



**Testimony of the
District of Columbia Building Industry Association
on Zoning Commission Case 04-33A
Map and Text Amendments, Inclusionary Zoning Overlay District
Thursday, October 19, 2006, 6:30 PM
Before the Zoning Commission of the District of Columbia
Presented By
Jeffrey H. Gelman, Partner
Greenstein DeLorme & Luchs, P.C.**

Good Evening members of the Zoning Commission – I am Jeffrey Gelman, an attorney in the law firm of Greenstein DeLorme and Luchs, P.C. and a member of the Executive Committee and Board of Directors of the District of Columbia Building Industry Association. I also chair its Housing Committee. I am here today testifying in behalf of DCBIA with respect to the application of the proposed MIZ program on historic districts and properties.

As you know from our building association's prior testimony before this Commission, and the testimony of many housing developers, we do not believe that the MIZ program as drafted will achieve any significant benefits and will cause severe harm to housing development in the District, resulting in higher prices and fewer housing choices. Since this is our view on a city-wide basis, there is even a greater concern for historic buildings and historic areas. To apply MIZ to historic properties, you will be pitting one very important social objective of preserving historic properties for current and future generations against the social objective of greater affordable housing.

Since we believe that the proposed MIZ program is overly complex, too rigid and fails to recognize the uniqueness of separate property sites, we do not believe this Commission should promote the MIZ program for historic properties and pit two social policies against each other. Other housing programs that have proved successful in the District and elsewhere do not pit affordable housing objectives against historic preservation objectives. To do so will lead to a greater level of community acrimony and consternation, and delay and add considerable cost to the rehabilitation of historic properties and the construction of new buildings in historic districts.

For your convenience, I have attached to my testimony a copy of my testimony to the D.C. Council on October 10, 2006 which contains a number of observations relevant to your consideration of these issues.

Thank you for the opportunity to provide these remarks.

**ZONING COMMISSION
District of Columbia**
CASE NO. 04-33A
EXHIBIT NO. 56

ATTACHMENT

TESTIMONY
OF
JEFFREY H. GELMAN
GREENSTEIN DELORME & LUCHS, P.C.
Before
Committee of the Whole
of the District of Columbia Council
October 10, 2006 2:00 PM

Bill No. 16-779, Inclusionary Zoning Implementation Act of 2006

Good afternoon, Chairman Cropp and members of the Committee of the Whole. My name is Jeffrey Gelman, a principal in the law firm of Greenstein DeLorme & Luchs, P.C. Several of you have known me for a number of years. I am a real estate finance and development and housing attorney and have devoted approximately half of my time during my twenty-two years as an attorney on the creation and preservation of low-income affordable housing. I have participated in and worked with most of the Federal housing programs, and nearly all of the local housing programs. I have served on numerous government and non-government advisory committees, and have assisted a number of non-profit and for profit and community development organizations concerning economic development and housing programs and issues.

I have had the benefit of learning from and hearing the advice of many of the nation's leading experts on affordable housing. I can say I have seen the best and worst of housing policy and programs over the last two decades. I am sad to say that the mandatory inclusionary program as presented by the Zoning Commission for the District of Columbia is among the worst of housing policies and programs.

There is an extensive record established from the hearings held before the Zoning Commission which you all have access to, which explains in great details the deficiencies and problems with the proposed MIZ program. My personal involvement began over five years ago by participating in many meetings and hundreds of hours of discussions with the proponents of mandatory inclusionary zoning programs, community development organizations, developers, lenders, industry associations and government organizations. I have read dozens of studies and treatises involving inclusionary zoning.

As a strong advocate of creating and preserving affordable housing, I entered this debate with an open mind and optimistic intentions. What I have concluded is this, although we all recognize the great need for more affordable housing, and the absolutely essential need to address this shortage, there is a great disagreement between those who are the so-called "advocates" and the so-called "providers". Although this is a generalization with some exceptions, the so-called "advocates" are social organizations, labor unions, clergymen,

academicians and public interest organizations. The so-called “providers” are the developers, whether they are market-rate or affordable housing developers, or both, and whether they are for-profit or non-profit. The advocates advocate, the providers provide. Unfortunately, these two groups are in considerable disagreement.

To summarize the basis of the disagreement in the short period time I have for these remarks, the advocates believe the only possible way to increase the number of affordable units and to create them in an inclusive way throughout the City is by a compulsory development program that is widely and strictly applied. The providers find the proposed MIZ program to be overly complex and rigid, without recognition of the uniqueness of each piece of real estate.

