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August 30, 2005

BY HAND

Carol J. Mitten, Chairman
Zoning Commission for the District of Columbia
441 Fourth Street, NW, Suite 210 South
Washington, DC 20001

Re Zoning Commission Case #04-33 (Text Amendments to Require
the Provision of Affordable Housing – Inclusionary Zoning)

Dear Ms. Mitten:

The District of Columbia Building Industry Association ("DCBIA") submitted testimony in case # 04-33 on July 25, 2005, as did a number of individual members of DCBIA and other concerned developers. In response to your request for additional comments from the building industry on specific workability issues of mandatory inclusionary zoning (MIZ), and to further assist the Commission in its deliberations of whether or not – or in what form – to pursue an MIZ program, DCBIA submits the following additional information and attachments.

The basic position of DCBIA is that without sufficient incentives to fully offset its inherently higher costs and development risks, MIZ will not contribute meaningfully or cost effectively to the production of affordable housing in the District. Without adequate compensation, whether as density bonuses or other subsidies, MIZ is simply a development tax. The consequences of adopting a poorly designed and administered MIZ program include reduced housing production and renovation, higher housing prices (due to reduced housing supply and higher costs for the housing that is being built) and reduced tax revenues to the District. Given the high probability of such consequences under the current proposed programs, great caution is warranted.

Adopting a sensible MIZ program to address affordable housing is fraught with practical difficulties. The testimony highlights the problem of striking the proper balance among all the inter-related variables of MIZ to create a single, fixed formula that is workable across a broad range of different development situations. Such a formula would also have to be workable over time as market conditions change. Even with the proper formula, DCBIA is concerned about whether the District could effectively and efficiently administer such a program.

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ZONING COMMISSION
CASE NO. 04-33
District of Columbia
EXHIBIT NO. 134

We must keep in mind that the District of Columbia is not an isolated market but that it is competing with surrounding suburbs for the development of housing. Creation of a “poorly designed” MIZ program will most assuredly send housing developers to develop in those suburbs while land prices adjust in the District. The mere deliberation by the Zoning Commission of such a market destabilizing program has already had a chilling effect on the purchase and development of land in the District. **There is anecdotal evidence of the loss of more than 2,000 units in the planning stage – abandoned because of the uncertainties created by the potential implementation of an MIZ program.**

Also, please keep in mind during your deliberations that very few members of the Campaign for Mandatory Inclusionary Zoning (CMIZ) build housing themselves. They lack the personal knowledge and experience of the many developers that have testified before the Zoning Commission. Furthermore, none of the extremely important, in depth information provided by developers to representatives of the CMIZ during the last ten months of discussions resulted in any improvements or changes in their proposal and/or the proposed text amendments. This is quite extraordinary and demonstrates the disconnect between their proposal and the practical consequences of implementation of such a program.

The central question is whether MIZ can meaningfully address the problem of the need for more affordable housing in the District of Columbia. The testimony and research from other jurisdictions strongly supports the conclusion that MIZ has produced modest results only in other urban in-fill areas and would face even greater challenges with the District’s height and historic preservation restrictions. Given this testimony and research, DCBIA asserts that mandatory inclusionary zoning is not an effective tool for addressing the critical problem of inadequate affordable housing in the District of Columbia.

DCBIA has long advocated and continues to advocate that the District utilize more efficient means for addressing this critical issue, including increasing the funding for the production of affordable housing, adopting a broad range of development incentives in the form of tax abatements and tax credits, expediting the permitting process for affordable housing developments; and most importantly, encouraging the more effective use of District owned land for affordable housing. The District's own numbers indicate that during the past five years, over 17,000 affordable units have been created and preserved,

7,000 of which are new affordable units. A significant number of the 10,000 existing units preserved affordable were in fact uninhabitable units that were returned to the marketplace, and thus increased the housing stock of affordable units.

An incentive-based, voluntary program should be one component of a broader housing program. Such an incentive-based program would avoid the "one-size-fits-all mandate," which creates great risk to market rate residential development. If structured to accommodate the particular challenges of applying inclusionary zoning in urban settings, such an incentive-based program could make a contribution – but only as one limited element in a more comprehensive, multi-faceted approach – to more meaningfully address the production of affordable housing in the District. DCBIA feels it was unfortunate that in setting down this case for hearing, the Commission chose not to give any consideration to an incentive based program as was recommended by the Office of Planning.

