

**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
441 4TH STREET, N.W. - - WASHINGTON, D.C.**

**TENANT ACTION NETWORK ("TAN")
TESTIMONY REGARDING INCLUSIONARY ZONING ("IZ")
CASE NO. 04-33 (TEXT AMENDMENTS TO REQUIRE THE PROVISION
OF AFFORDABLE HOUSING - - INCLUSIONARY ZONING)**

JULY 25, 2005

I. INTRODUCTION

Good day. We are David Conn and Betty Sellers. We represent the Tenant Action Network ("TAN"). We would like to thank the Zoning Commission for holding these hearings on the need for Inclusionary Zoning ("IZ"). TAN represents the interests of residents of rental housing in the District of Columbia. We understand that about 65% of the residents of the city live in rental housing. About 65% of those units are covered by the terms of the Rental Housing Act, including the rent stabilization program, which the Council recently reenacted for another five years. TAN has also worked with Council Member Graham and the Consumer and Regulatory Affairs oversight committee of the D.C. City Council to strengthen and revitalize the Rental Housing Conversion and Sale Act ("RHCSA") to insure that landlords do not deprive tenants of an opportunity to purchase their buildings when a third-party makes an offer to purchase.

II. RATIONALE BEHIND IZ PROPOSALS

We all know that affordable housing has become a crisis in Washington, D.C., the metropolitan area, and the nation. Although Washington, D.C. does have a Rental Housing Act with a rent stabilization program, all new housing constructed since the end of 1975 remains exempt. The exemption also applies to any newly constructed unit or wing of a building added

**ZONING COMMISSION
District of Columbia**
CASE NO. 04-33
EXHIBIT NO. 93
ZONING COMMISSION
District of Columbia
CASE NO. 04-33
EXHIBIT NO. 93

**TENANT ACTION NETWORK ("TAN") TESTIMONY ON INCLUSIONARY ZONING
BEFORE THE ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
JULY 25, 2005**

after 1980. Therefore, at least 35% of rental housing has no price controls whatsoever with limits on rent governed solely by the free market. Given the acceleration in housing costs, newly constructed housing most likely will continue to remain costly either to rent or to buy.

While a rental stabilization program can provide great benefits, the D.C. Government in enacting the rent stabilization program with the advent of home rule in 1975 noted that rent stabilization tends to inhibit new construction. Therefore, the program essentially set up a two-tier system. Housing already constructed remained under rent stabilization, while new construction qualified for an exemption. The two-tiered system means that newly constructed housing has no affordable unit requirement, and that such housing tends to cost too much money for moderate and low-income residents to rent.

Therefore, the theory of IZ makes eminent sense. No takings issues would arise under the 5th or 14th Amendments to the United States Constitution because developers receive a density bonus of up to 20% before the requirement to offer affordable units for purchase or rent comes into play. The generous density bonus has a quite sensible limitation to conform with D.C. law and regulations, including the height act.

The city needs to have IZ to ensure that any affordable housing will be constructed. The program has to remain mandatory, and should not become "voluntary", since voluntary provides little or no incentive to create affordable housing. We need affordable housing for people with up to both 50% and 80% of the Area Median Income. This will ensure that teachers, police, firefighters, service providers, hotel workers will have a chance to live in the city where they

**TENANT ACTION NETWORK ("TAN") TESTIMONY ON INCLUSIONARY ZONING
BEFORE THE ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
JULY 25, 2005**

work and service the higher income crowd that the District covets as residents. We owe it to those workers who will provide the services and amenities to make this infrastructure work to provide affordable housing so they may also become productive taxpaying residents. A city steeped in respect and diversity to reflect its internationalism can best be promoted by a program of affordable housing. Otherwise, we risk becoming a city of the very rich and very poor.

III. WE PREFER THE CMIZ PROPOSAL TO THE OFFICE OF PLANNING IDEA

The D.C. Campaign for Mandatory Inclusionary Zoning ("CMIZ") provides a far superior starting point for the mandatory IZ proposal than does the Office of Planning ("OP") proposal. First, the CMIZ proposal uses specific percentages to obtain affordable housing - such as the 15% of all units built in low-rise apartments with bonus densities and 12% set-asides of all units in mid and high-rises of apartments. These figures almost mirror the sliding scale of 12.5% to 15% used in Montgomery County, MD, the first area in the country to use set-asides and mandatory IZ. While we note that we prefer a higher figure, such as the 30% set-aside figure for a new 175 unit high-rise proposed at the Wheaton Metro station, the CMIZ proposal provides the needed specificity as a good starting point. On the other hand, OP proposes to use ratios, such as 1 affordable unit out of every 2 units built only in the bonus density area granted. This does not provide the needed specificity or comfort level that we will obtain a reasonable measure of affordable housing.

We note that the terms of affordability do better in the CMIZ proposal. Namely, the 20 years of affordability for a unit sold in the CMIZ proposal at least approaches the 30 year term

**TENANT ACTION NETWORK ("TAN") TESTIMONY ON INCLUSIONARY ZONING
BEFORE THE ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
JULY 25, 2005**

Montgomery County enacted in April 2005 [description attached]. A 30-year term makes more sense to us given that many mortgages use a fixed 30-year term. Moreover, the CMIZ proposal's term of affordability for rental units at 50 years comes closer to the 99 year term recently imposed in Montgomery County. Namely, we suggest the District follow the Montgomery County terms of affordability.

