

**In Brief: The HDFC Coalition Policy Committee's Proposal to Amend the New York State Private Housing Finance Law (PHFL) that Governs HDFC Cooperatives**

**Q: What is the New York State Private Housing Finance Law (PHFL)?**

**A:** The PHFL is a part of NY State law that regulates HDFC co-op corporations. Most HDFC co-ops are incorporated under Article 11 of the PHFL, and also under the NY State Business Corporation Law (BCL). Changes to the PHFL could greatly impact you and your HDFC co-op.

**Q: Would it be a good idea to amend (change) the PHFL?**

**A:** It depends. If the PHFL is to be changed, we believe that all changes must help, not hurt, the HDFC shareholders who saved their buildings and neighborhoods by investing their own time, money and "sweat equity." We believe that any changes must protect affordability for current and future generations of HDFC shareholders, and must also protect shareholder equity, autonomy and right of self-determination. We don't want our private homes that the City just wanted to get rid of years ago to now be over-regulated or effectively converted into public housing.

**Q: Why are changes to the PHFL being considered now?**

**A:** For two main reasons: (1) The current "DAMP" tax break for HDFCs expires in 2029 and must be renewed at some point before 2029, and (2) some elected officials believe that HDFC co-ops should be more restricted, or even controlled by government and non-profit housing groups that are seeking receive fees and long-term contracts to oversee your building.

The Department of Housing Preservation and Development (HPD) under Mayor de Blasio tried and failed in 2016-2017 to impose new restrictions on HDFCs through a new "regulatory agreement" from the City. The Mayor's regulatory agreement plan failed because of HDFC shareholder opposition, but some NY State elected officials from districts here in NYC now want to impose many of the same restrictions for HDFCs through a change to the PHFL.

**Q: What does the HDFC Coalition Policy Committee propose for the PHFL?**

**A:** We created our own proposal to change the PHFL with the help of attorneys that would:

1. Provide a permanent tax break for HDFC co-ops that is better and helps more HDFCs than the current "DAMP" tax exemption which expires in 2029.
2. Renew the current PHFL tax forgiveness section for distressed HDFCs needing relief from tax arrears (very similar to the already-introduced bill A06992).
3. Clear up grey areas in the PHFL so that HDFC co-ops with expired restrictions have the undisputed right to decide for themselves to either continue as income-restricted HDFCs to get low tax rates, or to decline PHFL tax breaks to be exempt from restrictions, and also to reform as a typical co-op if, and only if, the HDFC co-op's shareholders vote to do so.

**Q: OK, so what's next for HDFC co-ops and shareholders?**

**A:** We want to hear from you, and we want to help your voice be heard by elected officials. Please see our website for our PHFL proposal and let us know what you think, and THANK YOU!

December 2, 2019

Hon. Harvey Epstein, Esq.  
Member of the Assembly for the 74th District  
New York State Assembly  
250 Broadway, 22nd Floor  
New York, NY 10001

**Re: Proposal to Amend the New York State Private Housing Finance Law (PHFL)**

Dear Assembly Member Epstein:

The HDFC Coalition's Policy Committee would like to thank you for meeting with us at your district office on November 15, 2019 to discuss your plan to draft and introduce a new bill that would substantially revise the New York State Private Housing Finance Law (PHFL) which governs privately-owned HDFC cooperatives.

The HDFC Coalition Policy Committee requested the meeting to help ensure that the voices of 90,000 New Yorkers who own and live in some 30,000 affordable HDFC co-ops be heard, and that any proposed legislation affecting HDFCs be designed first and foremost to protect these New Yorkers -- the people who actually live in these homes.

The Policy Committee desires to work with you to develop a legislative proposal that preserves affordability for current and future generations of HDFC shareholders, and that also protects shareholder equity, autonomy and right of self-determination. The Policy Committee would like to avoid a repeat of the City's attempt to impose an onerous regulatory agreement, which was overwhelmingly opposed and soundly defeated by HDFC shareholders. Similarly, the Policy Committee also wishes to avoid a repeat of New York State Senate bill S6543-2017, which would have effectively converted our private homes into public housing. This bill was stricken in Albany after HDFC shareholders strongly opposed it.

Rather, the Policy Committee respectfully asks to be included in any working group developing your new bill. The Policy Committee believes that the true stakeholders-- people who own and live in HDFCs--should be at the table when the future of our homes is discussed. The Policy Committee offers the expertise of the pro bono attorney who has been working diligently with us on these issues. A more balanced process to produce meaningful change can only occur when the true concerns of HDFC shareholders are known and their recommendations considered.

Attached is a copy of the Policy Committee's current draft proposal to improve and clarify the PHFL. The Policy Committee has already begun to distribute our draft to the HDFC co-op community for comment. Our proposal to amend the PHFL would do three things:

1. Provide an improved, and permanent, property tax benefit for HDFC co-ops, so that they are not threatened by the 2029 expiration of the "DAMP" tax benefit, and so that HDFCs located in areas with lower real estate values also receive this much-needed tax relief.
2. Renew the tax forgiveness section for distressed HDFCs needing relief from tax arrears (this section of the proposal is very similar to the already-introduced bill A06992).
3. Clarify existing law with respect to HDFC co-ops with expired restrictions or regulatory agreements; such HDFCs should continue to decide for themselves whether to accept or decline PHFL tax relief and associated restrictions, and HDFCs should also be able to independently reform as typical co-op corporations if their shareholders vote to do so.

The attached draft proposal addresses the needs of the vast majority of HDFC co-ops that wish to continue as income-restricted affordable housing, but that require real tax relief to remain so. The Policy Committee agrees with you that now is the time to renew tax forgiveness for financially distressed HDFCs so that their shareholders can remain as homeowners without losing equity. And as a matter of fairness and law, HDFC co-ops must have the right to independently reincorporate as normal co-ops. We should not lose sight of the fact that HDFC cooperatives are privately owned, and that any changes must respect the legal terms of sale for the buildings that the former tenants - and now private homeowners - purchased from the City of New York.

We all agree that HDFCs help to keep New York City diverse and inclusive. Amending the PHFL to ensure the continued viability of privately-owned HDFC cooperatives, while respecting the shareholders' right of self-determination, will be necessary if the City and State of New York are to properly honor and respect the tens of thousands of HDFC shareholders who rebuilt their crumbling buildings and saved the neighborhoods in which they still live, and where they plan to remain for generations to come.

For the reasons noted above, we believe that the effort to develop successful PHFL legislation would be more productive if we work together, with input from HDFC shareholders via the HDFC Coalition's Policy Committee and its legal advisers included as part of the process.

To that end, the HDFC Coalition Policy Committee would also like to propose co-hosting a series of town hall meetings with your office so that HDFC shareholders from across the city have the opportunity to provide their input on proposed legislation to amend the PHFL, and to ensure that their affordable homes are protected.

Given that your office has indicated a short timeline to introduce such a bill, the HDFC Coalition Policy Committee respectfully requests a response at your earliest convenience.

Sincerely,

The HDFC Coalition Policy Committee  
Tina DiFeliciano, Peter S. Green, John McBride, Michael Palma Mir, April G. Tyler

Cc:

HDFC Coalition, Member Shareholders and Chapters  
Members of the New York State Assembly Committee on Housing  
Members of the New York State Senate, Committee on Housing, Construction and Community Development  
Hon. Andrew M. Cuomo, Governor of the State of New York  
Hon. Letitia James, Esq., Attorney General of the State of New York  
Members of the New York City Council, Committee on Housing and Buildings  
Hon. Louise Carroll, Esq., Commissioner, New York City Department of Housing Preservation and Development

Attachment:

Draft Legislation to Amend the NYS PHFL: "HDFC Self-Determination and Affordability Act of 2020," by Steven Siegel, Esq. and the HDFC Coalition Policy Committee

December 2, 2019

**Introduction to the “HDFC Self-Determination and Affordability Act of 2020”**

Dear fellow HDFC shareholder:

The HDFC Coalition Policy Committee worked with attorney Steven Siegel in 2018-2019 to develop a legislative proposal to change the New York State Private Housing Finance Law (PHFL) entitled the “HDFC Self-Determination and Affordability Act of 2020.” The PHFL regulates how corporations such as Housing Development Fund Corporations (HDFCs) can operate, and changes to the PHFL can be powerful.

