

D C OFFICE OF ZONING

2006 APR 24 PM 3:33

April 24, 2006

VIA HAND DELIVERY

Steven E Sher
Director of Zoning and Land Use Services
202 663 7278
steven.sher@hklaw.com

D C Zoning Commission
Suite 210
441 4th Street, N.W.
Washington D C. 20001

Re Case No 04-33 – Inclusionary Zoning
Comments on the Notice of Proposed Rulemaking

Dear Members of the Commission

The Zoning Commission has taken proposed action to adopt an Inclusionary Zoning text amendment and, through the publication of a notice of proposed rulemaking, has solicited public comments on the proposed regulations. On behalf of our clients, who include many prominent residential developers in the city, we submit the following comments and suggestions for the consideration of the Commission:

- Set-aside requirements (§2603)
 - As proposed, the regulations require that either fifty percent or seventy-five of the achievable bonus density be devoted to inclusionary units, depending upon the zone district and the type of construction. In addition, a project must include a minimum of either eight or ten percent of the matter-of-right density as inclusionary units, if that number is greater than the percentage of the achievable bonus.

Those requirements and the whole inclusionary zoning concept are based upon the premise that additional market rate units are necessary to offset the economic burden placed upon a housing developer who is required to sell or lease units at some discount from the ordinary market rate. Notwithstanding the studies and recommendations of the Office of Planning, extensive analysis was provided to the Commission during the hearings which indicated that requiring half of any increase in density to be provided as inclusionary units (a ratio of 1:1, market rate housing to inclusionary housing) was not economically viable and would seriously undermine the relatively fragile housing market. We strongly urge that the Commission change the requirements of §§ 2603.1 and 2603.2 such that no more than twenty-five percent of the bonus density (a ratio of 3:1, market to inclusionary) be provided as inclusionary units.

ZONING COMMISSION
District of Columbia
CASE NO. 04-33
EXHIBIT NO. 197

Holland+Knight

April 24, 2006

Page 2

- As noted above, the requirements also track to a percentage of the matter-of-right density, if that number is greater than what is achieved using bonus density. Since the Commission has determined that the inclusionary zoning concept is correctly based upon being able to achieve bonus density, we believe that it is antithetical to the underlying rationale to impose a requirement based on total density when there is no guarantee that any bonus density can be achieved. We recommend that the provisions in §§2603.1 and 2603.2 requiring inclusionary units as a percentage of total density be eliminated.
- If the Commission determines to keep the requirement relative to a percentage of the matter-of-right density, which we believe should not be the case, we recommend that the Commission make it clear that the eight and ten percent requirements of §§2603.1 and 2603.1 apply only to the residential portion of mixed use projects.
- The set-aside requirements are specified in §§2603.1 and 2603.2. The R-5-C through R-5-E Districts are left out of those sections even though they are referenced in §2603.3. We believe that the R-5-C through R-5-E Districts should be included in §2603.1, which would then cover both wood frame and steel and concrete frame construction.
- The regulations distinguish between units for low income households and moderate income households in §§2603.3 and 2603.4. Those distinctions are based in part on zone district and in part on the type of construction. We believe that the regulations should only distinguish on the basis of the type of construction, such that in all zones, 100 percent of inclusionary units of steel and concrete frame construction should be for moderate income households. For inclusionary units that are not of steel and concrete frame construction, fifty percent of the inclusionary units would then be for low income households and fifty percent for moderate income households.
- Under §2603.5, the Mayor may purchase up to twenty-five percent of inclusionary units at any time prior to the issuance of the first certificate of occupancy. Since units are frequently offered for sale well in advance of the issuance of a certificate of occupancy, this creates a great deal of uncertainty as to what units are available for sale and potentially places purchase contracts for inclusionary units at risk if the Mayor decides to exercise the right to purchase. We recommend that either this right be eliminated or that it be limited to a specific time frame (i.e., the developer must notify the Mayor prior to offering the units for sale and the Mayor must exercise this right within fifteen days after being so notified).

Holland+Knight

April 24, 2006

Page 3

- Bonus density (§2604)

The whole underpinning of the inclusionary zoning concept is to offer bonus density to trade-off against the negative economic impact of having to provide below-market units. In §2604.1, the Commission has proposed to provide twenty percent additional FAR (actually expressed as gross floor area) over the normal matter-of-right limits. In §2604.2, the Commission proposed certain modifications to the matter-of-right standards for height and lot occupancy to enable projects to utilize the twenty percent bonus.