Although this point would seem to go with a second public hearing, we suggest the program of affordable housing through IZ encompass the entire city, not just selected areas.

IV. POINTS FOR FURTHER CONSIDERATION

We note that the CMIZ proposal includes a provision to have 7.5% of units in a substantially rehabilitated dwelling available for affordability under the IZ program. The CMIZ proposal has a definition for substantial rehabilitation. We caution that the Zoning Commission and CMIZ revisit this issue. A laudable goal is achieved by this requirement for the substantial rehabilitation of non-rent stabilized buildings, generally built after 1975, which have no affordability requirements. However, this proposal could inadvertently take rent-stabilized buildings built before 1975 out of the rent-stabilization program. We need to examine whether this promotes or hinders affordable housing.

The definitional problem exists due to the Rental Housing Act, 42 D.C. Code § 3502.14, and associated regulations, 14 D.C.M.R. § 4212, concerning a substantial rehabilitation.

[Attached]. You will see that the statute enables a landlord subject to rent control to raise the rent ceiling no more than 125%, but in order to qualify to seek such an increase, the housing

**TENANT ACTION NETWORK (“TAN”) TESTIMONY ON INCLUSIONARY ZONING
BEFORE THE ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
JULY 25, 2005**

provider must demonstrate to the Rent Administrator that the cost of the proposed substantial rehabilitation exceeds 50% of the assessed value of either the housing accommodation or the unit where the housing provider shall do the work. If the landlord cannot demonstrate that the proposed cost of the work exceeds 50% of the assessed value of the housing accommodation or the unit, the landlord must instead file for a capital improvement under 42 D.C. Code § 3503.10 and 14 D.C.M.R. § 4210. If the landlord chooses the capital improvement route, the rent ceiling increase may not exceed 15% of the current rent ceiling for an individual unit or 20% in a building-wide capital improvement.

The problem with the CMIZ proposal to start with is that the definition of a substantial rehabilitation does not match the definition under the Rental Housing Act. What CMIZ proposes, that substantial rehabilitations can constitute a renovation of a system such as plumbing or heating, generally qualifies as a capital improvement in the rent control world, which limits the increases to 20% in the rent ceiling. What CMIZ’s proposal may do is make housing less affordable by divesting tenants of the protections of rent-stabilization while providing affordability for only 7.5% of the units.

While we do not want to discourage the innovative proposal of CMIZ, the group’s analysis lacks any mention of the loss of rent stabilization protections for tenants, and does not consider whether its proposal will actually increase the costs of housing.

TAN urges the Zoning Commission to delve into this issue in more depth. One thing to consider in the event of a substantial rehabilitation is whether the residents ought to vote on

**TENANT ACTION NETWORK (“TAN”) TESTIMONY ON INCLUSIONARY ZONING
BEFORE THE ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
JULY 25, 2005**

whether they would prefer to convert the building from rental to ownership.

We also believe the Amendment needs clarification to state that the city’s Tenant Opportunity to Purchase Act (“TOPA”) applies in cases of substantial rehabilitation, if applicable, and in any event where a conversion from rental to ownership gets proposed. Currently, the tenants must vote by a majority to allow a conversion, and we need to make certain that in any new regime of IZ that tenants do not forfeit this right. See 42 D.C. Code § 3400, et seq.

Moreover, another reason TOPA has such importance is that in the event of a conversion, the law currently provides that any resident who qualifies as a senior citizen [income of \$40,000 or less and age of 62 or older] receives a lifetime rental tenancy with rent increases limited to the annual Consumer Price Index (“CPI”) for that year. Therefore, in the event of building conversions, we want to ensure that the elderly do not have to buy and can remain as rental tenants. We want to ensure that an IZ program does not abrogate this important right. We would prefer it if the “lifetime tenancy” provision gets extended to cover disabled citizens as well.

Following Montgomery County, the housing authority or a qualified non-profit has a right of first refusal on units sold to maintain affordability in a certain percentage. While the goal of maintaining the housing as affordable is highly laudable, we question whether this is the best way to accomplish it. If so, both the Council and Zoning Commission need to know that corresponding changes may need to be made in the Conversion and Sale Act, should such a provision be enacted as part of an IZ program.

**TENANT ACTION NETWORK (“TAN”) TESTIMONY ON INCLUSIONARY ZONING
BEFORE THE ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
JULY 25, 2005**

**V. REBUTTAL TO THE D.C. BUILDING INDUSTRY ASSOCIATION’S
FALLACIOUS ASSERTIONS**

After 20 years of involvement in the fight for affordable housing in the District, TAN remains skeptical of arguments put forth against mandatory IZ by D.C. BIA. We have seen D.C. BIA oppose almost every major initiative to keep rental housing affordable, including efforts to divest tenants of their rights of first refusal to own their own rental property under the Rental Housing Conversion and Sale Act. While we fully understand that D.C. BIA wants to make maximum profit on all housing, unburdened by any regulation, we note that the D.C. BIA constantly asks for more Government subsidies and tax breaks for its members. Let’s examine the fallacies in the arguments put forth by Mr. Gelman, Mr. Barber, and Mr. Rubinfeld just to name a few.