We undertook this effort to draft legislation ourselves because we feel that HDFC shareholders are the most important stakeholders in the shaping of our collective future. And we don’t believe that recent efforts by government to overregulate HDFC co-ops have been designed to properly assist or respect the HDFC shareholders who saved their buildings and the neighborhoods that they live in, and by doing so helped restore the real estate tax base of NYC following the City’s fiscal crisis.

The tax break for HDFCs, known as DAMP, that allows our co-ops to be affordable expires in 2029. And HDFC co-ops have for decades have to some degree been left in a legal limbo as to their rights and status. Although these issues need addressing, we feel that recent attempts by government to restrict and reform HDFC co-ops have been, overall, an attempt to convert our privately-owned homes into public housing.

The HDFC Policy Committee’s original plan was to first complete the draft of our “HDFC Self-Determination and Affordability Act of 2020” and then to share it citywide with HDFC shareholders. After getting comments, ideas and input on the draft from the HDFC shareholder community, we were to then revise the draft as needed and present it to elected officials for consideration.

We recently learned, however, that Assembly Member Harvey Epstein, who represents District 74 of Manhattan’s Lower East Side, plans to soon introduce his own draft of a bill to amend the PHFL. We understand that Assembly Member Harvey Epstein has consulted on his draft with the New York City Department of Housing Preservation and Development (HPD), UHAB, the New York State Attorney General’s office, Legal Aid, the NYS Department of Housing and Community Renewal (DHCR), attorneys in private practice and other elected officials. (Epstein’s

anticipated new bill would be in addition to the already introduced bill A06992-2019, which would renew tax forgiveness for HDFCs with tax arrears.)

Because it has become clear that an effort to change the PHFL is already underway, the HDFC Coalition Policy Committee felt it best to publicly share our draft now and to seek comment from the HDFC shareholder community and others. The HDFC Coalition Policy Committee welcomes your comments, ideas and suggestions.

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This is an introduction to a new legislative proposal that is intended to resolve important issues facing over 1,100 housing cooperatives formed as housing development fund corporations (HDFCs) under Article 11 of the New York Private Housing Finance Law (PHFL). The proposed legislation and memorandum in support are enclosed.

The statute governing HDFCs was enacted over fifty years ago. The statute does not reflect the current realities affecting this vital sector of affordable housing. Tens of thousands of HDFC shareholders and their families need timely legislative intervention to ensure the continued affordability and preservation of their homes -- and in a manner that does not infringe upon the right of self-determination of each HDFC cooperative.

Most HDFC cooperatives were sponsored by the New York City Department of Housing Preservation and Development (HPD). These co-ops are bound by time-limited restrictions, as is also the case with every other type of government sponsored private housing authorized by the PHFL. For a substantial portion of these HDFCs, the time limited restrictions have expired.

The proposed legislation has three overriding goals: (1) to protect and promote the self-determination of HDFC co-ops; (2) to provide strong incentives for HDFC co-ops with expired controls to agree to remain as affordable housing; and (3) to ensure that the HDFC co-ops that agree to remain as affordable housing are in sound condition and are economically self-sufficient. These three overriding objectives are complementary.

To achieve these objectives, the bill would make clear that HDFC co-ops may exercise control over their own destinies when restrictions expire. At the same time, the bill would provide substantial tax incentives so that HDFCs will affirmatively choose to remain as affordable housing subject to income restrictions, consistent with democratic principles of self-governance. This approach is a matter of basic fairness and justice; is consistent with the promises given to HDFCs over the past thirty years; and is in full accord with how all other government-sponsored private housing under the PHFL is treated (such as Mitchell-Lama housing and Article V redevelopment companies). Most importantly, this approach will ensure the long-term economic viability of affordable HDFC co-ops.

The particular financial and legal challenges facing HDFCs today cannot be fully understood without an appreciation of the extraordinary role that HDFCs played in New York's housing crisis of a generation ago. Beginning in the early 1980s, New York City adopted the HDFC form of housing cooperative as a means to divest itself of -- and revitalize -- its tax-foreclosed multifamily housing stock. At the time the City was experiencing large-scale abandonment of its private low- and middle-income multifamily housing stock. In response to this housing crisis, the City determined to turn over the ownership and management of many City-owned tax-foreclosed multifamily buildings to the existing tenants in the form of HDFC co-ops. Over the past few decades the City's HDFC initiative proved to be one of New York's most enduring housing success stories. Tens of thousands of resident-shareholders of HDFCs played an important role in the stabilization and preservation of New York City's multifamily housing stock in the period following the City's fiscal crisis of the 1970s and 80s. The City's large-scale creation of HDFC co-ops was a major policy innovation and was an important part of the City's response to the housing crisis of that era.

All government and community stakeholders benefitted from the large-scale creation of HDFCs. The City benefitted by reducing its enormous portfolio of tax-foreclosed apartment buildings at a time when the buildings were a substantial burden to the City and when there was virtually no private market for these properties. The residents benefitted by the preservation and upgrading of their own buildings and by becoming homeowners for the first time. And the surrounding communities benefitted by the stabilization of the neighborhood, the upgrading of housing and by the transformation of a rental community into a homeownership community.

As previously noted, the regulatory controls placed on HDFCs were time-limited. Consequently, the HDFCs that were created in the 1980s and 1990s have regulatory controls that already have expired or will soon expire. For this class of HDFCs, there is a great deal of uncertainty as to their legal status and their financial future. This proposed legislation clarifies the legal status of HDFCs with expired regulatory controls in a way that protects and promotes their autonomy and self-governance while strengthening the inducements for these HDFCs to voluntarily agree to continue to operate as affordable housing.

Specifically, our legislative proposal would:

1. **Ensure that HDFCs can remain as affordable housing through a new real estate tax benefit.** The proposed legislation codifies into the statutory law the inducements for HDFCs with expired regulatory agreements or resale restrictions to voluntarily agree to remain as affordable housing with the continued availability (and strengthening) of tax incentives and/or subsidized financing. The bill removes the 40-year fixed term of the existing tax exemption and makes the tax exemption permanent. The bill also codifies a new tax benefit for HDFCs: a real estate tax abatement equivalent to 150 percent of the

tax abatement for most conventional housing cooperatives authorized by Real Property Tax Law 467-a. The rationale for this new tax benefit is based on a quirk in current law. By way of background, the Legislature (subsequent to the enactment of PHFL 477) enacted RPTL 467-a, which granted a real estate tax abatement to virtually all housing cooperatives in New York City *other than* HDFCs. The conventional tax abatement contains no income restrictions or similar eligibility requirements. A luxury co-op on Park Avenue is eligible for a conventional co-op tax abatement.

Although HDFCs do receive the DAMP tax exemption in lieu of the conventional co-op tax abatement, the application of the DAMP tax exemption to many HDFC co-ops is not nearly as valuable as would be the application of the conventional co-op tax abatement. This is so because the conventional co-op tax abatement provides a dollar-for-dollar reduction in real estate tax liability. By contrast, the DAMP tax exemption merely provides a cap on assessed valuation (and thereby a cap on the resulting real estate tax liability). If an HDFC's assessment is already below the DAMP "cap," then the HDFC receives no tax benefit at all.

The bill remedies this anomaly by providing that HDFC co-ops are entitled to either the benefits of a conventional co-op tax abatement or the DAMP tax exemption. The point is that – as a matter of fairness and equity -- an HDFC income-restricted co-op should receive at least the tax benefit that a market-rate co-op receives. The bill goes further – and provides that HDFC co-ops are entitled to the greater of 150 percent of the conventional co-op tax abatement or the DAMP tax exemption. This increased benefit is a recognition that HDFC co-ops are entitled to greater benefits than market-rate co-ops – as a vital means to promote and protect housing affordability in New York City and as a means to provide financial stability to HDFCs. The benefit is also intended as an inducement for HDFC co-ops with expired regulatory agreements or expired income restrictions to make a long-term commitment to remain as income-restricted HDFCs, rather than exercising their right to reincorporate as another form of housing cooperative not subject to income restrictions.

