

District of Columbia Office of Planning

MEMORANDUM

TO: Zoning Commission for the District of Columbia
FROM: Jennifer Steingasser, ^{JS} Deputy Director for Development Review & Historic Preservation
DATE: July 16, 2010
SUBJECT: Setdown for Zoning Commission Case No 04-33D for Emergency text amendments to amend affordability duration provisions of §2602.3 of 11 DCMR Chapter 26 – Inclusionary Zoning

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OFFICE OF ZONING

I. RECOMMENDATION

The Office of Planning (OP) recommends that the Zoning Commission.

- Adopt on an emergency basis, the amendments set forth below to §§ 2602 and 2505 of Title 11 DCMR Chapter 26 – Inclusionary Zoning:
- Authorize the issuance of a Notice of Proposed Rulemaking;
- Set down the amendments for public hearing
- Allow the immediate publication of the Public Hearing Notice;
- Authorize the Public Hearing Notice to be for a 30-day period rather than a 45-day period; and
- Invite public testimony or comment on an alternative proposal to be discussed below.

This report also serves as the prehearing report required by § 3013.

The proposed amendments follow. Deletions are ~~struck through~~ and additions are **in bold**

Subsection 2602.3 is amended by adding a new paragraph (f) so that the entire provision will read as follows:

2602.3 This Chapter shall not apply to:

- (a) Hotels, motels, inns, or dormitories;
- (b) Housing developed by or on behalf of a local college or university exclusively for its students, faculty, or staff,
- (c) Housing that is owned or leased by foreign missions exclusively for diplomatic staff,
- (d) Rooming houses, boarding houses, community-based residential facilities, single room occupancy developments;
- (e) Properties located in any of the following areas:
 - (i) The Downtown Development or Southeast Federal Center Overlay Districts;

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- (ii) The Downtown East, New Downtown, North Capitol, Southwest, or Capitol South Receiving Zones on February 12, 2007;
- (iii) The W-2 zoned portions of the Georgetown Historic District,
- (iv) The R-3 zoned portions of the Anacostia Historic District; and
- (v) The C-2-A zoned portion of the Naval Observatory Precinct District.
- (vi) The Eighth Street Overlay; and

(f) Any development funded in whole or in part by the federal or District government if:

- (i) At least eighty percent (80%) of its dwelling unit will be reserved for low- or moderate-income households;**
- (ii) Each unit will be sold or rented to such households for an amount no greater than would be permitted for a moderate-income household under purchase/rental schedule in effect as of the date that the purchase agreement or lease was executed;**
- (iii) The set aside and price controls described in subparagraphs (f) (i) and (ii) (“controls”) will remain in place for a period of not less than thirty (30) years for for-rent units and fifteen (15) years for for-sale units beginning from the date the development was “placed in service”, as that term is defined by the federal or District funding program.¹**
- (iv) The obligations of subparagraphs (f)(i) through (iii) are stated as declarations within a covenant, which may be the covenant required by the federal or District government, that is recorded in the Land Records of the District of Columbia and are binding upon the present and future owners of all or part of the development.**

New subsections 2604 4 and 2604 5 are added and read as follows:

- 2604.4 A development exempted by § 2602.3 (f) may nevertheless utilize the bonus density provided for in § 2604 and the zoning overlay provisions on Chapters 11 – 16, 18, or 19 if the covenant described in § 2602.4 (f) (iv) includes a declaration that the controls will remain in place as long as the development exists as to at least the number of units that would have been required to have been set aside for moderate or low income households had §§ 2601.1 and 2601.2 applied.**
- 2604.5 If the affordability levels required by the federal or District program are greater than what would be required for the property’s zone district pursuant to §§ 2603.3 or 2603.4, a development utilizing bonus density need only comply with the**

¹ DHCD and OP are continuing discussions about the affordability period and starting date OP may submit a supplemental report

applicable requirement of those provisions once control period for the federal or District program expires.

Subsection 2405.1 is repealed:

~~2605 1 ————— A development that provides, pursuant to federal or other District housing programs, affordable dwelling units for sale or lease may count such units towards the requirements of this Chapter, provided that all provisions of this Chapter and the Act are met~~

II. INTENTION OF AND IMPETUS FOR PROPOSED AMENDMENT

This request is initiated by the Office of Planning, at the request of the Department of Housing and Community Development (DHCD) primarily to resolve conflicts presently faced by affordable housing developments being funded by federal and District programs, particularly those projects being funded by the United States Department of Housing and Urban Development (HUD) The letter of request from DHCD is enclosed with this memorandum.