D.C. BIA contends that if the housing market suffers a downturn that IZ will cause less housing construction, and no new affordable units will be constructed. Yes, there is a risk that the economy could suffer a downturn at some point. Builders will assess the rate of returns and profits to determine the level of residential housing construction. Therefore, the IZ program will not dissuade construction. The point is that the economic upturns and downturns have a say in the likely decision.

D.C. BIA ignores the testimony of the CMIZ team: namely the Maryland developers who have had experience and success using mandatory IZ formulations. Instead, D.C. BIA argues that the District building needs should be considered on their own merits – unique and not akin

**TENANT ACTION NETWORK (“TAN”) TESTIMONY ON INCLUSIONARY ZONING
BEFORE THE ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
JULY 25, 2005**

to Montgomery County. Well, Mr. Gelman and Mr. Barber. Mayor Williams has declared that the city is open for business and is openly trying to attract 100,000 new and wealthy residents. If Mayor Williams pursues the goal vigorously, the unique circumstances in the District suggest that the building and renovation boom will continue. It will not likely fade away. Thus, the need to construct new housing will force the development of some new affordable housing under a mandatory IZ formula.

D.C BIA falsely suggests that it cares about the equity that the subsidized home buyer will receive. While D.C BIA uses that as a smokescreen to hide its true economic interests, MANNA sincerely believes that limiting the equity a subsidized buyer can realize on an “early” sale of the unit harms people. TAN agrees with CMIZ and the comments made by the Chair the other night. The goal is to keep an affordable stock of housing, not to deplete it by allowing those under subsidy to sell at a market rate before the term of affordability terminates. The newly subsidized buyer will have it explained, and if he/she doesn’t like the benefit of the bargain can decline. Others will want the opportunity to own, and will agree willingly to accept a limited return if selling early. D.C. BIA ignores the fact that CMIZ enables the subsidized resident selling early to retrieve improvements and half of the increase in equity, while the remainder goes to the Housing Production Trust Fund, a realization that even subsidized residents should recapture some of the increase in equity.

Let’s face it. The D.C BIA can come up with no legal argument that Mandatory IZ constitutes a “taking” of property without justification under the 5th or 14th Amendments to the

**TENANT ACTION NETWORK (“TAN”) TESTIMONY ON INCLUSIONARY ZONING
BEFORE THE ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
JULY 25, 2005**

Constitution. The program does not involve a physical taking of property as in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Nor does the program involve a regulation that deprives a property owner of all economically beneficial use of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Because the housing and construction industry already faces heavy land-use regulation and even price controls under the rent stabilization program, mandatory IZ does not constitute a regulation that interferes with the property owner’s reasonable investment-backed expectations. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). D.C. BIA can no longer claim that the regulation does not substantially advance a legitimate state interest now that the test in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), which used the “substantially advances” test has been overruled by the Supreme Court in the recent case of *Lingle v. Chevron USA Inc.*, U.S. No. 04-163 (May 23, 2005).

Even rent stabilization schemes do not affect a “takings” of private property without just compensation. *Pennell v. City of San Jose*, 485 U.S. 1 (1988). Nor do regulations that enable tenants to have a right to purchase a building even if the landlord believes he/she has diminished value of the property as a result. *Silverman v. Barry*, 872 F.2d 1045 (D.C. Cir.), *cert. denied*, 488 U.S. 956 (1988); *Hornstein v. Barry*, 560 A.2d 530 (D.C. 1989) (*en banc*).

Thus, the D.C. BIA attacks the mandatory nature of the IZ program. While nobody has stated that mandatory IZ standing-alone will resolve the affordable housing crisis, we note that even in the “boom” housing years of late that the for-profit building industry has not met the

**TENANT ACTION NETWORK (“TAN”) TESTIMONY ON INCLUSIONARY ZONING
BEFORE THE ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
JULY 25, 2005**

needs for affordable housing on a voluntary or “incentive” basis. The for-profit industry has ample tax incentives, but the D.C. City Council made a policy decision that we agree with: namely that we do not have construction of enough affordable rental or owner-occupied housing. Therefore, the legislative branch has correctly seen through the smokescreen that D.C BIA and its adherents have raised during this hearing.

Accordingly, the arguments of D.C. BIA and the related naysayers to mandatory IZ should receive no weight.

VI. RECOMMENDATION AND CONCLUSION

A mandatory IZ program for new construction appears absolutely vital and necessary to promote affordable housing. Because new rental construction does nothing to promote affordability and the imposition of price controls on new construction appears highly unlikely, we believe a mandatory IZ program along the lines suggested by CMIZ best meet the needs of moderate and low-income citizens for new housing. We believe that some of the more stringent terms of length of affordability from Montgomery County, MD, need importation into the IZ Amendment. Moreover, we prefer to see adoption of higher percentages of affordable housing as a mandatory set-aside than proposed by CMIZ or OP. However, the CMIZ proposal is far superior to OP for the commencement of a strong and viable IZ program to promote affordable housing.

**TENANT ACTION NETWORK ("TAN") TESTIMONY ON INCLUSIONARY ZONING
BEFORE THE ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
JULY 25, 2005**

Thank you for offering the opportunity to testify about this vitally important program.

We remain available to offer comment and answer any questions that you may have.