- 2. Renew the existing authority under the PHFL for financially distressed HDFCs to apply for real estate tax forgiveness.** Current legislation was enacted in 2002 and authorized tax forgiveness only for HDFCs that “[as of] January 1, 2002 had outstanding municipal real estate taxes relating to any period prior to January 1, 2001.” This baseline year for tax forgiveness (i.e., tax arrears as of 2001) has never been updated to a more current tax year. The proposed legislation updates the baseline year so that the City has the flexibility to offer tax forgiveness (in appropriate cases and subject to strict controls set forth in



current law) for HDFC co-ops that are at risk of tax foreclosure. In this way an HDFC co-op is saved from tax foreclosure and may thereby provide sustainable and affordable housing for years to come. This is critically important -- not just for the HDFC shareholders themselves -- but also for neighborhood stability.

3. **Clarify that HPD supervision extends to all HDFCs under current deed restriction or regulatory agreement and while the HDFC elects to receive the proposed new tax abatement.** The legislation would clarify that HDFCs with expired regulatory agreements or other City-imposed income restrictions may determine their own future. The legal status of HDFCs with expired regulatory agreements or expired City-imposed income restrictions has long been uncertain. This section removes that cloud of uncertainty.

The strengthening of HDFC self-determination and autonomy is an important objective of this legislation. But so too is the promotion and protection of HDFC affordability. These objectives are not inconsistent. As previously noted, the proposed legislation advances each of these objectives by providing inducements for HDFCs with expired regulatory agreements or resale restrictions to voluntarily agree to remain as affordable housing. This approach is consistent with the legislative approach formally adopted in all other forms of government-sponsored or -assisted housing authorized by the PHFL. Indeed, this approach is wholly consistent with the existing Article 11 of the PHFL. We believe that these proposed legislative changes provide proper balance between the existing property rights of HDFC shareholders and the decades of historically-consistent degree of HPD oversight and income guidelines for HDFCs, with the goals of preserving affordable housing for resident-owners.

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Again, we welcome your comments, ideas and suggestions.

Sincerely,

The HDFC Coalition Policy Committee

HDFC Coalition Proposal for a Revised HDFC Cooperative Property Tax Calculation via Amendment to the New York State Private Housing and Finance Law																
Comparison of Existing and Proposed Taxation for HDFC Cooperatives in Tax Years 2016 and 2019																
Borough	Block	Lot	Zip Code	Building Address	Dwelling Units	Commer- cial Units	Tax Year	Assessed Value of Building	Assessed Value per Dwelling Unit (AVU)	Full Tax per Dwelling Unit: AVU x Tax Rate (No Tax Relief)	With Existing DAMP Tax Exemption: Tax paid per Apartment	% of Taxes Paid with Existing DAMP Tax Exemption	Tax per Dwelling Unit if 1.5 x Co- op/Condo Tax Abatement	% of Taxes Paid with 1.5 x Existing Co- op/Condo Abatement	Greater of: DAMP Tax Exemption or 1.5x Co- op Condo Tax Abatement	% of Taxes Paid with New HDFC Coalition PHFL Proposal
Manhattan	387	44	10009	283 East 4th St	36	0	2016	\$ 721,710	\$ 20,048	\$ 2,583	\$ 1,261	49%	\$ 1,494	58%	\$ 1,261	49%
					36	0	2019	\$ 835,470	\$ 23,208	\$ 2,927	\$ 1,318	45%	\$ 1,693	58%	\$ 1,318	45%
Manhattan	1941	23	10030	211 West 135th St	8	0	2016	\$ 221,352	\$ 27,669	\$ 3,565	\$ 1,261	35%	\$ 2,062	58%	\$ 1,261	35%
					8	0	2019	\$ 262,461	\$ 32,808	\$ 4,138	\$ 1,318	32%	\$ 2,394	58%	\$ 1,318	32%
Manhattan	1879	41	10025	212 West 108th St	30	0	2016	\$ 635,939	\$ 21,198	\$ 2,731	\$ 1,261	46%	\$ 1,580	58%	\$ 1,261	46%
					30	0	2019	\$ 746,459	\$ 24,882	\$ 3,138	\$ 1,318	42%	\$ 1,815	58%	\$ 1,318	42%
Manhattan	1056	18	10036	433 West 46th St	16	0	2016	\$ 380,790	\$ 23,799	\$ 3,066	\$ 1,261	41%	\$ 1,774	58%	\$ 1,261	41%
					16	0	2019	\$ 654,840	\$ 40,928	\$ 5,162	\$ 1,318	26%	\$ 2,986	58%	\$ 1,318	26%
Manhattan	2082	42	10031	510 West 151st St	14	0	2016	\$ 202,950	\$ 14,496	\$ 1,868	\$ 1,261	68%	\$ 1,080	58%	\$ 1,080	58%
					14	0	2019	\$ 267,390	\$ 19,099	\$ 2,409	\$ 1,318	55%	\$ 1,393	58%	\$ 1,318	55%
Bronx	2609	43		1185 Fulton Ave	42	0	2016	\$ 388,350	\$ 9,246	\$ 1,191	\$ 1,191	100%	\$ 689	58%	\$ 689	58%
					42	0	2019	\$ 468,900	\$ 11,164	\$ 1,408	\$ 1,318	94%	\$ 815	58%	\$ 815	58%
Bronx	3081	42		2114 Belmont Ave	16	0	2016	\$ 157,050	\$ 9,816	\$ 1,265	\$ 1,261	100%	\$ 732	58%	\$ 732	58%
					16	0	2019	\$ 198,720	\$ 12,420	\$ 1,566	\$ 1,318	84%	\$ 906	58%	\$ 906	58%
Bronx	3112	3		803 East 182nd St	44	0	2016	\$ 421,560	\$ 9,581	\$ 1,234	\$ 1,234	100%	\$ 714	58%	\$ 714	58%
					44	0	2019	\$ 526,590	\$ 11,968	\$ 1,509	\$ 1,318	87%	\$ 873	58%	\$ 873	58%

<b>DAMP Tax Exemption - Tax Paid per Apartment</b>		
Year	Existing Increase 6% per year	Proposed Increase 2.5% per year
2019	\$ 1,318	\$ 1,318
2020	\$ 1,397	\$ 1,351
2021	\$ 1,481	\$ 1,385
2022	\$ 1,570	\$ 1,419
2023	\$ 1,664	\$ 1,455
2024	\$ 1,764	\$ 1,491
2025	\$ 1,870	\$ 1,528
2026	\$ 1,982	\$ 1,567
2027	\$ 2,101	\$ 1,606
2028	\$ 2,227	\$ 1,646
2029	\$ 2,360	\$ 1,687
2030	\$ 2,502	\$ 1,729
2031	\$ 2,652	\$ 1,773
2032	\$ 2,811	\$ 1,817
2033	\$ 2,980	\$ 1,862
2034	\$ 3,159	\$ 1,909
2035	\$ 3,348	\$ 1,957
2036	\$ 3,549	\$ 2,005
2037	\$ 3,762	\$ 2,056
2038	\$ 3,988	\$ 2,107
2039	\$ 4,227	\$ 2,160
2040	\$ 4,481	\$ 2,214
2041	\$ 4,749	\$ 2,269
2042	\$ 5,034	\$ 2,326
2043	\$ 5,336	\$ 2,384
2044	\$ 5,657	\$ 2,443
2045	\$ 5,996	\$ 2,505
2046	\$ 6,356	\$ 2,567
2047	\$ 6,737	\$ 2,631
2048	\$ 7,141	\$ 2,697
2049	\$ 7,570	\$ 2,765

<b>Existing Co-op Condo Tax Abatement for Market Rate Buildings</b>	
Average Assessed Value	Benefit Amount Per Year
\$50,000 or less	28.10%
\$50,001 - \$55,000	25.20%
\$55,001 - \$60,000	22.50%
\$60,001 and above	17.50%

<b>Proposed Abatement for HDFCs at 1.5 x Market Rate Abatement</b>	
Average Assessed Value	Benefit Amount Per Year
\$50,000 or less	42.15%
\$50,001 - \$55,000	37.80%
\$55,001 - \$60,000	33.75%
\$60,001 and above	26.25%

**Memorandum in support of the HDFC Self-Determination and Affordability Act of 2020**

**Steven Siegel, Esq.<sup>1</sup>**

**SUMMARY OF PROVISIONS**

This proposed legislation is designed to assist and strengthen housing development fund companies (HDFCs) – a vital part of New York City’s housing stock. Most New York City HDFCs are organized as housing cooperatives. Beginning in the early 1980s, the City of New York, through its Department of Housing Preservation and Development (HPD), converted hundreds of City-owned tax-foreclosed multifamily buildings into HDFC co-ops. The buildings were turned over to the tenants to own and manage. Most buildings were in poor condition at the time of transfer to the tenants. The tenant-shareholders of the newly created HDFC co-ops worked hard to stabilize and upgrade their buildings. Today, there are 1,048 HDFCs in New York City containing approximately 25,000 apartments. Approximately 75,000 New Yorkers make their homes in HDFC co-ops.

