguring the existing floor area that is allowed under zoning today.”

In testimony before City Council on February 9, 2016, City Planning Director Carl Weisbrod said:

When a special permit is reshaping a building, that is, not creating new floor area, not creating any new housing opportunities, but simply moving around floor area that’s already permitted, we would not apply MIH. But where the special permit is creating substantial new floor area, we would apply MIH for special permits. The MIH options made available to the projects will be set forth in the restrictive declaration attached to the special permit and this, like the rest of the rest of the application, will be subject to the City Council’s approval.

Finally, the CPC report reads:

The Commission anticipates applying the MIH program to...special permits that 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.

ii For an example of #floor area# used to denote “permitted floor area” see:

ZR 23-154I(1):

The #residential floor area# of a #development# or #enlargement# may be increased by 0.833 square feet for each one square foot of #moderate income floor area#, or by 0.625 square feet for each one square foot of #middle income floor area#, provided that for square foot of such #floor area compensation# there is one square foot of #floor area compensation#, pursuant to paragraph (b) of this Section.

For an example of #floor area ratio” used to denote “built floor area ratio” see:

ZR 43-17

[...]

Mezzanines are allowed within individual quarters, in #buildings# with an existing #floor area ratio# of 12.0 or less, and only between floors, or between a floor and a roof, existing on January 22, 1998, that are to remain, provided that such mezzanines do not exceed 33 and 1/3 percent of the gross #floor area# of such individual quarters. Such mezzanines shall not be included as #floor area# for the purpose of calculating minimum required size of a #joint living-work quarters for artists#.