Respectfully submitted:


David F. Conn and Betty J. Sellers

Tenant Action Network ("TAN")

dctenants@yahoo.com

Attachment A

simultaneously to the affected tenant on a form of notice approved by the Rent Administrator.

SOURCE: Notice of Final Rulemaking published at 33 DCR 1336, 1401 (March 7, 1986); as amended by Notice of Final Rulemaking published at 33 DCR 2656, 2668 (May 2, 1986).

4212 PETITIONS FOR SUBSTANTIAL REHABILITATION

4212.1 A housing provider who proposes to substantially rehabilitate a rental unit or housing accommodation may petition the Rent Administrator for an increase in the rent ceiling for the rental unit or housing accommodation under § 214 of the Act (a "substantial rehabilitation petition").

4212.2 A housing provider shall file a substantial rehabilitation petition on a form prescribed by the Rent Administrator and shall include with the petition the following information:

(a) Detailed plans, specifications and projected cost of the proposed rehabilitation;

(b) Documentation of the assessed value of the housing accommodation as determined by the D.C. Office of Tax and Revenue for real estate taxation purposes for the tax year beginning no later than sixty (60) days after the date on which the petition is filed; and

(c) A schedule showing all rental units in the housing accommodation to be rehabilitated showing whether the rental unit is vacant or occupied and, if vacant, the date and cause of its vacation.

4212.3 A housing provider shall not begin the rehabilitation of any rental unit or housing accommodation or seek to evict a tenant in order to rehabilitate a rental unit without the prior approval of the Rent Administrator.

4212.4 The Rent Administrator shall consider and dispose of each substantial rehabilitation petition within sixty (60) days of the date on which the petition is filed.

4212.5 The Rent Administrator shall grant a substantial rehabilitation petition without a hearing if the Rent Administrator finds the following:

(a) That each rental unit for which a rent ceiling adjustment is sought is vacant;

(b) That no rental unit in subsection (a) was vacated in violation of §§ 501 or 502 of the Act; and

(c) That the cost of the proposed substantial rehabilitation exceeds fifty percent (50%) of the assessed value of the rental unit or housing accommodation; provided, that the assessed value of a rental unit shall be that portion of the assessed value of the housing accommodation calculated by multiplying the assessed value of the housing accommodation calculated by a fraction whose numerator is the square footage of the rental unit and whose denominator is the total square footage of the housing accommodation including all common elements.

4212.6 If any rental unit for which a rent ceiling adjustment is requested under this section is occupied, the Rent Administrator shall consider and dispose of the petition pursuant to the hearing provisions of chapters 39 and 40.

4212.7 A housing provider who has filed a petition under this section affecting an occupied rental unit

shall promptly serve on the tenant of the occupied unit a notice of intent to substantially rehabilitate the rental unit or housing accommodation in which it is located which shall state at least the following:

- (a) That a petition to allow substantial rehabilitation has been filed with the Rent Administrator who will review the petition;
- (b) That no work that will displace or inconvenience tenants, and no work in any occupied apartment, without a tenant's permission, will begin for at least one hundred twenty (120) days;
- (c) Whether the tenants will be required to vacate in order to perform the work necessary for the substantial rehabilitation, if it is approved;
- (d) If the tenants shall be required to vacate for completion of the proposed rehabilitation, that the notice is the one hundred twenty (120) day notice to vacate required by § 501(f) of the Act;
- (e) That upon completion of substantial rehabilitation the tenants have the right to re-rent their former rental units at the newly authorized rent ceiling; and
- (f) That the tenants are entitled to relocation assistance as provided in title VII of the Act if they are required to vacate in order for the necessary work to be done. Where the tenants shall be required to vacate if the petition is approved, the initial notice shall contain the language set forth in § 501 of the Act.

4212.8 The Rent Administrator shall grant a substantial rehabilitation petition affecting an occupied rental unit only if the Rent Administrator finds the following:

- (a) That the proposed rehabilitation is in the interest of the tenant of the rental unit;
- (b) That the cost of the proposed rehabilitation equals or exceeds fifty percent (50%) of the assessed value of the rental unit or housing accommodation as determined under § 4212.5(c); and
- (c) That the building permit for the proposed rehabilitation was issued after January 31, 1973.

4212.9 To determine whether a proposed substantial rehabilitation is in the interest of the tenant, the Rent Administrator may consider the following:

- (a) The existing physical condition of the rental unit or housing accommodation as shown by reports or testimony of D.C. housing inspectors, licensed engineers, architects and contractors, or other qualified experts;
- (b) Whether the existing physical condition impairs or tends to impair the health, safety or welfare of any tenant;
- (c) Whether the existing physical conditions can be corrected by improved maintenance, repair or capital improvement; and
- (d) The impact of the proposed rehabilitation on the tenant or tenants in terms of proposed financial cost, inconvenience or relocation.