Our basic concern is that MIZ has been presented by the proponents as a "cost-free" answer to the issue of affordable housing. We believe that the advocacy for an MIZ program has raised expectations far beyond such a program's ability. We urge the Commission to bring a prudent amount of skepticism to the grand assertions made by the MIZ proponents and to exercise caution in its deliberations.

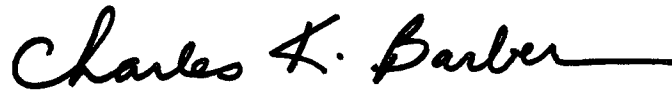
Also, the Commission neither "advertised" nor "noticed" the public in the Notice of Public Hearing with respect to various important aspects of the proposed MIZ program, nor did the Commission publish the actual proposed text amendment. Given those facts and the Commission's acknowledgment in the Notice of Public Hearing, as well as at the public hearings, that various aspects of the proposed text amendments lie beyond the Zoning Commission's jurisdiction, the Zoning Commission must notice the public and hold public hearings on the precise text amendments it intends to bring to a vote. Furthermore, we strongly believe that the Zoning Commission should not act on any text amendments unless contemporaneous action is taken by other sections of the government to address the areas that lie outside the jurisdiction of the Zoning Commission, such as administration, enforcement, funding, tenant and purchaser selection procedures, setting of eligible income levels, etc.

If the Commission elects to adopt some form of mandatory inclusionary zoning, we strongly recommend that it consider the analysis presented in Attachment 1 on the specific elements of the proposals of the Campaign for Mandatory Inclusionary Zoning and the Office of Planning. In addition, we recommend that on the final day of public hearing, scheduled for September 8, 2005, the Commission pose to the applicants the questions presented in Attachment 2.

Thank you giving us the opportunity to provide additional information for your consideration.

Sincerely yours,

DISTRICT OF COLUMBIA BUILDING INDUSTRY ASSOCIATION

A handwritten signature in black ink that reads "Charles K. Barber" followed by a horizontal line.

Charles K. Barber, Co-Chair
DCBIA Legislative/Government Affairs Committee

Attachments

**ATTACHMENT 1
TO
DCBIA LETTER DATED AUGUST 30, 2005**

The following summarizes DCBIA's comments regarding key elements of the proposed MIZ programs. Our intent is to indicate areas where modifications would

1) enhance the feasibility of MIZ for a broader range of potential developments; and 2) not impede market-rate housing production in areas where density bonuses are not available or practical.

1. Applicable Scope of MIZ

a) The application of density bonuses to substantial rehabilitation is typically not feasible because the required modification of the structures of existing buildings would not be cost competitive and/or would often times violate historic preservation requirements. Substantial rehabilitation occurs most often with the District's older and most deteriorated housing stock, which is least likely to structurally support additional density. Furthermore, many if not most of these older buildings are legally non-conforming structures that are legal so long as they are not expanded in size. Often, the re-configuration of older apartments to meet contemporary standards results in a rehabbed property with even fewer dwelling units. Imposing an MIZ requirement on substantial rehabilitation will further the deterioration of older properties – rather than their preservation and renewal.

b) The same practical and cost constraints that apply to substantial rehabilitation, apply to the conversion of commercial buildings to residential uses.

c) Planned Unit Developments (PUDs) and government-sponsored property dispositions, including those of the National Capital Revitalization Corporation and the Anacostia Waterfront Corporation, mandate their own specific covenants and public benefits, including affordable housing and other desired community amenities, which can be tailored to optimize the possibilities of a given development. **Overlaying MIZ requirements to such developments will introduce new project costs and delays – for no purpose.**

In addition, any application of an MIZ program to PUDs would be beyond the scope of this proceeding, since the possibility of such application was not included in the notice for these hearings.

d) The application of MIZ requirements to subsidized (e.g., Low Income Housing Tax Credit projects) and conventional developments that produce affordable housing is inappropriate and will increase costs and cause delays. San Diego, for example, excludes market-rate developments selling below 150% of the AMI from its MIZ requirements.

e) Areas zoned C-3-C that already have density bonuses in place (e.g., Transferable Development Rights) should be excluded from MIZ to encourage (or at least not impede) the ability of residential projects to compete with commercial uses in creating the “living downtown.” TDRs were created by the Zoning Commission in 1991 at the time

it adopted the DD District as a critical benefit and as a *quid pro quo* for down zonings and other burdens imposed by the DD requirements. It would be a breach of faith – and an unfair change of the "rules of the game" in mid-stream – if the Zoning Commission were to now render such TDRs to be worthless.

