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IN SENATE

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Introduced by Sen. JACKSON -- read twice and ordered printed, and when printed to be committed to the Committee on Housing, Construction and Community Development

AN ACT to amend the private housing finance law, in relation to enacting the housing development fund company self-determination, preservation and affordability act

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Short title. This act shall be known and may be cited as the "housing development fund company self-determination, preservation and affordability act".

§ 2. Legislative findings and declarations. 1. In 1966, the Legislature enacted Article 11 of the private housing finance law. Article 11 authorized the development of rental and cooperative housing that is subject to certain income restrictions. The type of income-restricted housing is referred to as housing development fund companies (HDFCs).

2. 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 multi-family housing stock. At the time the city was experiencing large-scale abandonment of its private low and middle-income multi-family 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.

3. Previously, the city sold at auction nearly all of its tax-foreclosed multi-family 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

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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the counterproductive private auction process and to return the buildings to the tax rolls.

4. Over the past four 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 multi-family housing stock in the period following the city's fiscal crisis of the 1970s and 1980s. 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. Today, there are over 1,100 HDFC co-ops in New York city.

5. 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.

6. When the city imposed regulatory controls on the city-sponsored HDFCs, 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.

7. This 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.

8. An important feature of city-sponsored HDFCs is the city's use of its authority to enter into a "regulatory agreement" with the HDFC. Under section 576 of the private housing finance law, 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 such section of the private housing finance law, every HDFC regulatory agreement must provide that:

(1) Households must meet income eligibility guidelines, which are defined by statute as six times the annual rent plus six percent of the shareholder's "original investment" in the HDFC. See paragraph b of subdivision 1 of section 576 of the private housing finance law.

(2) Profits must be used only for capital improvements or to reduce rent/maintenance. Dividends cannot be paid to owners. See paragraphs c and d of subdivision 1 of section 576 of the private housing finance law.

(3) 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 paragraph e of subdivision 1 of section 576 of the private housing finance law.

(4) 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 paragraph e of subdivision 1 of section 576 of the private housing finance law.

9. Thus, under section 576 of the private housing finance law 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.

10. 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; 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.

11. Thus, the city used section 576 of the private housing finance law 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 restrictions have expired.

12. There are presently over 1,100 HDFCs in New York city containing approximately 25,000 apartments. Of these HDFCs, approximately 20 percent 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.

13. 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 section 576 of the private housing finance law. 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.

14. An HDFC with expired regulatory controls nevertheless remains subject to Article 11 of the private housing finance law 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," as defined in paragraph a of subdivision 3 of section 573 of the private housing finance law. However, once an HDFC regulatory agreement or other HPD-imposed income restriction has expired, nothing in the private housing finance law 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 private housing finance law). 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.

15. A city-established HDFC is eligible to receive a partial real estate tax exemption granted by the city pursuant to section 577 of the private housing finance law. 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".

16. The tax exemption runs for forty years and will expire in 2029. 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.

17. 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. By 2019 the city abandoned the proposed legislation in the face of widespread opposition by HDFC community groups and other stake-holders.

18. 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 private housing finance law). 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 by the (proposed amendment to private housing finance law, 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."

19. 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.

20. Contrary to the city's 2017 statement, the New York Attorney General issued an opinion in 2015 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 their determination that the statutory term "amendment" - as used in subdivision 5 of section 573 of the private housing finance law - 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 business corporation law.

21. Consistent with the city's 2017 statement, HDFCs always have had the right under the private housing finance law -- and continue to have the right under the private housing finance law -- to dissolve and reincorporate under the business corporation law or other applicable law, provided that the housing development fund 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 of the private housing finance law 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.

22. This legislation squarely addresses the legal uncertainty that threatens the future of many city-sponsored HDFCs. More particularly, this 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.

23. The current HDFC tax exemption for most city-sponsored HDFCs co-ops is scheduled to expire in 2029. Already, many financial institutions have indicated a reluctance to lend to HDFCs in light of the financial uncertainty associated with the scheduled expiration of the HDFC tax exemption in five years. This legislation will eliminate this uncertainty by providing a permanent tax incentive for HDFCs.

24. Currently, HDFC co-ops receive a partial tax exemption - known as "the DAMP tax benefit". The DAMP tax benefit takes the form of a cap on assessed valuation per dwelling unit - currently $12,542. As previously noted, this legislation removes the sunsetting of the DAMP tax exemption and makes the tax exemption permanent. Furthermore, the legislation allows HDFC co-ops to receive the greater of the DAMP tax exemption or twice the tax abatement that most market-rate co-ops presently currently receive under section 467-a of the real property tax law (but which HDFC co-ops presently are ineligible to receive). This increased tax benefit to HDFCs is a recognition that income-restricted HDFC co-ops are entitled to greater benefits than market-rate co-ops. This increased tax benefit is a vital means to promote and protect housing affordability and to provide financial stability to HDFCs. The benefit also is intended as an inducement for current HDFC co-ops (with expired regulatory controls) 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.

25. This legislation also 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 sales records of the HDFC in order to ensure compliance with these requirements. 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 affordability requirements.

26. 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. However, for perhaps 10 to 20 percent of HDFCs -- which are in fair to poor financial condition - something more is needed. In recognition of this special need of economically distressed HDFCs, the legislation 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. The 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 economically distressed 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.