4212.10 The amount of a rent ceiling increase that a housing provider may take and implement

pursuant to a final order of the Rent Administrator on a substantial rehabilitation petition shall be as follows:

(a) The amount which authorizes rent increases sufficient to repay a loan in the principal amount of the cost of the approved rehabilitation over the amortization period and at the rate of interest documented by the housing provider in a *bona fide* loan commitment agreement with a lender; or

(b) In the absence of a loan commitment agreement, over an amortization period of two hundred forty (240) months at the rate of interest equal to two (2) points above the average monthly bank prime loan rate established by the Federal Reserve Board in Publication H-15, Selected Interest Rates, for the week in which the substantial rehabilitation petition is filed; provided, that the amount of the rent ceiling shall not exceed one hundred twenty-five percent (125%) of the rent ceiling at the time the petition is filed.

4212.11 A housing provider shall take and perfect a rent ceiling adjustment pursuant to final order of the Rent Administrator on a substantial rehabilitation petition in the manner set forth in § 4204.10, and the date of perfection of the rent ceiling adjustment shall be the date on which the housing provider satisfies the notice requirements of § 4101.6; provided, that a housing provider shall not take and implement a rent ceiling increase under this section until the approved substantial rehabilitation has been completed.

4212.12 Where a housing provider increases the rent for a rental unit to an amount equal to or less than the rent ceiling adjustment permitted by § 4212.1, the housing provider shall comply with the provisions of §§ 4205.4 and 4205.5, and the notices required by §§ 4101.6 and 4205.4(a) may be issued simultaneously on a form of notice approved by the Rent Administrator.

SOURCE: Notice of Final Rulemaking published at 33 DCR 1336, 1404 (March 7, 1986); as amended by Final Rulemaking published at 33 DCR 2656, 2668 (May 2, 1986).

EDITOR'S NOTE: The District of Columbia Office of the Chief Financial Officer published a Notice of Public Interest at 44 DCR 2345 (April 18, 1997) which advised that "[t]he **OFFICE OF TAX AND REVENUE** will assume all of the duties and functions previously performed by the **DEPARTMENT OF FINANCE AND REVENUE**, as set forth in Commissioner's Order 69-96, dated March 7, 1969." All references to the "Department of Finance and Revenue" in the

DC ST § 42-3502.14

Formerly cited as DC ST 1981 § 45-2524

TEXT

DISTRICT OF COLUMBIA OFFICIAL CODE 2001 EDITIONDIVISION VII. PROPERTY.TITLE 42. REAL PROPERTY.SUBTITLE VII. RENTAL HOUSING.CHAPTER 35. RENTAL HOUSING GENERALLY.SUBCHAPTER II. RENT STABILIZATION PROGRAM.**§ 42-3502.14. Substantial rehabilitation.**

TEXT (a)

(a) If the Rent Administrator determines that (1) a rental unit is to be substantially rehabilitated, and (2) the rehabilitation is in the interest of the tenants of the unit and the housing accommodation in which the unit is located, the Rent Administrator may approve, contingent upon completion of the substantial rehabilitation, an increase in the rent ceiling for the rental unit, if the rent increase is no greater than the equivalent of 125% of the rent ceiling applicable to the rental unit prior to substantial rehabilitation.

TEXT (b)

(b) In determining whether a housing unit is to be substantially rehabilitated, the Rent Administrator shall examine the plans, specifications, and projected costs for the rehabilitation, which shall be made available to the Rent Administrator by the housing provider of the rental unit or housing accommodation to be rehabilitated.

TEXT (c)

(c) In determining whether substantial rehabilitation of a housing accommodation is in keeping with the interest of the tenants, the Rent Administrator shall consider, among other relevant factors:

TEXT (c) (1)

(1) The impact of the rehabilitation on the tenants of the unit or housing accommodation; and

TEXT (c) (2)

(2) The existing condition of the rental unit or housing accommodation and the degree to which any violations of the housing regulations in the rental unit or housing accommodation constitute an impairment of the health, welfare, and safety of the tenants.

TEXT (d)

(d) This section shall apply to the following:

TEXT (d) (1)

(1) Any rental unit with respect to which a housing provider has notified the tenant, after July 17, 1985, of an intent to substantially rehabilitate; and

TEXT (d) (2)

(2) Any rental unit with respect to which, before July 17, 1985:

TEXT (d) (2) (A)

(A) The housing provider has notified the tenant of the intended substantial rehabilitation; and

TEXT (d) (2) (B)

(B) All the tenants have left.

CREDIT

CREDIT(S)

(July 17, 1985, D.C. Law 6-10, § 214, 32 DCR 3089.)

HISTORICAL NOTES -- HISTORICAL AND STATUTORY NOTES

HISTORICAL AND STATUTORY NOTES

Prior Codifications

1981 Ed., § 45-2524.

Legislative History of Laws

For legislative history of D.C. Law 6-10, see Historical and Statutory Notes following § 42-3501.01.

Miscellaneous Notes

Termination of Law 6-10: See Historical and Statutory Notes following § 42- 3502.01.

ANNOTATIONS (Notes of Decisions Index)

DC CODE § 42-3502.14

Current through May 31, 2005

Copyright © 2005 By The District of Columbia. All Rights Reserved.
END OF DOCUMENT

(C) 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.