Each developer, and each development site, has its own unique design, development and community issues, construction costs, and costs of equity and debt. The proposed MIZ program is based on a set of assumptions based on averages. Unfortunately, averages do not exist in the real world of development, and even if they did, the averages become out of date and irrelevant as soon as you finish calculating the averages.

The big falsehood of the proposed MIZ program is the statement that the program will be cost-free to the government and tax payers and will not harm developers and property owners because of the value of the extra density being offered for market rate units. However, the extra density is not enough, and often will not even be achievable density, and will leave the developers incurring great losses, unless they find a way to make up the losses. There are really only two ways to make up the losses, to apply for and compete with affordable housing developers for the limited Federal and District subsidies and/or push the sale or rental prices on other units higher. It is certainly ironic that a program that professes to increase affordable housing opportunities will actually decrease such opportunities by pushing prices higher for the vast majority of units. This inevitably happens with housing programs and policies that do not correctly take into account the economics and risks of housing development.

What I ask each of you to do today is to take the leadership on this issue of creating and developing affordable housing and to critically look at whether the proposed MIZ program helps or actually hurts the effort. I and many others believe that the currently proposed MIZ program will have a historically devastating impact on housing development and preservation. The development community has offered many suggestions to establish a viable and successful inclusionary zoning program, unfortunately most of this advice has been ignored. This City and its residents deserve better than this MIZ program.

I have attached a copy of my written comments previously submitted to the Zoning Commission detailing the deficiencies of the proposed MIZ program and making recommendations. Thank you for the opportunity to present these remarks.

Attachment:
Written Comments of Jeffrey Gelman submitted April 24, 2006 to the Zoning Commission
concerning the proposed MIZ program

April 24, 2006

Ms. Sharon Schellin
Acting Secretary to the Zoning Commission
Office of Zoning
441 Fourth Street, NW
Suite 200 South
Washington, D.C. 20001

Re: Zoning Commission Case No. 04-33
 Comments on Notice of Proposed Rulemaking
 On Mandatory Inclusionary Zoning

Dear Ms. Schellin:

I have been a real estate finance and development attorney practicing in the District of Columbia for the past twenty years, with a significant emphasis representing companies building and preserving affordable housing. I have also been the Chair of the Housing Committee for the District of Columbia Building Industry Association for the past ten years and have worked closely with the District of Columbia Government on various housing programs and policies.

I offer the following comments and suggestions as my own personal remarks as a long-time affordable housing practitioner in the District of Columbia. My comments and suggestions are separate from the comments being provided by the District of Columbia Building Industry Association ("DCBIA") although I participated in the formulation of those comments as well.

OBSERVATIONS

**I. THE PROPOSED INCLUSIONARY TEXT AMENDMENTS REFLECT
 THE WORST PRINCIPLES IN AFFORDABLE HOUSING POLICY AND
 PROGRAMS.**

First, successful housing programs should motivate and encourage the development of affordable housing. The proposed MIZ program does not.

There is a significant imbalance (as well as fluctuations) between costs of providing affordable units in new residential construction and the value of the bonus density that may be

used for additional market rate units under the proposed MIZ program. The primary reason that mandatory inclusionary zoning programs have had marginal results in other jurisdictions is the inflexibility of the programs and the inadequate recognition of the unique cost structures of each project. The only reason that such mandatory programs may have shown any minimal success is due to the strength of market forces and not because the programs encouraged or motivated development of affordable housing. Unlike the proposed MIZ program, successful housing programs tie the requirement of providing affordable housing to a sufficient subsidy so that the projects retain financial viability.

Second, there are very predictable negative consequences of the proposed MIZ program which greatly outweigh the projected benefits of the proposed program.

The District of Columbia Government's own projections of how many affordable units may be generated by the proposed MIZ program is a tiny fraction of the number of affordable units already successfully being built and preserved under existing and proven housing programs. The proposed MIZ program runs counter to the Government's own stated objective of producing a greater number of affordable units. The proponents of the proposed MIZ program and the Office of Planning have acknowledged that many more affordable housing units could be produced throughout the residential neighborhoods of the District for the cost which will be incurred by developers and the Government from developing affordable units under the proposed MIZ program in some of the highest cost areas and high-rise projects in the District. The Chair of the Zoning Commission herself stated in one of its public hearings that the value of the proposed program is its symbolic value which carries the message that the Government cares for its lower-income residents. Unfortunately, such pronouncements and symbolism does not produce affordable housing and deflects attention from housing programs that have proven track records.

