**<u>Memorandum in support of the HDFC Self-Determination, Preservation and Affordability Act of 2021</u>**

**[DRAFT 10/27/20 – Steven Siegel]**

## 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 is at a crossroads. All City-sponsored HDFC co-ops, at their inception, were subject to 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. 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 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. Concomitantly, 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;[1] and is in full accord with how all other government-sponsored private housing is treated. Most importantly, this approach will ensure the long-term economic viability of affordable HDFC co-ops.

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 in recent years has proposed state and local legislation governing HDFCs. In 2017, the City proposed local legislation that 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 if an HDFC co-op is unwilling or unable to submit to the

[1] Indeed, the approach is consistent with contractual provisions contained in HDFC governing documents that formed part of the offering plans in City-sponsored HDFC co-ops beginning in the early 1980s. As noted in the text above, these contractual provisions expressly state that City oversight over the HDFC co-ops expire in a fixed term of years (either ten years or 25 years).

City's draconian re-regulation. Also in 2017, the City proposed state legislation that would subject HDFCs to perpetual governmental control -- even though the original contractual agreements establishing City-sponsored HDFCs (as well as the HDFC statute itself) made clear that governmental controls on HDFCs were time-limited. The City's proposed legislation is contrary to the letter and spirit of the existing law, and to the promises made to HDFCs over the past three decades that are embodied in real estate covenants and 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 these affordable housing cooperatives.

**A. Background**

HDFC co-ops are privately owned 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 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. Previously, the City sold at auction nearly 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. The City's HDFC initiative was in the City's own interests: it enabled the City to avoid to avoid the counterproductive private auction process and to return the buildings to the tax rolls.

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 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 by the transformation of a rental community into a homeowning 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.

***

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) some of the terms of the Section 576 "regulatory agreement" were incorporated into various HDFC incorporation documents and in the deed conveying title to the property;[2] and (2) a 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.

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.[3]

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.

---

[2] 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.

[3] 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.

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 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.[4] 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 would be required to forfeit the DAMP tax exemption.

As previously noted, the City in 2017 proposed local legislation that would revoke the DAMP tax exemption from any HDFC that declined to sign a new Regulatory Agreement with HPD. The proposed new Regulatory Agreement would contain many provisions that would largely deprive 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. Fortunately, by 2019 the City abandoned the proposed legislation in the face of widespread opposition by HDFC community groups and other stakeholders.

Also in 2017, the City proposed new state legislation that would re-regulate HDFCs and that would change the law to ensure that all HDFCs remain subject to affordability controls in perpetuity. See S2543 (2017) (proposed amendment to the PHFL). As stated in the City's Memorandum in Support of S2543,

> [T]here is a great need for an amendment to clarify that the corporate purpose of an HDFC -- to provide affordable housing to persons and families of low income -- **is perpetual in duration**. Absent the checks and balances provided

[4] 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 2017-18, the DAMP tax exemption imposes a cap on the assessed value of HDFCs of $10,374 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.

> by the [proposed amendment to PHFL, which would subject HDFCs for the time to the requirements of the Not for Profit Corporation Law], there may be a great loss of affordable housing.

Thus, the City expressly acknowledged that, under existing law, HDFCs with expired regulatory agreements have the option of remaining as an HDFC or, in the alternative, the option of converting to another form of housing cooperative without affordability controls. S2453 was intended to eliminate the second option. Ultimately, S2453 was not enacted and the statutory law governing HDFCs remains unchanged.

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 opposed the City's various proposals to impose new controls through unilateral regulation or to effect changes in the statutory law that would subject HDFCs to unilateral perpetual control by the City.

The proposed legislation takes an entirely different approach to the problems and uncertainties facing HDFCs then the top-down unilateral approach taken by the now-defunct S2453. As previously noted, 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.

**B. Summary of provisions**

**Section 1**

Section 1 would clarify that HDFCs with expired regulatory agreement or other City-imposed income restrictions (and that are no longer receiving HDFC partial tax exemptions) 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 and once the HDFC no longer receives HDFC partial tax exemptions.[5]

However, there has long been uncertainty as to the legal status of HDFCs with expired regulatory agreements or expired City-imposed income restriction. This section removes that cloud of uncertainty.

The operative language of Section 1 is as follows:

> **The Legislature finds and declares that housing development fund companies always have had the right under this section and section 576 of the Private Housing Finance Law -- and continue to have the right under this section and section 576 -- to dissolve and re-incorporate under the Business Corporation Law or other applicable law, provided that the**

[5] 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.