This vital housing resource is at a crossroads. All City-sponsored HDFC co-ops, at their inception, were subject to regulatory agreements or resale restrictions that required that the housing remain affordable for a fixed term. For HDFC co-ops created in the early 1980s this term was ten years. For HDFCs co-ops created in the late 1980s and thereafter, the term was 25 years.

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<sup>1</sup> Of Counsel, Cullen and Dyckman, LLP. This Memorandum was prepared on behalf of the HDFC Coalition Policy Committee in connection with that organization’s legislative advocacy. I gratefully acknowledge the invaluable research assistance and editorial suggestions of John McBride. Publication date: August 21, 2019. Contact: sns26@caa.columbia.edu.

Consequently, the HDFC co-ops that were created in the 1980s and 1990s have regulatory controls that already have expired or will soon expire. For this class of HDFC co-ops, there is a great deal of uncertainty as to their legal status and their financial future.

This proposed legislation clarifies the legal status of HDFC co-ops with expired regulatory controls. More particularly, the proposed legislation has two overriding goals: (1) protecting and promoting the self-determination of HDFC co-ops; and (2) providing strong incentives for HDFC co-ops to voluntarily agree to remain as affordable housing. *These two objectives are complementary.*

The bill's basic approach is to clarify that HDFC co-ops may exercise control over their own destinies when restrictions expire -- but also provide substantial tax incentives so that HDFCs will affirmatively choose to remain as affordable housing subject to income restrictions -- consistent with democratic principles of self-governance. This approach is a matter of basic fairness and justice; is consistent with the promises given to HDFCs over the past thirty years; and is in full accord with how all other government-sponsored private housing is treated. Furthermore, this approach is wholly consistent with *existing* Article 11 of the PHFL that governs HDFCs.

The need for this legislation is compelling. The existing law governing HDFCs is not a model of clarity and has resulted in a great deal of ambiguity and confusion as to the rights of and obligations of HDFCs with expired regulatory agreements or resale restrictions. Furthermore, the City of New York recently has proposed local legislation governing HDFCs. The City's proposed legislation, if enacted, would subject HDFCs to an entirely new regulatory regime, or, in the alternative, eliminate the existing tax incentive that was promised to run through at least 2029. The City's proposed legislation is contrary to the letter and spirit of the existing law, and to the promises made to HDFC over the past three decades that are embodied in co-op governing

documents sponsored by the City itself.

This legislation would preempt the City's efforts and would provide a clear and equitable framework for the preservation of this essential portion of the City's affordable housing stock.

## **A. Background**

HDFC co-ops are income-restricted housing cooperatives that are established under the authority of Article 11 of the Private Housing Finance Law (PHFL). Article 11 was enacted in 1966. Beginning in the early 1980s, New York City adopted the HDFC form of housing cooperative as a means to revitalize its tax-foreclosed multifamily housing stock. The concept was simple: turn over the ownership and management of City owned tax-foreclosed multifamily buildings to the existing tenants. Previously, the City has sold at auction all of its tax-foreclosed multifamily property to private investors – and that traditional approach to disposing of tax foreclosed property had led to an accelerating cycle of housing disinvestment and abandonment.

Over the past few decades the City's HDFC initiative proved to be one of New York's most enduring housing success stories. Tens of thousands of resident-shareholders of HDFCs played an important role in the stabilization and preservation of New York City's housing stock in the period following the City's fiscal crisis of the 1970s and 80s. The City's large-scale creation of HDFC co-ops was a major policy innovation and was an important part of the City's response to the housing crisis of that era. All government and community stakeholders benefitted from the large-scale creation of HDFCs. The City benefitted by reducing its enormous portfolio of tax-foreclosed apartment buildings at a time when the buildings were a substantial burden to the City and when there was little in the way of a private market for these properties. The residents benefitted by the preservation and upgrading of their own buildings and by becoming homeowners

for the first time. And the surrounding communities benefitted by the stabilization of the neighborhood, the upgrading of housing and the by the transformation of a rental community into a homeownership community.

As previously noted, the regulatory controls placed on HDFCs were time-limited. Consequently, the HDFCs that were created in the 1980s and 1990s have regulatory controls that already have expired or will soon expire. For this class of HDFCs, there is a great deal of uncertainty as to their legal status and their financial future. This proposed legislation clarifies the legal status of HDFCs with expired regulatory controls in a way protects and promotes their autonomy and self-governance while strengthening the inducements for these HDFCs to voluntarily agree to continue to operate as affordable housing.

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An important feature of City-sponsored HDFCs is the City's use of its authority under the Act to enter into a "regulatory agreement" with the HDFC. Under PHFL § 576, either the State or the municipal "supervisory agency" (*i.e.*, HPD) may enter into a regulatory agreement with an HDFC if the agency advances public funds to the HDFC.

Under PHFL 576, every HDFC regulatory agreement must provide that:

- Households must meet income eligibility guidelines, which is defined by statute as six times the annual rent plus six percent of the shareholder's "original investment" in the HDFC. *See* PHFL § 576(1)(b).
- Profits must be used only for capital improvements or to reduce rent/maintenance. Dividends cannot be paid to owners. *See* PHFL § 576(1)(c), (d).
- The property may not be sold or transferred without HPD approval for so long as the regulatory agreement remains in effect and/or unless and until any funds or mortgages owed to the City are paid in full. *See* PHFL § 576(1)(e).

- The HDFC may not be dissolved without HPD approval for so long as the regulatory agreement remains in effect and/or unless and until any funds or mortgages owed to the City are paid in full. *See* PHFL § 576(1)(e).

Thus, under Section 576 of the Act, the City’s authority to impose on HDFCs certain key restrictions remains in effect only for so long as a regulatory agreement remains in effect. Put differently, the City’s authority to impose Section 576 restrictions (including restrictions on dissolution of HDFCs and on the sale and disposition of HDFC property) is limited to only those HDFCs that are subject to a regulatory agreement and does not extend to HDFCs in which a regulatory agreement or mortgage is no longer in effect.

The City applied its Section 576 authority to HDFCs in two ways: *i.e.* (1) the terms of the Section 576 “regulatory agreement” were incorporated into various HDFC incorporation documents and in the deed conveying title to the property;<sup>2</sup> and (2) the regulatory agreement was incorporated into mortgage documents when the City made loans to HDFCs to finance capital improvements. In each case the City imposed resale restrictions that had a fixed term. At the inception of the HDFC program in the early 1980s, city-sponsored resale restrictions imposed by the sale documents expired in ten years. By the late 1980s, city-sponsored resale restrictions imposed by the sale documents ran for 25 years. Furthermore, resale restrictions that were made a part of city-sponsored rehabilitation loans to HDFCs ran for the life of the loan -- *i.e.*, usually 15 to 25 years.