Department of Housing and Community Affairs

[Welcome](#) | [Housing](#) | [Code Enforcement](#) | [Landlord & Tenant](#) | [Community Programs](#) | [Consumer](#) | [Resource Center](#)
[Complaints](#) | [Licensing](#) | [Committees, Commissions and Boards](#) | [Frequent Updates](#) | [Español](#) | [Contact Us](#)

MPDU — Program Summary and Background

THE MODERATELY PRICED DWELLING UNIT PROGRAM MONTGOMERY COUNTY, MARYLAND'S INCLUSIONARY ZONING ORDINANCE

Background and History of the Program

Montgomery County, Maryland is located immediately north and northeast of Washington, D.C. It is the most populous County in Maryland with an estimated population in 2003 of approximately 919,000 residents. During the 1970's and 1980's, the County changed from a bedroom community for the central city to the region's second largest employment center. More than 60 percent of the County's residents work in the County.

Beginning in the early 1970's, a shortage of housing affordable to low and moderate income households occurred in the County. In addition to a large increase in young families looking for housing, this situation was exacerbated by a number of other conditions. Controlled growth policies enacted by the County government made it difficult for developers to subdivide raw land into residential lots. The installation of public infrastructure such as water and sewer lines, schools and roads did not keep pace with the demand for housing. The County instituted a sewer moratorium in 1972 that significantly restricted the number of new water and sewer house connections that were permitted.

Because the demand for residential building lots greatly exceeded the supply, prices rose at a rate much higher than general inflation. As the events curtailing the availability of building lots occurred, builders saw a reduction in their housing output. They began constructing the largest and most profitable houses on virtually irreplaceable buildable land. The increasing costs of new houses also caused the price of existing housing to increase, making it difficult for new and young families to find housing in the County that they could afford. The median price of a new single-family detached home in the County in 2000 was \$364,000, and the median price for a new single-family townhouse was \$212,000. The average turnover rent in April 2000 for a market-rate, two-bedroom apartment was \$1,200.

In the early 1970's, housing advocacy groups such as the Suburban Maryland Fair Housing League and the League of Women Voters began discussing the inadequacy of the County's housing policies.



affordable housing. These groups recommended the concept that builders should provide a certain percentage of all units in new residential developments at prices that would be affordable to low and moderate-income households. The County Council introduced a local legislation that proposed an innovative, County-wide inclusionary, zoning and density allowance program known as the Moderately Priced Housing Program. The legislation proposed that builders of most residential housing make a portion of the housing units available at affordable market rate sales prices or rental rates.

The proposed legislation raised a number of questions. One of the most important was the constitutional question of whether this requirement constituted a taking of property without compensation. Another issue dealt with the implications of the government requiring owners of expensive homes to live side by side with moderate and low-income neighborhoods. Real estate appraisers raised the question of what economic impact affordable units would have on the value of the more expensive homes in the subdivision. A corollary question was whether higher income buyers would choose not to purchase homes in Montgomery County in favor of other Washington suburbs that did not have an affordable housing requirement. An alternative proposal was submitted by home builders that would allow a developer to satisfy the affordable housing requirement of a subdivision by constructing the units at a different location.

The County Council worked on the legislation for over a year. As a solution to the problem of an "unconstitutional taking", the Council revised the bill to provide bonus densities to builders who constructed the required moderate income housing. A major debate occurred over the contention that giving bonus densities would undermine the planning commission's plan which went into designating zoning densities which were adopted in the County's master plan and in local area master plans. Builders suggested that, if the County were to provide a density bonus, this would be sufficient incentive to make it unnecessary for the program to be mandatory.

The bill with a number of major substantive amendments was unanimously approved by the County Council on October 23, 1973. The legislation required that 15 percent of the number of dwellings in every subdivision containing 50 or more units be affordable to low and moderate-income households. The total density of the subdivision could be increased by up to 15 percent. An amendment gave the County's public housing authority (The Housing Opportunities Commission-HOC) the right to purchase one-third of the moderate income units produced in each subdivision. These units would be used for the Commission's own housing or for assistance to low-income tenants.

The County Executive vetoed the legislation because he believed it to be unconstitutional, an invasive public policy, and too difficult to administer. On November 6, 1973, the County Council overrode the executive veto and the Moderately Priced Housing law became effective on January 21, 1974. Because land previously subdivided did not contain the bonus density, these subdivisions were exempt from the requirement. The first moderately priced housing units (MPDU's) built under the program were offered for sale to qualified purchasers.

Inclusionary Zoning and Controls Imposed by the Program

The MPDU program is believed to be the country's first mandatory, inclusionary zoning program that specified a density bonus allowance to builders for providing affordable housing. The density bonus was designed to preclude developers from losing opportunities to build

rate units and to help offset some of the production costs of the MPDUs. The law requires that between 12.5 and 15 percent of the total number of units in every such high-rise building of 20 or more units be moderately priced. The law is applicable to lots zoned one-half acre or smaller. Subdivisions which are not served by public water sewer are exempt from the requirement because higher densities are difficult to achieve without installing well and septic systems. The zoning ordinance allows a density increase of up to 15 percent above the normal density permitted under the zone. The ordinance also allows for attached housing in single-family zoning classifications so that optimum development of property can be achieved and less costly housing can be constructed. The density bonus effect, creates free lots upon which the MPDUs are constructed. The builder normally provides some additional market rate units equal to the difference between the density bonus and the MPDU requirement. Because of physical constraints of the land, the full density bonus is not always obtained; the MPDU requirement, therefore, falls within a range of from 12.5% to 15.0% based on the actual bonus density achieved.