> **housing development find company: (1) was formerly subject to a regulatory agreement but such regulatory agreement has expired and/or was formerly subject to contractual restrictions implementing the requirements of section 576 but that such contractual restrictions have expired; and (2) had formerly received a tax exemption under section 577 of the Private Housing Finance Law but such tax exemption either has expired or is otherwise no longer being received.**

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 1 preserves that fundamental 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 1, in effect, incorporates by reference the BCL's separate treatment of "amendment" and "dissolution."

Notably, most City-sponsored HDFCs are incorporated under **both** the PHFL and the BCL. By clarifying that the long-established BCL approach to the distinct concepts of "amendment" and "dissolution," Section 1 removes any uncertainty by harmonizing the respective corporate amendment and dissolution provisions of the PHFL and BCL – each of which presently apply to most City-sponsored HDFCs.

The reasons for Section 1 not only relate to a clarification of the legislative intent (*i.e.*, that HDFCs co-ops are not restricted from reincorporating once regulatory agreements and other City-imposed income restrictions have expired and once the HDFC co-op no longer receives HDFC tax benefits). 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.

Notwithstanding all of the foregoing, the City's apparent position is that it retains the authority to regulate HDFCs in perpetuity[6] – even though nothing in the PHFL provides the City

---

[6] 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"). HPD joined in the 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. For further discussion and analysis of the Guidance's incorrect legal analysis, see my memorandum to the HDFC Policy Committee dated September 19, 2020 addressing the Guidance (posted on the website of the HDFC Coalition).

As previously noted, the City -- in another official document – adopted a legal position that is directly contrary to the position that is expressed by the AG and the City in the Guidance. By its 2017 Memorandum in Support of Legislation to Amend the HDFC statute, the City declares, "[T]here is a great need for an amendment to clarify that the corporate purpose of an HDFC -- to provide affordable housing to persons and families of low income -- **is perpetual in duration**. Absent the checks and balances provided by the [proposed amendment to PHFL, which would 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.

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 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 period of years (usually 20 years), including, for example, residents of Mitchell-Lama middle-income co-ops and Redevelopment Companies.[7] From an equitable standpoint, there is no reason to treat the

---

subject HDFCs for the time to the requirements of the Not for Profit Corporation Law], there may be a great loss of affordable housing." In other words, the City's position expressed in the Memorandum is that, absent an amendment to the statutory law, HDFCs with expired regulatory agreements had the option of remaining as HDFCs or, in the alternative, converting to another form of housing cooperative without affordability controls.

In any event, Section 1 of the proposed legislation eliminates any ambiguity with respect to this issue that was erroneously created by the Attorney General's 2015 Guidance.

[7] 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 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 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 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**

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 and/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.

---

HDFC co-op that opts-out of the program would be required to forsake the DAMP tax exemption. <u>See</u> PHFL § 577.

**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.[8]

Section 3 also codifies a new tax benefit for HDFCs: a real estate tax abatement[9] 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*.[10] 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.

---

[8] 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.

[9] Both tax exemptions and tax abatements result in a reduction of a property's real estate taxes, but do so in different ways. By way of background, real estate taxes are based on a fixed percentage of a property's assessed value ("AV"). An *exemption* is applied directly to a portion of a property's AV. By contrast, an *abatement* is applied directly to a property's real estate tax liability.

[10] 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.

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.

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. 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.

Finally, Section 3 establishes a mechanism to ensure that HDFCs that receive the tax benefit comply with the new affordability requirements. As a condition of the continuing receipt of the tax benefit, each HDFC is required to file an annual certification stating that it has complied with the affordability requirements. HPD is authorized to review and audit the books and records of the HDFC in order to ensure compliance with the requirements of this Section. Furthermore, HPD has the right to suspend or revoke the tax exemption and tax abatement if HPD determines that HDFC has willfully not complied with the requirements of this Section.