Third, the proposed MIZ program runs counter to the District's more important objective of creating the greatest number of affordable units and seeking not to further contribute to the increase in sales prices and rental rates of housing.

The acknowledged objective of the proposed MIZ program is not to generate a large number of affordable units but to include affordable units in housing projects that would not otherwise be affordable to low-income persons. The targeted lower-income categories of 80% AMI and 50% AMI are way too low for the proposed bonus densities to offset. Better results (although still unimpressive) have been shown to occur under inclusionary zoning programs when the target was "work-force housing" of 80% to 120% AMI. The proposed affordable set-aside requirements on bonus density, at 75% for stick-built construction and 50% for steel and concrete construction, are much too high. Although it is the Government's general objective to obtain as much affordable housing as possible, this proposed program does the opposite by establishing the set-aside requirements too high which will cause the price of all other housing to increase even faster. In an effort to recoup uncompensated costs imposed by the high set-aside requirements, developers will push the price of all units other than the MIZ units higher and higher. And since the proposed MIZ program is essentially a city-wide program with general applicability to developments of 10 units or more, the MIZ program is redefining and effecting the entire housing market of new construction in the District. This will put the surrounding

jurisdictions at a greatly increased competitive advantage. It is incorrect to believe that the surrounding jurisdictions' inclusionary programs are similar to the proposed D.C. MIZ program or that the availability of additional space to accommodate additional density is the same in each of these different jurisdictions.

II. THE PROPOSED MIZ PROGRAM IS NOT AN ADDITIONAL "TOOL" IN THE "TOOLBOX" OF AFFORDABLE HOUSING.

First, it has been incorrectly asserted that the proposed MIZ program is another "tool" in the "toolbox" of creating affordable housing.

The proposed MIZ program is unlike other affordable housing programs. Other affordable housing programs are voluntary and incentive-based. This ensures that those seeking participation in these programs have underwritten the cost of providing the affordable housing set-aside against the subsidy being offered under the housing program. Programs that have an imbalance are abandoned and programs that have a balance between costs and benefits succeed. Unlike many other jurisdictions, the District has no shortage of dedicated affordable housing providers. The problem has been a shortage of financial resources.

Second, the proposed MIZ program is not market or revenue neutral.

Successful housing programs have added to the housing market by directing financial resources and providing tax incentives to encourage investment in affordable housing. The proposed MIZ program is a "tax" on the production of new housing by adding direct and indirect costs that will not be compensated for by the allocation of bonus density and by the extra time involved in designing and constructing higher density projects, often in the face of community opposition.

Third, the Zoning Commission and the Office of Planning received many comments and suggestions from market rate and affordable housing providers concerning the inefficiency and ineffectiveness of the proposed mandatory program.

The market rate and affordable housing providers offered many good suggestions which are not reflected in the proposed program. An inclusionary zoning program could be successfully crafted for the District, one that is based on adequate incentives and enticements. Unfortunately, except for the last several years, the District Government dedicated very few District tax dollars to affordable housing. In fact, the District's recent funding of the Housing Production Trust Fund from District tax revenues has only been possible because of the recent increase in economic development resulting from a strengthening of the market. The proposed MIZ program will serve as a restrictive covenant on property throughout most of the District and serve as a basis to challenge real estate assessments and reduce tax revenue collected by the District. Would it not be better to avoid interfering with economic development and continue to channel the greater tax revenues generated by economic development into social programs such as affordable housing?

III. THE OVERWHELMING VIEW OF DEVELOPERS, INCLUDING MARKET RATE DEVELOPERS, AFFORDABLE HOUSING DEVELOPERS AND MINORITY-OWNED DEVELOPERS, IS THAT THIS PROPOSED MIZ PROGRAM DOES NOT WORK AND WILL HAVE SEVERE CONSEQUENCES FOR THEIR BUSINESSES AND ALL RELATED BUSINESSES, SUCH AS THE CONTRUCTION TRADES, SURVEYORING FIRMS, ENVIRONMENTAL FIRMS, ARCHITECTUAL AND ENGINEERING FIRMS, AND MAINETANANCE AND JANITORIAL SERVICE FIRMS.