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<sup>2</sup> When the City first created HDFCs in the 1980s, the City did not require a newly created HDFC to enter into a document that was formally titled a “regulatory agreement.” Instead, the City required the newly-created HDFC to enter into certain documents (such as deeds and certificates of incorporation containing limited-term controls over shareholder income and dissolution of the corporation. Beginning in 2003, the City required newly created HDFCs to enter into a document that was formally titled a “regulatory agreement” consistent with PHFL §576.



Thus, the City used PHFL § 576 as a means to impose additional terms and conditions (including resale restrictions) on the operation of the HDFC for a fixed term following the establishment of the housing cooperative or during the life of a City-sponsored loan to the HDFC. For the vast majority of HDFCs, these PHFL §576 restrictions have expired.<sup>3</sup>

As previously noted, there are presently 1,048 HDFCs in New York City containing approximately 25,000 apartments. Of the 1048 HDFCs, 207 are subject to regulatory agreements. A substantial number of non-regulated HDFCs date from the 1980s and 1990s. These older HDFCs are no longer subject to City resale restrictions that expired after either ten years or 25 years following the incorporation of the HDFCs.

For as long as a particular City-imposed resale restrictions remained in effect, an HDFC is subject to a detailed scheme of regulations imposed by the City pursuant to PHFL 576. In general, HPD resale restrictions govern such important issues of HDFC governance as income limitations for purchasers, succession rights, sublet rights, flip taxes, HPD consent as a precondition to the sale of an HDFC building and HPD consent to the dissolution of an HDFC. Upon the expiration of the City-imposed restrictions, the HDFC is no longer subject to these externally imposed regulations.

An HDFC with an expired regulatory agreement nevertheless remains subject to Article 11 of the PHFL as well as to various governing documents, such as its Certificate of Incorporation, deed restrictions, proprietary lease and by-laws. Most importantly, an HDFC is required to provide

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<sup>3</sup> HPD reports that of the 1048 HDFC co-ops, 207 are subject to regulatory agreements. A substantial percentage of the balance (841 HDFCs) is no longer subject to the City resale restrictions that were imposed as part of the creation of the HDFC co-op. See City of New York, Department of Housing Preservation and Development, *Preserving Affordable Home Ownership: HDFC Coops and Our Community*, <http://www1.nyc.gov/assets/hpd/downloads/pdf/Owners/hdfc-coop-december-shareholderforum>.

housing for “persons of low income,” PHFL § 573(3)(a). However, once an HDFC regulatory agreement or other HPD-imposed income restriction has expired, nothing in the PHFL expressly precludes these HDFC co-ops from converting to a non-HDFC co-op by reincorporating as a conventional co-op (and thereby opting out of the remaining statutory restrictions imposed by the PHFL). That circumstance raised the possibility that some HDFCs may opt-out of the HDFC statute and become market-rate housing – which would represent a loss to the City’s inventory of affordable housing stock.

A City-established HDFC is eligible to receive a partial real estate tax exemption granted by the City pursuant to PHFL §577. Pursuant to this authority, the City in 1989 enacted a partial tax exemption for most city-sponsored HDFCs. The tax exemption is generally referred to as the “Division of Alternative Management Programs” tax exemption, or “DAMP tax exemption.” The tax exemption runs for forty years and will expire in 2029.<sup>4</sup> A condition of the DAMP tax exemption is that the HDFC remain an HDFC for the duration of the tax exemption. Hence, an HDFC that opt-outs of the HDFC statute and become market-rate housing

Recently, the City has proposed local legislation that would revoke the DAMP tax exemption from any HDFC that declined to sign a new Regulatory Agreement with the City. The proposed new Regulatory Agreement would contain many provisions that would largely deprive

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<sup>4</sup> In general, the DAMP tax exemption is the same as the exemption that is applicable to one- and two-family houses. The exemption began in 1989 with a taxable assessed valuation capped at \$3,500 per apartment. In subsequent years the exemption increases by 6% per annum, but by no greater than 20 percent over five years. In some cases, HDFCs receive no tax benefit, because their real estate taxes are less than the tax cap.

In City tax year 2019-20, the DAMP tax exemption imposes a cap on the assessed value of HDFCs of \$10,452 per apartment in an HDFC building. Thus, in a 20-unit HDFC, the DAMP tax exemption caps the assessed value of the HDFC at \$207,480 and thereby effectively caps the HDFC’s resulting real restate liability (at a current tax rate of 12.892%) at \$26,748.

HDFCs of autonomy and self-determination, including the imposition of external fiscal monitors paid for by HDFC income, new restriction on apartment sales and subletting, and limitations on the assets and other real property owned by HDFC shareholders. The fate of the City's proposed local legislation is uncertain.

The City's proposed local legislation was met with widespread opposition by HDFC community groups and other stakeholders. Most HDFCs understand that if they continue to receive the benefits of the DAMP tax exemption then they must remain subject to the HDFC program and subject to the pre-existing income limitations. However, HDFCs vigorously oppose the City's proposal to unilaterally revoke the DAMP tax exemption unless the HDFC "voluntarily" subjects itself to a new draconian regulatory regime that was not part of their original regulation.

In light of the uncertainty of the continued availability of the DAMP tax exemption beyond 2029 (and perhaps sooner if the City's proposed local legislation were to be enacted and, as a consequence, the DAMP tax exemption were to be revoked for certain HDFCs that decline to agree to the City's new conditions and regulations), this amendment to the PHFL would make permanent the DAMP tax exemption for HDFCs. Importantly, this change in law would apply to all HDFCs, including those with expired regulatory agreements and other City-imposed income limitations that elect to remain as HDFCs. As an important corollary, the amendment clarifies that HDFCs that elect to remain as HDFCs agree to certain income restrictions under the PHFL as a condition of continued receipt of the DAMP tax exemption.

## **B. Summary of provisions**

### **Section 1**

Section 1 would clarify that HDFCs with expired regulatory agreement or other City-imposed income restrictions are permitted to reincorporate as a private cooperative corporation – consistent with the intent of the 1966 enactment of Article 11 of the PHFL. Nothing in Article 11 precludes dissolution of an HDFC once a regulatory agreement or other valid city-imposed income restriction expires.<sup>5</sup> However, as described below, there has long been uncertainty as to the legal status of HDFCs with expired regulatory agreements or expired City-imposed income restriction expires. This section removes that cloud of uncertainty.

Section 573(5) of the PHFL requires permission of the HPD commissioner when an HDFC desires to amend its certificate of incorporation but not when the shareholders of an HDFC elect to dissolve the HDFC. Section I preserves that distinction in law. Section 1 makes clear that the corporate law concepts of “amendment” and “dissolution” – as recognized in the Business Corporation Law (BCL) – are separate and distinct, and may not be conflated. Section I incorporates by reference the BCL’s separate treatment of “amendment” and “dissolution.”

Section 1’s clarification of the meaning of “amendment” in section 573(5) of the PHFL -- by reference to sections 801 and 805 of the Business Corporation Law -- is also appropriate in light of the fact that most City-sponsored HDFCs are incorporated under **both** the PHFL and the BCL. By incorporating into the PHFL the long-established BCL approach to the distinct concepts of “amendment” and “dissolution,” Section 1 removes uncertainty by harmonizing the respective provisions of the PHFL and BCL – each of which presently apply to most City-sponsored HDFCs.

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<sup>5</sup> Absent a statutory provision to the contrary (and subject to the rights of creditors and taxing authorities), any corporation or other business entity may exercise its right to dissolution by a vote of its constituent shareholders.

The reasons for Section 1 not only relate to a clarification of the legislative intent (*i.e.*, that HDFCs coops are not restricted from reincorporating once regulatory agreements and other City-imposed income restrictions have expired).<sup>6</sup> The need for Section 1 also arises on equitable grounds – *i.e.*, as a fulfillment of the express promises set forth in City-drafted HDFC governing documents and property deeds that accompanied the formation of City-sponsored HDFCs from the early 1980s onward. As previously noted, the resale restrictions entered into by and between the City and 1980s and 1990s-era HDFCs expressly state that the HPD Commissioner’s authority to consent to the transfer of real estate held by HDFC remains in effect only for the term of the regulatory agreement. In the 1980s this period was ten years. By the late 1980s, the City extended this period to 25 years for newly incorporated HDFCs. More particularly, the express language in both the HDFC deed and the Certificate of Incorporation set forth a fixed term for the duration of the HPD Commissioner’s authority to consent to the transfer of HDFC property and a fixed term for the Commissioner’s authority to consent to HDFC dissolution. HDFC homeowners reasonably relied on language in their governing documents (including the HDFC Certificate of Incorporation and the property deed) that conferred authority on the HPD Commissioner to regulate the HDFC only for so long as these restrictions remained in effect.