**Section 4**

As previously noted, two of the principal objectives of the proposed legislation are to ensure that the HDFC co-ops are both affordable and economically self-sufficient. For the vast majority of HDFC co-ops, the proposed enhanced real estate tax benefit -- together with the availability of below-market interest financing available through HPD -- would be sufficient to ensure both affordability and fiscal stability. But for perhaps 10 to 20 percent of HDFCs -- which are in fair to poor financial condition -- something more is needed.[11]

[11] In the first two decades of the HDFC program, the City sponsored many HDFC co-ops that – at the time of sale – consisted of buildings that were in substandard or severely deteriorated condition. Since these buildings previously had been abandoned by their landlord, it is not at all surprising that the buildings had not been properly maintained for many years. What *is* surprising is that the City – once it had taken title to the properties through tax foreclosure – made no effort to replace major building systems **before** offering the buildings for sale to the tenants. Once the HDFC co-ops were created and the tenants became owners, many of these

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

---

HDFCs co-ops were able to secure financing from private or public sources in order to undertake the necessary capital improvements to upgrade the deteriorated buildings. However, some HDFCs were unable to obtain financing, and, consequently, have remained in precarious financial condition with unmet capital needs. It is this category of HDFC co-ops that is most in need of assistance under Section 4 of the proposed legislation.

**Proposed legislation:**

**<u>HDFC Self-Determination and Affordability Act of 2021</u>**

**[DRAFT10/27/20 – Steven Siegel]**

***

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

***

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. **The Legislature finds and declares that housing development fund companies always have had the right under this section and section 576 of the Private Housing Finance Law -- and continue to have the right under this section and section 576 -- to dissolve and re-incorporate under the Business Corporation Law or other applicable law, provided that the housing development find company: (1) was formerly subject to a regulatory agreement but such regulatory agreement has expired and/or was formerly subject to contractual restrictions implementing the requirements of section 576 but that such contractual restrictions have expired; and (2) had formerly received a tax exemption under section 577 of the Private Housing Finance Law but such tax exemption either has expired or is otherwise no longer being received.**

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 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 either to a regulatory agreement or to 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.**

**5. The Legislature finds and declares that housing development fund companies always have had the right under this section -- and continue to have the right under this section -- to dissolve and re-incorporate under the Business Corporation Law or other applicable law, provided that the housing development find company: (1) was formerly subject to a regulatory agreement but such regulatory agreement has expired and/or was formerly subject to contractual restrictions implementing the**

**requirements of this section but that such contractual restrictions have expired; and (2) had formerly received a tax exemption under section 577 of the Private Housing Finance Law but such tax exemption either has expired or is otherwise no longer being received.**

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 remains in compliance with the requirements of this section 577, 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 the conditions of the tax exemption and tax abatement as hereinafter described.**

**(b) In order for a housing development fund company described in Section 577(1)(a)(3) to be eligible for a tax exemption and tax abatement under this Section, such company shall be required – for so long as it receives such tax exemption and tax abatement – to not approve a sale of an apartment unless the purchaser of the apartment provides satisfactory proof of income and unless the income of the purchaser is no greater than the income limitation specified herein. Such income limitation shall be, 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, as determined from time to time by the United States Department of Housing**

**and Urban Development. As a condition of the continuing receipt of tax exemption and tax abatement, the housing development fund company shall file an annual certification with the commissioner or supervisory agency that the company has complied with the requirements of this section. Such certification shall be limited to a listing of apartments sold or transferred in the prior twelve months and a statement that the income of the purchaser or transferee of the apartment complies with the income requirement of this Section 577, except that a transferee who is a member of the transferor's family or household need not comply with the aforementioned requirement. The commissioner or supervisory agency may review and audit the books and records of a housing development fund company in order to ensure compliance with the requirements of this Section. The commissioner or supervisory agency shall have the right to suspend or revoke, in proportion to the percentage of dwelling units at a housing development fund corporation not in compliance with this Section, the tax exemption and tax abatement applicable to any housing development fund company if the commissioner determines that the company has willfully not complied with the requirements of this Section, and such non-compliance occurred on a date after the enactment of this section, so long as the housing development fund company is provided with prior written notification as to each specific instance of non-compliance and to which dwelling unit(s) such non-compliance is alleged. The housing development fund company shall have the right to rebut such allegations, and also to charge and collect additional monies from any shareholder(s), including successors and assigns, found by the commissioner or supervisory agency to have willfully not complied with the requirements of this section so as to recover expenses for all losses of tax exemptions and tax abatements and so as to recover all expenses associated with responding to such allegations by the commissioner or supervisory agency.**

**(c) 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)~~ **(d)** 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.

~~(c)~~ **(e)** 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)~~ **(f)** 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 twenty-one**, had outstanding municipal real estate taxes relating to any period prior to January first, **~~two thousand one~~** **two thousand twenty.**

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.