First, developers' opposition is opposition to this particular MIZ program and to any MIZ program that is inflexible and imposes unreasonable and unrealistic requirements.

Although many developers and others participated in discussions with the Office of Planning to develop a program that would have a much higher probability of working in the District, the resulting proposed MIZ program being promulgated by the Zoning Commission is not a reflection or product of that effort or expertise. The development community greatly supports affordable housing, and many of those developers are themselves either full or part-time affordable housing developers.

Second, there has been considerable open-mindedness and optimism of developers that a properly crafted inclusionary zoning program could work in the District.

Many developers and others participated in dozens of meetings and provided extensive analysis and reports on the concepts and details of an inclusionary zoning program for the District. Unfortunately, there is little or no evidence that this extensive amount of effort by the housing industry to craft an inclusionary zoning program for the District has been anything but ignored by the Zoning Commission in the proposed MIZ program. As a result, many developers, both majority and minority owned firms, feel ignored and disenfranchised from the result although they participated in the process. Although I anticipate that the Zoning Commission will receive a fair number of comments from the housing industry raising various concerns and objecting to all or parts of the proposed MIZ program, there will be many more developers who have already decided to forego doing future business in the District and thus see little point in commenting on the proposed MIZ program.

RECOMMENDATIONS

WAYS IN WHICH TO MAKE THE PROPOSED MIZ PROGRAM LESS LIKELY TO FAIL

Provide a Fair Notice and Transition Period

Provide for a three (3) year period for the housing market and housing providers to adjust to the new program. The implementation of such a significant program, which will greatly affect land values (and tax assessments and revenues), cause redesigning of planned projects, cause renegotiations of investment and financing arrangements, and incur community concern due to building greater densities, justifies a three (3) year transition period. Otherwise, the District will be facing a destabilizing and chilling effect in the housing market that can easily last for more than three years. Why derail the economic momentum and growth of businesses in the housing industry when a transition period is the answer?

Provide for an Independent and Objective Review of the Results

Include a sunset provision requiring the review by an independent body to report on the success or failure of the program and require the affirmative renewal of the program by the Zoning Commission and the District of Columbia Council after three years following a three (3) year transition period. If the program achieves what the Zoning Commission claims will be achieved, then the Zoning Commission should have no objection including such a provision.

Provide for a Higher Threshold of Units for Program Applicability

Change the applicability of the program from “ten or more dwelling units” to a level of “fifty or more dwelling units”. This higher threshold would go a long way in not harming the smaller housing providers, including emerging businesses and minority-owned businesses.

Provide for Exemption of PUDs and Government-Sponsored Sales

Exempt PUDs and government-sponsored sales of properties because these sales already include affordability requirements which are often different from those in the proposed MIZ program and which are tailored to the unique aspects of the properties and communities in which they are located.

Provide for Exemption of Otherwise Affordable Housing Projects

Exempt otherwise affordable housing projects such as those financed under the Housing Production Trust Fund, Tax-Exempt Lower Income Bonds, Lower Income Housing Tax Credits, HOME Program and Community Development Block Grant Program as well as others. Overlaying the proposed MIZ program will add costs and delay to affordable housing programs, and will distort long understood and established investment patterns in these programs. For example, institutional investors will not adjust easily or at all to an MIZ overlay of bond and tax

credit programs where such an overlay does not exist in other jurisdictions. What purpose can there be to overlay the MIZ program on other affordable housing programs other than for the proponents of the MIZ program to claim unjust credit for the production of those affordable units?

Provide for a Reasonable Affordability Period

Reduce the duration of the affordability period to a reasonable period of time. In a for-sale project, the duration will significantly impact the intended beneficiary of the housing by eliminating wealth accumulation and creating disincentives to maintaining the dwelling unit. Homeownership has been encouraged at all levels of government for one primary reason, it has and continues to be the primary manner for a family to build wealth, and the proposed MIZ program denies families the opportunity to build wealth. In a rental project, the duration will significantly impact the housing provider's ability to maintain and recapitalize the project. This situation can be seen in the Federal Section 8 project-based program. The problem was not that housing providers desired to exist the subsidy program and convert their properties to market rate, the problem was that the Federal Government did not come up with a proper continuation of the subsidy program when the original project-based contracts expired at the end of twenty years. In the proposed MIZ program that problem is even more acute since the proposed bonus density subsidy is inadequate from the beginning to offset the cost of the affordable units. At least under the Federal Section 8 project-based program, the subsidy continued for a period of twenty years under the subsidy contract. I propose a ten (10) year affordability period for for-sale housing units and a twenty (20) year affordability period for rental housing units.