Moreover, the entire 35-year history of the City’s HDFC program further supports the conclusion that HPD’s authority over HDFCs is not perpetual and, further, that HPD did not intend to assert heavy-handed regulatory authority over HDFCs after the expiration of resale restrictions.

As one commentator has observed:

The prevailing narrative is that as prices have risen HDFCs and their shareholders have perverted the intent of the HDFC coop program which was

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<sup>6</sup> Additionally, an HDFC is not eligible to re-incorporate unless and until it renounces any tax incentives that it receives pursuant to section 577 of PHFL (*i.e.*, the DAMP tax exemption). For further discussion of this point, see Section 2 of the proposed legislation.

always intended to preserve their coop apartments for low income occupancy in perpetuity.” In fact, this ... has never been the program of HPD... The program has **not** been designed to preserve apartments for low income occupancy in perpetuity.

[Larry McGaughey, “New HPD Regulatory Agreement for HDFCs,” unpublished paper presented at the Council of New York Cooperatives, November 13, 2016, at 7 (emphasis added)].

Notwithstanding all of the foregoing, the City’s present position is that it retains the authority to regulate HDFCs in perpetuity – even though nothing in the PHFL provides the City with that authority. To the extent that there is any lingering uncertainty in the PHFL concerning this issue, Section 1 clarifies that the City lacks such authority for perpetual regulation of HDFCs once any regulatory agreement or other income restriction expires.<sup>7</sup>

The salutary public purpose served by Section 1 is the protection and promotion of the autonomy and self-determination of the residents of HDFC co-ops. HDFC residents are entitled to realize at least some of the benefits of homeownership and “the American dream” (after a fixed period of years in the program) in the same way that tens of millions of other American homeowners have acquired a nest egg. Indeed, every other form of government sponsored cooperative housing in New York is given the opportunity to opt-out of the program after a fixed

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<sup>7</sup> In 2015, the New York Attorney General issued an opinion to the effect that HDFC cooperatives could never opt-out of the PHFL and that they were subject to the perpetual regulation of the HPD Commissioner. See New York Attorney General, “Guidance on Housing Development Fund Corporations Seeking to Transfer or Sell Property for, or Otherwise Convert Property to Market-Rate Use” (hereafter “Guidance”). The Attorney General reached this conclusion based on his determination that the statutory term “amendment” – as used in Section 573(5) of the PHFL – encompassed and implied the Commissioner’s *additional* authority to consent to the dissolution of an HDFC. The Attorney General’s Guidance is incorrect as a matter of law, in that it misconstrues the plain text of the HDFC statute as well as ignores the distinct treatment of the concepts of “amendment” and “dissolution” in other New York corporate law settings, including the BCL. In any event, Section 1 of the proposed legislation eliminates any ambiguity with respect to this issue that was created by the Attorney General’s 2015 Guidance.

period of years (usually 20 years), including, for example, residents of Mitchell-Lama middle-income co-ops and Redevelopment Companies.<sup>8</sup> From an equitable standpoint, there is no reason to treat the resident-owners of HDFCs differently than the resident-owners of Mitchell-Lama co-ops, Article V co-ops or all other forms of housing authorized by the PHFL.

The strengthening of HDFC self-determination and autonomy is an important objective of this legislation. But so too is the promotion and protection of HDFC affordability. *These two objectives are not inconsistent.* As previously noted, the proposed legislation advances both objectives by providing inducements for HDFCs (with expired regulatory agreements or resale restrictions) to voluntarily agree to remain as affordable housing. This approach is consistent with the legislative approach formally adopted in all other forms of government-sponsored or -assisted housing authorized by the PHFL. Indeed, this approach is wholly consistent with the *existing* Article 11 of the PHFL.

## **Section 2**

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<sup>8</sup> Limited-profit housing companies (popularly known as “Mitchell-Lama housing”) are permitted by statute to go private after 20 years. See PHFL § 35(2). Limited-dividend housing companies (a program quite similar to the Mitchell-Lama program) also are permitted by statute to go private after 20 years. See PHFL § 96(1). Redevelopment companies are permitted to go private after the expiration of the tax exemption granted to the company. See PHFL § 123(1).

As more fully discussed in the text above, the HDFC Act (i.e., Article XI of the PHFL) also allows HDFCs to go private but does so in a different way than the above-cited counterpart statutory provisions that govern other forms of government-assisted housing. The HDFC Act does not set forth a fixed term of years after which HDFCs may exercise their option to go private. Instead, the HDFC Act provides that the HPD Commissioner’s authority to control HDFCs (including granting or withholding consent to HDFC dissolution and granting or withholding consent to the conveyance of HDFC real property) remains in effect only for so long as the HPD regulatory agreement remains in effect. See PHFL § 576(1)(e). Furthermore, an HDFC co-op that opts-out of the program would be required to forsake the DAMP tax exemption. See PHFL § 577.

Section 2 restates explicitly what is implicit in the current law. In particular, Section 2 clarifies that an HDFC that is no longer subject to a regulatory agreement or is no longer subject to City-imposed contractual and/or deed restrictions shall continue to be subject to the regulation and oversight of the commissioner or supervisory agency *provided* that the HDFC continues to elect to receive a tax exemption pursuant to section 577 of the PHFL. However, if an unregulated HDFC elects not to receive a tax exemption pursuant to section 577 of the PHFL, then it shall cease to be subject to the regulation and oversight of the commissioner or supervisory agency. In that event, the HDFC is free to consider other ownership and management options, including re-incorporation under a law other than the PHFL.

### **Section 3**

Section 3 implements the affordability provisions of the proposed legislation. This section codifies into the statutory law the inducements for HDFCs (with expired regulatory agreements or resale restrictions) to voluntarily agree to remain as affordable housing: *i.e.*, the continued availability (and strengthening) of tax incentives and/or subsidized financing. Section 3 removes the 40-year fixed term of the existing tax exemption and makes the tax exemption permanent.<sup>9</sup>

Section 3 also codifies a new tax benefit for HDFCs: a real estate tax abatement equivalent to 150 percent of the tax abatement for most conventional housing cooperatives authorized by Real Property Tax Law 467-a. The rationale for this new tax benefit is based on a quirk in current law. By way of background, the Legislature (subsequent to the enactment of PHFL 477) enacted RPTL 467-a, which granted a real estate tax abatement to virtually all housing cooperatives in

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<sup>9</sup> As previously noted, this approach is consistent with the legislative approach formally adopted in all other forms of government-sponsored or -assisted housing authorized by the PHFL.



New York City *other than HDFCs*.<sup>10</sup> The conventional tax abatement contains no income restrictions or similar eligibility requirements. A luxury co-op on Park Avenue is eligible for a conventional co-op tax abatement.

Currently, a conventional co-op that is assessed at \$50,000 per unit or less is eligible for a tax abatement of 28.1 percent. A conventional co-op that is assessed above \$60,000 per unit – without any upper limit to assessed value – is subject to a 17.5 percent tax abatement. However, under current law, HDFCs that receive the DAMP tax exemption are **not** eligible to receive either the 28.1 percent conventional tax abatement or the 19 percent conventional tax abatement. See RPTL § 467-a(b) (providing that housing cooperatives that receive most other real estate tax incentives are not eligible to receive the conventional co-op tax abatement). This places many income-restricted HDFCs co-ops in the anomalous position of receiving *less* of a tax benefit than a conventional co-op without any income restrictions whatsoever.