The principal conflict concerns the termination of tenancies of households that no longer meet the eligibility requirement of the Inclusionary Zoning (IZ) program. In order to maintain the inventory of affordable units, the Council required that the administrative regulations establish a process by which the leaseholds of ineligible tenants “shall be terminated and their units made available to eligible households.” D.C. Official Code § 6-1041.07(10) The administrative regulations did so by requiring a lease rider that made continued eligibility a condition of the tenancy. The regulations further require the owner of the development to issue a notice to vacate if the tenant violates this or any other rider provision. 14 DCMR § 2216.4. The HUD funding regulations specifically disallow such evictions.

For the first 100% affordable project facing this issue, the proposed solution was to allow the owner to designate another unit as the IZ unit. This would require the owner to amend the certificate of mandatory zoning compliance it filed as a prerequisite to obtaining its building permit every time one of the tenants became ineligible. In addition, because the project was granted zoning flexibility through a PUD, it now became the subject of three covenants: one for the PUD, a second for IZ, and a third required by HUD So many levels of obligations may ultimately frustrate the development of this and other large inclusionary developments

The delay caused to this 99-unit project will result in similar delays for all future projects with similar funding constraints and may imperil approximately twelve projects awaiting final funding approval between now and November 2010 Because of this DHCD believes that emergency action is needed to ensure these affordable housing projects can proceed to construction.

While the intricate process stated in the administrative regulations for selecting households to rent or purchase IZ units and for monitoring the continued eligibility of renters makes sense in predominantly market-rate developments, it serves little purpose, and in fact has become counterproductive, for developments where the number of affordable units significantly exceed the minimum number of units required by IZ

The proposed rules would exempt such projects, but only if the affordable units are reserved at a level of affordability at least as stringent as required by IZ. In addition, the control period must be for at least thirty years for for-rent units and fifteen years for for-sale units and these obligations must be stated in a covenant, so that future owners of the developments, including individual unit owners, will be bound to comply.

Lastly, because a shorter control period is permitted by federal and/or District funding than is required by IZ, the use of bonus density is not available. However, bonus density may be utilized if the minimum IZ set aside and affordability levels will be perpetually met once the development is no longer bound by its funding obligations

Prior to the date of the public hearing, the Office of Planning will be exploring whether the election to comply with IZ after funding control ends could be made mandatory and automatic. This will require further discussion with DHCD and other stakeholders. However, in order to avoid the need to re-advertise this notice or the notice of proposed rulemaking, the Office of Planning asks that both notices invite public testimony or written comment on such a proposal.

Enclosure: letter from DHCD

A. Rodgers & S Cochran, project managers

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Housing and Community Development



JUL 16 2010

Ms. Harriet Tregoning
District of Columbia Office of Planning
1100 4th Street, SW, Suite E650
Washington, DC 20024

Ms. Tregoning,

The purpose of this letter is to request that the Zoning Commission enact emergency regulations to exempt developments funded in whole or in part by the federal or District government from the existing Inclusionary Zoning (IZ) zoning regulations. The language proposed in the Office of Planning's (OP's) setdown report would address problems that have recently developed in reconciling IZ requirements with certain requirements attached to federal or District-funded affordable housing projects.

I. Overview

The IZ program is administered by the District through a multi-agency implementation effort involving the Department of Consumer and Regulatory Affairs (DCRA), The Department of Housing and Community Development (DHCD), and the Office of Planning (OP).

Projects funded through DHCD and other local and federal entities are subject to other covenants and agreements governing the administration of affordable units, such that the following issues arise regarding IZ applicability:

- Residential developments that receive Federal and District funds have specific requirements that may conflict with IZ program requirements, threatening the availability of financing for these projects. Furthermore, covenants must go through several layers of review/approval among financing providers, which creates delays in obtaining financing and thus, starting of projects;
- The affordable housing benefit to the District from projects funded by federal and/or District dollars often surpasses that which is provided by the Inclusionary Zoning program because these projects typically contain a greater proportion of affordable units than the 8-10% that IZ requires,

- Possible inconsistency with other program requirements, which adds administrative burden on owners, and to the extent DHCD administers financing, administrative burden on DHCD for compliance efforts; and
- There is an administrative burden on DHCD in having to review/approve waiver requests to the Inclusionary Zoning administrative regulations and requests for changes to the form Inclusionary Zoning covenant. Instead of handling these waiver requests, on a case by case basis, the District would conserve resources by allowing a uniform exemption for federally or District funded projects with a certain percentage of affordable units. Further, the waiver process from the Inclusionary Zoning administrative regulations may not be expansive enough to cure all conflicts.