2. Effective Date of MIZ

The broad reach of MIZ programs suggests that the Zoning Commission should extend greater deference to land owners than that which would otherwise apply under traditional vesting rules following any adoption of mapping amendments. **A reasonable transition period to an effective date that also accommodates any required Council action should allow adequate time for the housing market to respond to the new ground rules.**

3. Density Bonuses and Affordability Set Asides

a) **The OP pro forma models, which presumably validate its density bonus formula, are based on questionable one-time assumptions of variable market conditions and on broad cost averages of limited application to specific developments.** Applying different averages and assumptions derives different results. In any case, such models are only a class room exercise – a snap shot of a number of assumptions that are almost certain not to apply.

b) **Because the density bonuses have been structured as potential minimum cost off-sets only, any negative change in market conditions and development costs will pose a risk to market-rate production. Construction costs continue to dramatically increase. In fact, the assumptions of the Office of Planning are already out-of-date.**

c) **Trading off only a few affordable units for more adequate market-rate density bonuses would assure a stronger housing market in the District with more government revenues for funding proven housing programs.** Assuming a market potential of 5,000 new units of applicable production over the next five years, a change from 1:1 to 2:1 in the proposed OP ratio of market-rate to affordable units results in only 160 fewer affordable set asides over five years – or 32 per year. The use of a 2:1 ratio would result in a higher probability that 5,660 market-rate units will, in fact, be produced in the District (and not in Northern Virginia), potentially yielding an estimated \$45 million in annual tax revenues.

4. Qualifying Income Thresholds

a) **The concept of using high-cost market-rate housing as a source of low-cost, subsidized housing makes MIZ economically impractical for addressing the needs of households at the lowest income levels.**

b) **Housing Production Trust Fund (HPTF) funding, now more adequately supported by the surge in recordation and transfer fees, is directed largely at lower income housing needs with only 20% devoted to moderate income or workforce housing. Therefore, an MIZ program focused on workforce households well above 50% of the AMI would better complement the HPTF program with a broader combined reach of both programs.**

c) In high-cost housing markets, MIZ becomes more feasible (or, at least, incurs fewer market distortions) when qualifying income thresholds more closely approach the AMI. Accordingly, other larger MIZ cities (Boston, Denver, San Diego, San Francisco) have adopted more market-sensitive thresholds ranging from 80% to 120% of the AMI, relying on other housing assistance programs to more effectively address the needs of lower income residents.

d) With condominium fees now averaging \$350 or more per month, the OP proposal assumes a condominium fee for affordable set asides subsidized by market-rate buyers. **Apart from potential legal challenges, this raises serious equity and marketing issues.** The CMIZ proposal recommends a vague “unbundling” of condominium fees, which would presumably isolate affordable buyers from project amenities. Whatever the approach, **condominium fees can only move qualifying income thresholds further up the AMI scale** – or alternatively increase the density bonuses required to absorb the higher subsidy costs incurred in high-end condominium development

5. Off-Site Production and In-Lieu Payment Options

a) **MIZ ordinarily affords some kind of off-site production and in-lieu payment options as a means of providing much needed flexibility in a one-size-fits-all mandate. To be effective, the option process must be reasonably accommodative.** A grudging and adversarial process will only act as another disincentive for residential development in the District. The OP proposal attempts to address flexibility – reluctantly. Along with the CMIZ proposal, its clear intent is to make any alternative to on-site production a punitive last resort.

b) **Restrictive on-site production requirements may promote inclusiveness, but they do so at the expense of extending affordability benefits to more residents through the less costly production of more units off-site.** Inclusiveness of income levels is a commendable goal, but its trade-off costs are substantial, which raises a fundamental question. If the goal is to produce more affordable housing, why force production on the City’s most expensive land and in its most expensive buildings?