The County imposes certain resale and occupancy restrictions on the MPDUs when the completed units are sold. Because of changes in the law over time, these controls vary according to when the unit was initially sold. For this reason, the control period can be 10, 15, or 30 years. The price for which the unit can be resold is controlled during the control period and the unit must be resold through the MPDU program to another MPDU certificate holder. The County has the right of first refusal to purchase any MPDU put up for sale, and all units that are sold during the control period are purchased by the County or HUD.

The MPDU must be owner-occupied throughout the applicable control period, and when the owner sells the unit for the first time after the control period ends, it may be sold at market price. Any "excess" or "windfall" profit obtained through the sale is split between the County and the owner.

Program Goals

The goals of the MPDU program are:

1. To produce moderately priced housing so that County residents and persons in the County can afford to purchase or rent decent housing;
2. to help distribute low and moderate-income households throughout the County;
3. to expand and retain an inventory of low-income housing in the County by the Housing Opportunities Commission (HOC) and recognized nonprofit housing sponsors to purchase up to 40% of the affordable units (HOC is limited to 20%);
4. to provide funds for future affordable housing projects by sharing the windfall appreciation when MPDUs are first sold at the market price after expiration of resale price controls.

Over the past several years there have been consistently about 2,000 households and individuals holding MPDU eligibility certificates. The MPDU program markets to low-income renters and first-time home buyers with incomes ranging from \$20,000 up to \$68,000 for families of 5 or more people. The median income of a 4-person family living in the Washington Metropolitan area in 2005 is \$89,000. Households having an income at or below approximately 70 percent of the area's median income, adjusted by family size, qualify for the program. Priority in the sale of the MPDUs is given to people who either live or work in the County.

County.

The average annual MPDU production rate is about 250 units with an additional resold under the 10-year price controls. Because of the high demand for the MPDU County conducts lotteries to select potential purchasers of the units in each offer range in price from \$120,000 for a 2 bedroom condominium to approximately \$130,000 for a 3 bedroom detached house with a basement and garage.

MPDU units purchased by HOC are rented to households with low or very low income. Depending on the financing sources used by HOC to purchase the units, tenant income ranges from below \$10,000 to \$36,150 which is approximately 50% of the area's median income. The HOC has a waiting list of approximately 8,000 households and currently owns 1,600 MPDUs. Nonprofit housing sponsors have purchased approximately 85 MPDUs since 1989.

Program Administration and Funding

Operation and administration of the program takes place within a unit of the Division of Housing and Code Enforcement of the County's Department of Housing and Community Affairs (DHCA). The section includes a program manager, a program specialist, and administrative aide. Operations are overseen by the Chief of the Housing Division. The current annual operating budget for the Moderately Priced Dwelling Unit (MPDU) program is approximately \$400,000 which includes salaries and fringe benefits for the staff, printing and postage, computers and telephones. Funding is through the County's operating budget.

The program is established under County zoning legislation adopted by the Council and approved by the County Executive. Certain program requirements such as income maximum sales prices and rental rates are set through executive regulations developed by the Department, and approved by the County Executive and the County Council.

The program's implementation involves both the public and private sectors; the local government in regulatory and administrative functions and the building industry as the producer of the housing. Builders must subdivide their land, obtain building permits, and construct the units. They notify the MPDU office when units are to be offered for sale. The MPDU office certifies the eligibility of individuals and families who want to rent units under the program, enters into agreements with builders for staging the sale of the units, establishes the MPDU sales and rental prices and oversees the selection of potential buyers and renters through a lottery selection process. The MPDU section enforces the occupancy and resale provisions of the law and oversees the resale of units.

Funding for HOC's acquisition of MPDUs comes from a variety of sources, including acquisition-without-rehabilitation program funds, local tax exempt bonds, private investment in federal low-income housing tax credit partnerships, and from funds from the Maryland Housing Finance agency.

Evolution of the Program over Time

There have been a number of changes in the program since its inception. The original

legislation required that 15 percent of the total number of units in the subdivision with a density bonus of 20 percent above the normal zoning category. Controls on price and rental rate of the MPDUs lasted for 5 years and the units were for sale as determined by the builder.

In 1981, after five years of experience with the program, the building industry requested the MPDU requirement be reduced to 10 percent of the units in the subdivision but believed the 15% requirement was excessive. The County Council compromised the requirement to 12.5 percent, but enacted two other amendments that strengthened the program. The price control period was extended from 5 years to 10 years, and all units to be for sale unless they were located in an all rental subdivision.

A committee composed of builders, staff from the County's planning agency, Housing Department staff and members of the County Council studied the program again and recommended substantive changes that were adopted into law in 1989. The major amendments (1) increased the bonus density to 22 percent; (2) based the MPDU requirement on a scale ranging from 12.5 percent to 15 percent depending on the bonus density achieved; (3) increased the rental control period to 20 years; (4) required that a portion of the resale price of an MPDU sold after the expiration of the price control period be paid to the Housing Initiative Fund; and (5) permitted an increase in the MPDU sale prices to allow builders to pay for improvements in the design of the MPDUs to make them more comparable with the market rate houses. Another major amendment provided for alternative methods of meeting the MPDU requirement when the units are not affordable because of high condominium or homeowner's association fees and where the services provided could be eliminated or modified for the MPDU residents. An example would be a luxury high-rise condominium building. The alternative program permits the developer to make a contribution to the Housing Initiative Fund or provide units at another location; the alternative may also require more units or units that are more affordable.