Although HDFCs *do* receive the DAMP tax exemption in lieu of the conventional co-op tax abatement, the application of the DAMP tax exemption to many HDFC co-ops is not nearly as valuable as would be the application of the conventional co-op tax abatement. This is so because the conventional co-op tax abatement provides a dollar-for-dollar reduction in real estate tax liability. By contrast, the DAMP tax exemption merely provides a cap on assessed valuation (and thereby a cap on the resulting real estate tax liability). If an HDFC's assessment is already below the DAMP “cap,” then the HDFC receives no tax benefit at all.<sup>11</sup>

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<sup>10</sup> A housing cooperative is ineligible to receive conventional co-op tax abatement if it receives certain other real estate tax incentives. Because City-sponsored HDFC co-ops receive the DAMP tax exemption, these co-ops are ineligible to receive the conventional co-op tax abatement.

<sup>11</sup> Many of the HDFC co-ops that do not receive *any benefit whatsoever* from the current DAMP tax exemption are located in the lowest income neighborhoods. The reason is obvious: real estate values are generally lower in the lowest income neighborhoods. Because the DAMP tax

Section 3 remedies this anomaly by providing that HDFC co-ops are entitled to *either* the benefits of a conventional co-op tax abatement and the DAMP tax exemption.<sup>12</sup> The point is that – as a matter of fairness and equity -- an HDFC income-restricted co-op should receive *at least* the tax benefit that a market-rate co-op receives. Section 3 goes further – and provides that HDFC co-ops are entitled to the greater of 150 percent of the conventional co-op tax abatement or the DAMP tax exemption. This increased benefit is a recognition that HDFC co-ops are entitled to greater benefits than market-rate co-ops – as a vital means to promote and protect housing affordability in New York City and as a means to provide financial stability to HDFCs. The benefit also is intended as an inducement for current HDFC co-ops (with expired regulatory agreements or expired income restrictions) to make a long-term commitment to remain as income-restricted HDFCs – rather than exercising their right to reincorporate as another form of housing cooperative that is not subject to income restrictions.

#### **Section 4**

Section 4 extends the authority of the City of New York to offer special tax relief to HDFC

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exemption provides only a cap – not a reduction – in taxable assessed valuation, HDFCs co-ops in the lowest income neighborhoods often are assessed at under the DAMP cap and hence receive no tax benefit. *However, these HDFC co-ops are among those most in need of financial assistance.* Section 3 redresses a major inequity in the current system of tax benefits provided to HDFCs by providing assistance to all HDFCs, including HDFCs that do not benefit from the current DAMP tax exemption.

<sup>12</sup> Section 3 adopts the current level of the DAMP tax exemption – a cap of \$10,452 per dwelling unit for tax year 2019-20 – and limits future increases in the cap to 2.5 percent per annum. Under current law, the DAMP tax exemption cap automatically increases at the rate of 6 percent per annum. That increase is far in excess of recent annual increases in the cost of living. For example, the U.S. Department of Labor reports that the New York/New Jersey Consumer Price Index increased by 1.7 percent for the 12 months ending as of July 2019. Thus, an annual increase in the DAMP tax exemption cap of 2.5 percent is fair and reasonable – in that it is fully consistent with recent historic trends in cost-of-living increases.

co-ops that are in severe fiscal distress and that are in danger of tax foreclosure by reason of unpaid real estate taxes. Such tax relief is conditioned on the HDFC co-op agreeing to enter into a special regulatory agreement in which the City exercises appropriate oversight and monitoring of the HDFC.

Current legislation was enacted in 2002 and authorized tax forgiveness only for HDFCs that “[as of] January 1, 2002 had outstanding municipal real estate taxes relating to any period prior to January 1, 2001.” This baseline year for tax forgiveness (i.e., tax arrears as of 2001) has never been updated to a more current tax year.

Section 4 updates the baseline year so that the City has the flexibility to offer tax forgiveness (in appropriate cases and subject to strict controls set forth in current law) for HDFC co-ops that are at risk of tax foreclosure.

In this way an HDFC co-op is saved from tax foreclosure, and may thereby provide sustainable and affordable housing for years to come. This is critically important -- not just for the HDFC shareholders themselves – but also for neighborhood stability.

**Proposed legislation:**

**HDFC Self-Determination and Affordability Act of 2020**

**Steven Siegel, Esq.<sup>1</sup>**

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[Matter in boldface is new; matter struck through is deleted]

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1. Section 573(5) of the Private Housing Finance Law is hereby amended as follows:

5. The secretary of state shall not file the certificate of incorporation of any such corporation or any amendment thereto unless the consent or approval of the commissioner or the supervising agency, as the case may be, is affixed thereon or attached thereto. Consent to the filing of such certificate of incorporation shall be based upon findings by the commissioner or supervising agency as to the character and competence of the sponsor. **For purposes of this paragraph, the term “amendment” as applied to such corporation shall mean and include any changes in a certificate of incorporation as authorized in Business Corporation Law § 801 but shall not be deemed to include a dissolution of such corporation pursuant to Business Corporation Law § 805.**

2. Section 576 of the Private Housing Finance Law is hereby amended as follows:

1. Every housing development fund company as a condition precedent to receiving an advance pursuant to this article, shall enter into an agreement with the commissioner or with the supervising agency, as the case may be, to be regulated as follows:

a. Maximum rentals shall be fixed by the commissioner or the supervising agency, as the case may be, based upon the final gross project cost, at an

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<sup>1</sup> Of Counsel, Cullen and Dyckman, LLP. This Memorandum was prepared on behalf of the HDFC Coalition Policy Committee in connection with that organization’s legislative advocacy. I gratefully acknowledge the invaluable research assistance and editorial suggestions of John McBride. Publication date: August 21, 2019. Contact: sns26@caa.columbia.edu.

amount sufficient to pay the necessary costs of the project.

b. Dwellings in any such project shall be available for persons or families whose probable aggregate annual income does not exceed six times the rental (including the value or cost to them of heat, light, water and cooking fuel) of the dwellings to be furnished such persons or families, except that in the case of persons or families with three or more dependents, such ratio shall not exceed seven to one. For purposes of this paragraph, tenants in a housing project of a housing development fund company organized under the provisions of the business corporations law and this article shall have added to their total annual carrying charges an amount equal to six per centum of the original investment of such person or family in the equity obligations of such housing company.

c. Profits shall be used for capital improvements or to reduce rentals.

d. Ordinary dividends may not be declared. Capital dividends may be declared only with the consent of the commissioner or the supervising agency, as the case may be.

e. The property or franchises of the corporation may not be disposed of without the consent of the commissioner or the supervising agency, as the case may be, nor may the corporation be dissolved unless payment in full is made of remaining balances of principal and interest due and unpaid on any mortgage or mortgages, of any advances made from the fund pursuant to this article and of any and all expenses incurred in effecting such dissolution.

f. The commissioner or the supervising agency, as the case may be, shall have power, in his or its discretion, if he or it determines that any advance pursuant to this article is in jeopardy of not being repaid, or that the proposed housing project for which such advance was made is in jeopardy of not being constructed, to appoint to the board of directors of the corporation a number of new directors, which number shall be sufficient to constitute a majority of such board. Directors so appointed need not be stockholders or members or meet other qualifications which may be prescribed by the certificate of incorporation or by-laws. In the absence of fraud or bad faith directors so appointed shall not be personally liable for the debts, obligations or liabilities of the corporation.

2. A regulatory agreement pursuant to this section shall be terminated upon repayment in full of any and all advances made pursuant to this article provided that such termination shall not take place until (a) assumption of the regulation of the project by the commissioner, in the case of a state-aided mortgage, or by the supervising agency, in the case of a municipally-aided mortgage or by the appropriate federal authorities in the case of a federally-aided mortgage or (b) if the project is not to be financed with a state-aided, municipally-aided or federally-aided mortgage, the expiration of any exemption of the real property

of the project from local and municipal taxes.