27. In summary, this legislation provides a much needed permanent tax incentive for HDFCs -- as well as targeted tax relief for economically distressed HDFCs. The permanent tax benefit will eliminate the current uncertainty surrounding the expiration of the DAMP tax exemption in 2029 - and will thereby ease the availability of mortgage financing for HDFCs. Furthermore, the permanent tax benefit will serve as a strong incentive for HDFCs with expired regulatory controls to affirmatively choose to remain as affordable HDFC 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 private housing finance law 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.

§ 3. Subdivision 5 of section 573 of the private housing finance law, as amended by chapter 410 of the laws of 1984, is amended to read 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 subdivision, the term "amendment" as applied to such corporation shall mean and include any changes in a certificate of incorporation as authorized in section eight hundred one of the business corporation law but shall not be deemed to include a dissolution of such corporation pursuant to section eight hundred five of the business corporation law. The dissolution of such corporation does not require the consent or approval of the commissioner**

or the supervising agency. A housing development fund company has the right under this section and section five hundred seventy-six of this article to dissolve and re-incorporate under the business corporation law or other applicable law, provided that the housing development fund company:

a. 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 five hundred seventy-six of this article but such contractual restrictions have expired; and

b. had formerly received a tax exemption and/or tax abatement pursuant to section five hundred seventy-seven of this article and such tax exemption and/or tax abatement has either expired or is otherwise no longer being received.

§ 4. Section 576 of the private housing finance law is amended by adding a new subdivision 4 to read as follows:

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 oversight of the commissioner or supervisory agency, subject to the limitation set forth in paragraph (d) of subdivision one of section five hundred seventy-seven of this article, provided that the housing development fund company continues to elect to receive a tax exemption and/or tax abatement pursuant to section five hundred seventy-seven of this article. If such housing development fund company elects not to receive a tax exemption and/or tax abatement pursuant to such section, then it shall cease to be subject to the regulation and oversight of the commissioner or supervisory agency.

§ 5. Subdivision 1 of section 577 of the private housing finance law, as amended by chapter 658 of the laws of 1967, paragraph (a) as amended by chapter 428 of the laws of 1980, paragraph (c) as added by chapter 494 of the laws of 1995, and paragraph (d) as added by chapter 73 of the laws of 2009, is amended to read 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, commencing~~] so long as a housing development fund company remains in compliance with the requirements of this section, and shall commence 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:

(i) newly created housing development fund companies that are subject to regulatory agreement and/or contractual or deed restrictions imposed by the commissioner or supervisory agency;

(ii) 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

(iii) 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 in paragraph (b) of this subdivision.

(b) In order for a housing development fund company described in subparagraph (iii) of paragraph (a) of this subdivision to be eligible for a tax exemption and tax abatement pursuant to 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 (i) the apartment resale requirement of paragraph b of subdivision one of section five hundred seventy-six of this article; or (ii) a requirement that the income of a purchaser of an apartment not exceed one hundred sixty-five 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 such 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 paragraph, except that a transferee who is a member of the transferor's family or household need not comply with such requirement.

(c) (i) The commissioner or supervisory agency may review and audit the sales 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 authority to suspend or revoke the tax exemption and tax abatement applicable to any housing development fund company, in proportion to the percentage of dwelling units at a housing development fund corporation not in compliance with this section, if the commissioner determines that the company has willfully violated the provisions of this section, so long as the housing development fund company is provided with prior written notification as to each specific instance of noncompliance and to which dwelling unit such noncompliance is alleged.

(ii) A housing development fund company shall have the right to rebut allegations of a willful violation of this section, and also to charge and collect additional monies from any shareholder, 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.

(iii) Any annual certification submitted pursuant to this section that has been accepted for filing and that has not been subject to a suspension or revocation action by the commissioner or supervisory agency for a period of five years shall be deemed correct and shall not be subject to further audit or review by the commissioner or supervisory agency.

(d) The conditions set forth in paragraph (b) of this subdivision shall be the sole and exclusive conditions governing the eligibility of a housing development fund company described in subparagraph (iii) of paragraph (a) of this subdivision for receipt of the tax exemption and tax abatement authorized in paragraph (e) of this subdivision.

(e) For each eligible housing development fund company, the annual amount of the tax exemption and tax abatement authorized pursuant to this section shall be the greater of:

(i) twelve thousand five hundred forty-two dollars, equivalent to the cap on assessed value per apartment of fifty thousand dollars in the two thousand twenty-four tax year, and which shall increase by two and a half percent per year in each subsequent tax year; or

(ii) the net reduction in real estate taxes resulting from two hundred percent of the tax abatement for housing cooperatives authorized by section four hundred sixty-seven-a of the real property tax law.

(f) 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)~~] (g) 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)~~] (h) 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.

§ 6. Paragraph (b) of subdivision 1 of section 577-b of the private housing finance law, as amended by chapter 225 of the laws of 2004, is amended to read as follows:

(b) on January first, two thousand [~~two~~] twenty-four, had outstanding municipal real estate taxes relating to any period prior to January first, two thousand [~~one~~] twenty-three.

§ 7. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.