A recent change in the MPDU Law which took effect on April 1, 2005 lengthened the control period for sales units to 30 years (which will renew each time the MPDU is sold during the existing control period). Under this law, the control period for rental MPDUs was previously 10 to 99 years. Another change in the law reduced the number of units within a development that trigger the requirement to provide MPDUs. Previously, developments with 10 or more units were required to provide MPDUs; this has been reduced to developments with 5 or more units.

Program Acceptance and Criticism

The MPDU program has received broad general support in Montgomery County. Homebuyers are among the most vocal supporters because the program makes affordable housing available to persons who otherwise would not be able to purchase a house in the area. Employers and businesses are helped because the program makes housing available to a lower level and mid-management employees. Affordable housing organizations and city officials advocate for the program because it provides for a wide geographic distribution of moderate income housing which encourages economic and racial integration in the area. Elected officials back the program because of its low impact on any given community neighborhood and because the program does not require a large financial investment in Montgomery County. Although, in the past, builders expressed objection to some of the program's regulations, they are generally supportive of the program and have made numerous

suggestions for its improvement.

The most likely critics of the program are those who advocate no growth or slow because the program offers increased densities in existing zones. The MPDU Program has been criticized for causing additional congestion on County roads, and requiring funding of County facilities, infrastructure, and services. Because the units are not at the market price, "fairness in taxation" groups have criticized the program because owners do not pay a fair amount in property taxes relative to the amount of public services they receive.

It would be expected that criticism of the program would come from the communities in which the low and moderate cost housing is being built. This criticism has rarely occurred because the program is equally administered in all parts of the county and, if properly designed, only a small portion of a subdivision is built as low or moderate cost housing. The criticism that does occur from neighborhood groups most often deals with an insistence that alternative proposals of meeting the MPDU requirement be discouraged, and that all neighborhoods be subject to the same MPDU production requirement. MPDUs have not been shown to have a detrimental effect on the value of the market priced housing and has never been legally challenged by either developers or citizens.

Program Achievements and Limitations

The most important achievement of the MPDU program is the production of more than 10,110 affordable housing units. Housing constructed as MPDUs now constitutes 10 percent of the County's total housing stock. The program has also provided a mechanism for the Housing Opportunities Commission and other nonprofit housing groups to purchase approximately 850 units for long term retention as part of the County's low-income housing supply. The program contributes to the economic and racial integration of the County. MPDUs are marketed to an economically and racially diverse group; 51 percent of the purchasers during the 1988-1992 period were minority households.

The program's most significant limitation is its reliance on a favorable housing market. The production of MPDUs is based on the accompanying production of market rate housing. The rate of production decreased following the economic slow down of the early 1990s; fewer than 350 units are being produced annually; supplying less than 20% of the units on the waiting list. Although builders have occasionally constructed a subdivision's MPDU ahead of schedule because they can be easily sold, there is little the County can do to stimulate MPDU construction during slow housing sales periods. Most of the land in the County is zoned one-half acre and smaller (R-200) has been built on; therefore, fewer subdivisions or more units are being submitted for development approval.

Another limitation is the loss of an owner occupied, affordable house at the end of the price control period (for those units sold before March 1, 2002). A compromise was reached when the law was amended to require that half the "excess" or "windfall" profit from the sale of the MPDU is sold at the fair market price after the control period expires be paid to the Housing Initiative Fund (HIF). The fund is used to produce future affordable housing projects.

Because of a number of factors, including a change in the income tax laws dealing with housing investments, little rental housing except for those projects with low-income

credits or tax-exempt bond financing have been constructed. The bonus density d provide enough incentive to construct apartment projects. To solve this problem, has offered construction and permanent financing through the HIF to nonprofit h sponsors to purchase and renovate existing apartment houses and to build new re

Replicability of the Program

The Moderately Priced Dwelling Unit program can be replicated in any jurisdic local legislative and zoning powers and significant residential construction activi localities bear little of the financial cost of this program, it is an attractive alternat supplement to traditional housing subsidy programs. Both developing suburban a more urbanized areas undergoing residential expansion or redevelopment can oft improved by the inclusion of an affordable housing component in market rate dev in exchange for increased density allowances.

Three of Montgomery County's neighboring/jurisdictions, Fairfax and Loudoun (Virginia and Prince George's County, Maryland, have recently enacted inclusion: programs modeled, to a large extent, after the MPDU program. Fairfax County is implementing its Affordable Dwelling Unit program after first trying a voluntary then convincing the County's Board of Supervisors and State General Assembly (for a mandatory program. The Fairfax County staff received a great deal of supp building industry in getting its legislation approved. These programs have some c from Montgomery County's program for instance Fairfax requires 50 year price c Prince Georges County has no split of the windfall profit if an owner stays in the years.

If you would like additional information on the program please contact [Eric Lars](#)

[AWARDS](#) | [Privacy Policy](#) | [User Rights](#) | [Accessibility](#) | [Disclaimer](#)
 Copyright 2002-2005 Montgomery County Government All Rights Reserved
 Best viewed with IE 5.0 or Netscape 6.0 and higher