3. The commissioner or supervising agency may require a housing development fund company receiving advances under this article to execute a financing statement for real property improvement. The financing statement shall be in such form as the commissioner or supervising agency shall prescribe and shall include the name and address of the housing development fund company and of the agency making the advances, the location of the project, with a description sufficient to identify the property, including street address, if any, and a statement that funds have or will be advanced to the company pursuant to this article and the maximum amount of such advances, together with such other information as the form shall specify. The financing statement shall be filed in the office in which a mechanic's lien affecting the property would be filed, which office shall accept it for filing without fee and docket it in the manner of such lien. From the date of such filing the state or municipality, as the case may be, shall have a lien for the total of advances under this article made and not repaid. The provisions of articles two and three of the lien law shall govern such lien, except that it shall be valid for a period of three years from the date of filing, unless extended as provided in section seventeen of the lien law. Upon repayment of the advances, the commissioner or supervising agency shall deliver to the housing development fund company a copy of the financing statement with an endorsement thereon that the lien is satisfied. Upon filing of such copy, without payment of fee, in the office in which the financing statement was filed, the lien shall be discharged.

**4. A housing development fund company that is no longer subject to a regulatory agreement or is no longer subject to contractual and/or deed restrictions entered into with the commissioner or supervisory agency shall continue to be subject to the regulation and oversight of the commissioner or supervisory agency provided that the housing development fund company continues to elect to receive a tax exemption pursuant to section 577 of the Private Housing Finance Law. If such housing development fund company elects not to receive a tax exemption pursuant to section 577 of the Private Housing Finance Law, then it shall cease to be subject to the regulation and oversight of the commissioner or supervisory agency.**

3. Section 577 of the Private Housing Finance Law is hereby amended as follows:

1. (a) The local legislative body of any municipality in which a project of a housing development fund company is or is to be located may exempt **and abate** the real property in such project from local and municipal taxes including school taxes, other than assessments for local improvements, to the extent of all or part of the value of the property included in the completed project. The tax exemption

**and tax abatement shall operate and continue for ~~such period as may be provided by such local legislative body, but in no event for a period of more than forty years,~~ so long as an HDFC is subject to a regulatory agreement as hereafter described, and shall commence ~~commencing~~ in each instance from the date on which the benefits of such exemption first became available and effective. The tax exemption and tax abatement shall be applied to: (1) newly created housing development fund companies that are subject to a regulatory agreement and/or contractual or deed restrictions imposed by the commissioner or supervisory agency; (2) housing development fund companies that are presently subject to a regulatory agreement and/or contractual or deed restrictions imposed by the commissioner or supervisory agency; and (3) housing development fund companies that are not presently subject to a regulatory agreement and are not presently subject to contractual or deed restrictions imposed by the commissioner or supervisory agency but that agree to voluntarily enter into a regulatory agreement as hereinafter described. Such regulatory agreement shall include, at the election of the housing development fund company, either: (a) the apartment resale requirement of Section 576(1)(b) of the Private Housing Finance Law; or (b) a requirement that the income of a purchaser of an apartment not exceed 165 percent of the Area Median Income.**

**(b) For each eligible housing development fund company, the annual amount of the tax exemption and tax abatement authorized in this section shall be the greater of: (1) the net reduction in real estate taxes resulting from the Section 477 tax exemption heretofore granted by the local legislative body (equivalent to a cap on assessed value per apartment of \$10,452 in tax year 2019-20, and which thereafter is to increase by 2.5 percent per year in each subsequent tax year); and (2) the net reduction in real estate taxes resulting from 150 percent of the tax abatement for housing cooperatives authorized by Real Property Tax Law 467-a**

~~(b)~~ (c) Where a municipality acts on behalf of another taxing jurisdiction in assessing real property for the purpose of taxation, or in levying taxes therefor, the action of the local legislative body of such municipality in granting such tax exemption shall have the effect of exempting the real property in such project from local and municipal taxes including school taxes, other than assessments for local improvements, levied by or in behalf of both such taxing jurisdictions.

~~(e)~~ (d) The local legislative body of any municipality may grant an exemption under paragraph (a) of this subdivision to the real property of a project of any entity to which it is authorized to make a loan pursuant to section five hundred seventy-six-c of this article.

~~(d)~~ (e) In a city having a population of one million or more, within one hundred

twenty days following receipt of a written submission from the supervising agency requesting a tax exemption pursuant to paragraph (a) of this subdivision for the real property containing the project of a housing development fund company, the local legislative body shall approve or disapprove by resolution the requested tax exemption. If the local legislative body fails to take such action within one hundred twenty days following receipt of such written submission from such supervising agency, then the tax exemption requested by the supervising agency shall be deemed approved pursuant to paragraph (a) of this subdivision.

2. Any inconsistent provision of law to the contrary notwithstanding, mortgages of a housing development fund company shall be exempt from the mortgage recording taxes imposed by article eleven of the tax law.

3. (a) Notwithstanding the provisions of subdivision one hereof, the real property of a state urban development corporation project acquired, owned, constructed, managed or operated by a company incorporated pursuant to the not-for-profit corporation law and this article shall be entitled to all the benefits provided by section four hundred twenty-two of the real property tax law. The real property of a state urban development corporation project, other than a state urban development corporation project acquired, owned, constructed, managed or operated by a company incorporated pursuant to the not-for-profit corporation law and this article, shall be exempt from all local and municipal taxes, other than assessments for local improvements, to the extent of the value of the property included in such project as represents an increase over the assessed valuation of the real property, both land and improvements, acquired for the project on the date of its acquisition by the housing development fund company. The tax exemption shall operate and continue so long as the mortgage loans of such housing development fund company are outstanding, but in no event for a period of more than forty years, commencing in each instance from the date when such housing development fund company first acquired such property. If a state urban development corporation project qualifying for tax exemption pursuant to this subdivision is sold, with the approval of the commissioner, to another housing development fund company, such successor company shall be entitled to all the benefits of this subdivision.

(b) In the event a state urban development corporation project is not subject to a state-aided, federally-aided or municipally-aided mortgage, as defined herein, it shall receive the tax exemption granted under paragraph (a) of this subdivision only if it has entered into a regulatory agreement with the commissioner pursuant to section five hundred seventy-six of this article, and such tax exemption shall continue only so long as such agreement is in force and effect.



4. Section 577-b of the Private Housing Finance Law is hereby amended as follows:

1. The term eligible property as used in this section shall mean a multiple dwelling located in a city with a population of one million or more and owned by a company established pursuant to this article which:

(a) is controlled by and provides housing accommodations to its resident shareholders or members or agrees, on terms approved by the supervising agency, to offer to the residents of the multiple dwelling the opportunity to acquire ownership and control of the company; and

(b) on January first, ~~two thousand two~~ **two thousand nineteen**, had outstanding municipal real estate taxes relating to any period prior to January first, ~~two thousand one~~ **two thousand eighteen**.

2. (a) The supervising agency may offer to each company that owns an eligible property an opportunity to enter into a regulatory agreement pursuant to which the obligation to pay arrears of real estate taxes attributable to such property, including interest and penalties if any, shall be dealt with as provided in such agreement.

(b) The regulatory agreement shall include the following provisions:

(1) a term of thirty years;

(2) that the suspension of the obligation to pay arrears shall continue provided that the company complies with the terms of the regulatory agreement;

(3) that all suspended arrears including interest and penalties shall be forgiven provided that the company complies with the regulatory agreement for an initial period of ten years;

(4) that portions of the suspended arrears may be forgiven during the initial ten year period pursuant to a schedule established in the regulatory agreement;

(5) that any suspended obligations which have not been forgiven may be reinstated if the company fails to comply with the regulatory agreement;

(6) that all new municipal charges must be paid in a timely fashion;

(7) that the supervising agency shall be authorized to assume control of the company if the company fails to comply with the agreement;

(8) that the company must comply with customary financial and other reporting requirements; and

(9) that the company shall be required to increase maintenance charges or impose assessments to insure that the company can provide for its obligations.

(c) The regulatory agreement shall also include terms to address the following matters as well as any other issues that the supervising agency deems appropriate:

(1) establishment of a structured reserve fund;

(2) restrictions to insure sales and rentals only to low income individuals and families;

(3) establishment of a transfer fee payable to the company's reserve fund upon the sale of any units;

(4) restrictions on subletting;

(5) primary residence requirements; and

(6) certification of annual elections.

(d) The regulatory agreement may contain such alterations to the terms of the

original disposition as the supervisory agency deems necessary.