The critical parameter for using the bonus density is height. Increases in lot occupancy are not effective in achieving additional density because a residential building requires windows for light and ventilation and increasing the building footprint often results in spaces deeper than the optimal depth (exterior wall to exterior wall) for an apartment house. In order to be able to effectively use the increase in FAR, we suggest that the Commission add ten or twenty feet in height in certain zones to effectively gain one or more extra stories. In the table in §2604.2, we suggest that the height go from sixty-five feet to seventy-five feet rather than seventy feet, in C-2-B and SP-1 (an increase of ten feet rather than five feet), from fifty feet to sixty feet in C-2-A, from sixty-five feet to seventy-five feet in C-3-A and from ninety feet to 110 feet in C-2-C, where no increases were proposed in those zones

- Exemption for planned unit developments (PUDs) (§2602.3)

At its decision meeting on February 9, 2006, the Commission discussed whether PUDs should be included or excluded from the inclusionary zoning overlay. While there may be some rationale for deferring further discussion of that issue (and the notice of proposed rulemaking does not indicate an exemption for PUDs), deferring this issue for discussion as part of the mapping case poses significant adverse consequences for projects for which plans are in the pipeline or for which active consideration is ongoing as to whether and how development will proceed. The Commission and the District Government have used the PUD process to review and approve projects which have had multiple and substantial benefits for the city. The present regulations of Chapter 24 already indicate the range of amenities and benefits which an applicant may provide as part of the balancing against the development incentives and flexibility which may be requested. Housing and affordable housing are already listed in the Regulations and many projects have included housing and affordable housing components.

Inherent in the case-by-case review and adjudication of PUDs is the concept that each application is different and that the balancing that the Commission undertakes must consider the whole scope of a project. In the last several years, the OP has required developers seeking an increase in residential density to allocate a portion of that increase to affordable units. The OP has established fifteen percent as the base from which it has started

Holland+Knight

April 24, 2006

Page 4

discussions with applicants, but the range has gone up and down based on a variety of factors, including the size of the project, the nature of the housing, the target income range of the housing and the extent and nature of other benefits and amenities provided. We see no reason for the Commission to alter that approach. We believe that the Commission should reinstate its previous determination that PUDs not be automatically subject to the inclusionary zoning requirements and revise proposed §2602.3 accordingly.

- Restrictions on sale or lease (Development Standards - §2605)

The Commission has proposed that for-sale units may not be offered for lease and vice versa (§§2605.1 and 2605.2). These provisions ignore the reality that there may be both rental and ownership components in a single project, either within different buildings in a project or in the same building. This provision would make it impossible to use low income housing tax credits to finance the development of low income rental units in a development which also includes for-sale units. We think these provisions are unnecessary and counter-productive and should be eliminated.

- Requirement to maintain inclusionary units (§2602.4)

The Commission has proposed that inclusionary units be leased or sold only to eligible households for as long as the development exists. We have worked with many of the non-profit housing providers active in the District of Columbia. We understand that many of these providers will submit comments to the Commission suggesting that low or moderate income households who purchase inclusionary units should be given the opportunity to realize the benefits of home ownership that are otherwise available to other purchasers. Those households should be able to benefit from the equity that they build in paying for the units and from the appreciation in housing prices that is going on across-the-board in the District. We do not favor one particular mechanism over another, but we believe that societal and economic purposes would be well served by allowing a homeowner to retain some or all of the value that is built up over time. This may mean that the particular unit might not remain as an inclusionary unit forever but partial value recapture methods would create a source of funds for other units to be built in the future.

- Applicability date (§2608)

The regulations as proposed indicate that the text amendment would take effect at some point after the Commission has mapped the overlay and after the Mayor has issued the first purchase/rental schedule. We recommend that the period of time be 180 days, to allow the development community time to absorb the new regulations and determine how to effect those requirements in new developments

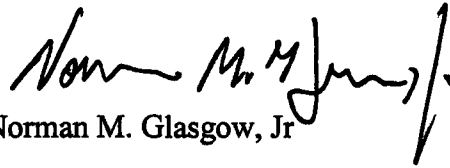
Holland+Knight

April 24, 2006

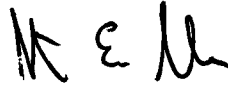
Page 5

We hope that the Commission will look favorably on these comments and recommendations. We are prepared to discuss these matters further or answer any questions the Commission may have in any forum which the Commission may establish to do so.

Sincerely,



Norman M. Glasgow, Jr



Steven E. Sher

Director of Zoning and Land Use Services

cc: Ellen McCarthy, Director, D.C. Office of Planning
Jennifer L. Steingasser, D C. Office of Planning
Stephen Cochran, D.C Office of Planning
Art Rodgers, D C Office of Planning

3721521_v1