Provide for an Economically Viable Bonus Density Set-Aside

Reduce the bonus density set-aside to an appropriate level. Although this area is outside my expertise, I have spoken to many developers and the general conclusion is that any set-aside requirement in excess of one affordable unit for every two market rate units (1:2) should be the maximum and many are more comfortable with one affordable unit for every three market rate units (1:3). The proposed regulations should be revised to base the area of the affordable units as a percentage of the bonus density achieved, and not on a percentage of the overall project. So for example, if 10,000 square feet of bonus density can be achieved, then 25% of that bonus density should be allocated for affordable units.

Provide for the Establishment of Sales Prices to Eliminate Interest Rate Risk

Establish the sales prices or rental rates of the affordable units at the time the units are placed under contract or lease to eliminate interest rate risk to the developer. For example, if an affordable unit is placed under a sales contract one year before the unit is completed and conveyed, the sales price would be established under the prevailing interest at the time the sales contract is signed not when the unit is conveyed. This is both favorable to the developer and to the family purchasing the unit because the developer will not have to absorb a decline in the sales price because of rising interest rates and the family can protect themselves from the same risk by locking into an interest rate at the time of signing the sales contract.

Provide for Elimination of Arbitrary Allocation of AMI Levels by Zone Districts

Eliminate the arbitrary allocation of AMI levels by zone districts because such allocations run contrary to commonsense and the cost to construct housing due to construct type.

Provide for Exemption of Premium-Priced Units from “Reasonably Dispersed” Requirement

Exempt premium-priced units such as upper floors and full views from the “reasonably dispersed” requirements or builders will find themselves unable to build such units which will deny the District of the tax revenues from these higher income families.

Provide for Establishment of Expedited Process for Relief when Bonus Density cannot be Achieved

Establish an expedited streamline process for obtaining relief from the MIZ program in cases where the bonus density cannot be reasonably achieved.

Provide Clarification that Set-Aside Requirements apply only to Achievable Bonus Density

Clarify the language that if the bonus density is not achievable, the project is exempt from the MIZ requirements. Although bonus density may be theoretically possible it may not be achievable in practice. The language stating that 8% of a project must be affordable should be conditioned on the bonus density being achievable.

Provide for Elimination or Revision of Timing of Mayor’s Right to Purchase MIZ Units

Eliminate the Mayor’s right to purchase up to 25% percent of the affordable units at any time prior to the issuance of the first certificate of occupancy because these units are most often offered to eligible families long before the first certificate of occupancy is issued. Alternatively, revise that language to state that the Mayor has 30 days after being notified by the developer to elect to purchase the affordable units and do not tie the timing to the issuance of the first certificate of occupancy.

CONCLUSION

In conclusion, I encourage the Zoning Commission to suspend proceeding with the proposed MIZ program and to request that the District Government, working with the Office of Planning, the Department of Housing and Community Development and the Deputy Mayor for Planning and Economic Development to develop an incentive-based inclusionary zoning program that will work for the District of Columbia, or alternatively, if the Zoning Commission

is not willing to suspend proceeding with the proposed MIZ program, then to adopt the recommendations set forth above.

Sincerely,

Jeffrey H. Gelman

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cc: The Honorable Mayor Anthony Williams
Deputy Mayor Stanley Jackson
Mr. Robert Bobb, City Administrator
The Honorable Linda Cropp, Chairman of the DC Council
The Honorable Sharon Ambrose, DC Council
The Honorable Jack Evans, DC Council
The Honorable Kwame Brown, DC Council
The Honorable Marion Barry, DC Council
The Honorable David A. Catania, DC Council
The Honorable Adrian Fenty, DC Council
The Honorable Jim Graham, DC Council
The Honorable Vincent Gray, DC Council
The Honorable Phil Mendelson, DC Council
The Honorable Vincent Orange, DC Council
The Honorable Kathleen Patterson, DC Council
The Honorable Carol Schwartz, DC Council
Mr. Jalal Green, Director, DC DHCD
Ms. Ellen McCarthy, Director, Office of Planning

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