II Waiver of Inclusionary Zoning Administrative Regulations

DHCD currently has the authority, upon request of an agency of the District or written request of an Inclusionary Development Owner, to waive provisions of Chapter 22 "Inclusionary Zoning Implementation" in Title 14 of the DCMR if three conditions are met:

- The Inclusionary Development's participation in a District or federal program to provide affordable housing to low or moderate-income households;
- The waived provision is not required by the Zoning Commission's IZ Regulations or the IZ Act, and
- Application of the provision is burdensome when combined with other District or federal regulations or standards, the goal of the provision is adequately addressed by other District or federal regulations, standards, or waiver of the provision is in the best interest of the District

Since DHCD's administration of the IZ program became effective on August 14, 2009, DHCD has granted waivers to two projects using federal funds and/or District funds for the development of affordable housing: Matthews Memorial Terrace and Brookland Artspace Lofts

A. Matthews Memorial Terrace

Matthews Memorial Terrace (MMT) is a 99-unit residential project located at 2636-2642 Martin Luther King Jr Avenue, SE (Square 5868, Lot 0174) The planned unit development for MMT was approved by the Zoning Commission on May 11, 2009 in Case 08-25. The development has one hundred percent (100%) affordability at sixty percent (60%) of the area median income.

MMT requested a waiver of the Inclusionary Zoning administrative regulations. DHCD granted this waiver request because the project met all three waiver conditions listed above. However, since the waiver was granted, MMT has identified conflicts between

the Inclusionary Zoning program and the terms of their federal funding source through Low Income Housing Tax Credit (LIHTC) financing and has requested additional waivers.

The first issue is that the IZ program requires the Mayor to establish a process by which ineligible renters of inclusionary units be terminated from their units, while LIHTC requirements do not allow tenant evictions. Second, the “next available unit rule” is complicated by the requirement of the IZ program to define specific units as IZ units in the Certificate of Inclusionary Zoning Compliance. In LIHTC projects, the qualifying household at the top of the waiting list be offered the next available unit, but they may not be appropriate for the moderate income IZ units if they are low-income households, thereby requiring the IZ unit to be vacant until a qualifying household is at the top of the list.

B. Brookland Artspace Lofts

Another fully affordable project, Brookland Artspace Lofts, located at 3305-3313 8th Street, NE (Square 3831, Lot 47) , which is a planned unit development approved by the Zoning Commission on October 19, 2009 in Case No 09-08, requested a waiver of the Inclusionary Zoning administrative regulations.

Brookland Artspace Lofts is similarly burdened with a conflict regarding LIHTC funding requirements. In addition, this project requested relief from the tenant selection requirements of the IZ regulations because of the unique target market of the project. The goal of this development is to provide affordable housing and workspaces to artists at or below sixty percent (60%) area median income (AMI). While this type of project is consistent with the Mayor’s goal of attracting a creative economy, there is currently no mechanism allowing for the sole selection of artists through the IZ lottery process

III. Inclusionary Zoning in Private Development

The project at 2910 Georgia Avenue NW is the first private development to create IZ units in the District. The Zoning Administrator granted a Certificate of Inclusionary Zoning Compliance for the project and DHCD approved the Inclusionary Zoning Covenant, which has been filed among the Land Records in the District of Columbia. The project was in turn granted its building permit and is currently under construction. Of the twenty (20) new units created through this project, two (2) will be IZ units affordable to low and moderate income households while the remainder will be sold at market rate.

IV The Need For An Emergency Exemption

The Matthews Memorial Terrance and Brookland Artspace Lofts projects exemplify the need for an exemption from the Zoning Regulations. These affordability projects are inherently complying with the goals of the IZ program and should not be over-burdened with reconciling the administrative requirements of different public affordability programs.

These projects, as well as those in the pipeline that will be facing similar hardships exemplify not only the need for this type of exemption, but also the urgency for the emergency act to be approved. There are a number of new construction projects funded by DHCD that are scheduled to go to closing by November 30, 2010. Under the proposed changes to the regulations, all of these projects would be exempt from the IZ zoning regulations because they each provide at least eighty percent (80%) affordable units. At least three of these projects will be one hundred percent (100%) affordable, and many of the units will be made available to households at or below thirty percent (30%) of the AMI. DHCD supports exempting these projects from the IZ requirements because the affordable housing benefit that they will provide the District exceeds what would otherwise be required by IZ, which is twelve and an half percent (12.5%), the max possible in any IZ program scenario.

Matthews Memorial is currently awaiting the approval of their second waiver request, which goes beyond DHCD's ability to waive the administrative requirements. They will be closing at the end of this month and need the stated issues to be resolved prior to that time. Emergency regulations will solve these issues in the short term and allow the project to proceed with the creation of 99 new affordable units in the District without excessive program requirements from multiple public entities. The IZ requirements were meant to ensure greater availability of affordable housing in the District, not to complicate the development process of these needed units.

The problems faced by these projects are illustrative of the issues that will be confronting approximately multiple projects between now and November 2010. It is critical that the Zoning Commission act on the proposed language on an emergency basis so that these affordable housing projects can proceed to construction.

Regards,

A handwritten signature in black ink, appearing to read 'Leila Finucane Edmonds', with a long horizontal flourish extending to the right.

Leila Finucane Edmonds
Director