6. Purchase of Affordable Set Asides by DCHA and Qualified Non-Profits

The proposal that DCHA and “qualified non-profits” (whatever that means) should take the role of investors in market-rate condominium developments to deepen the affordability of set asides through subsidized rentals will generate marketing and administrative challenges serious enough to threaten project feasibility. Prospective buyers of market rate units will not be enthusiastic to learn that their fellow condominium association members would include the District of Columbia Housing Authority, for example, for which they would be subsidizing the condominium fees of renters. This proposal would seriously destabilize the marketability of the market rate units and be profoundly counter-productive to a continuing vibrant housing market in the District.

7. Length of Affordability Controls

Lengthy price control periods on set asides raise questions of appropriate balance.

In the case of rental set asides, the costs of building repairs and renovations over extended control periods would have to be absorbed by market-rate renters, or (as with rent control) deferred. In the case of ownership set asides, owners with no reasonable opportunity to share in any growth of equity values would become (and act as) “de facto renters,” further isolating them from fellow residents

In the case of rentals, a less restrictive control period of 25 years would relate the control period to the expected life of a building’s operating systems, thereby reducing the disincentive to maintenance of rental properties.

In the case of ownership units, a control period of 10 years with some kind of equity-sharing formula phased over time would extend the benefits of home ownership to MIZ beneficiaries more directly and more generously.

**ATTACHMENT 2
TO
DCBIA LETTER DATED AUGUST 30, 2005**

1 What is a realistic estimate of the number of affordable units that might be created during the first five years of an MIZ program if your proposal is adopted? Identify any assumptions necessary for your estimate, such as the stability of interest rates, construction costs, and availability of developable land/redevelopable projects

2 What are the primary reasons for not exempting historic properties, substantial rehabilitation properties, otherwise affordable projects, government and quasi-government disposition of property with affordability requirements, and legally non-conforming structures?

3. Identify administrative procedures that the District would have to adopt in order to implement your MIZ proposed program. Describe the procedures that would be necessary, as well as the District office that should be responsible for implementing such procedures

4 Describe the affect on the developer of the District's oversight and control on "matter of right" projects that would be covered by an MIZ program. Identify the contact the developer might be required to have with the District during various stages of a project, such as,

- land/project acquisition stage
- project design
- permitting
- marketing of units
- lease or sale of units
- operation of the affordable units over time
- transfer of property

5 What would be an appropriate sunset provision for this program, which would provide an opportunity to assess the program's effectiveness and cost, including the impact on market rate housing prices and tax revenues, as well as a comparison with the productivity of other District housing programs?

6 What procedures should the Commission adopt now in order to provide an opportunity to modify any program initially adopted based on relevant legislative actions that the Council enacts – or fails to enact?

7 What changes in your proposal are you prepared to recommend, if any, based on the months of dialogue with housing developers, as well as their testimony provided at Zoning Commission hearings? If you propose no changes, do you believe that the issues and concerns raised by the development community are meritless?

8 What data should the District collect and monitor to determine whether an MIZ program, if adopted, is having an adverse impact on the housing market and should be reconsidered? What specific kinds of data would present a red flag (e g , number of housing starts, land prices, comparisons of development inside the targeted areas with other District housing projects) and what would be the appropriate time period necessary to make that judgment?

9 What were the findings and conclusions of the consultants retained by the Office of Planning (OP) to assist in analyzing and devising a voluntary inclusionary zoning program? Has their final report to OP been rendered and is it available for submission to the Commission? To the public?

10. OP's proposal sets aside affordable square footage as a portion of density bonuses provided – which implies that affordable set asides apply only if density bonuses are available. CMIZ's proposal affords density bonuses "where possible" – which implies that affordability set aside requirements apply regardless of the amount of density bonuses provided Please clarify.

11. OP's position is that its proposed density bonuses and affordable set aside formula will, in fact, off-set the builder's cost of compliance (CMIZ's position on this point is less clear) If, however, for a given potential development, the OP formula does not off-set projected costs, what will be the likely result? Why is that result better than the result that would follow under a voluntary program – where market-rate development, at least, would not be at risk?

12. Given that everyone appears to be in agreement that there is a great need for much more affordable housing in the District, why is it a greater social objective to achieve more mixed income housing at the expense of creating a greater amount of affordable housing? And in particular, why limit the opportunity of creating more affordable units offsite to demonstrated economic hardship situations only – and not to situations of practical difficulties?