

**MEMORANDUM**

OFFICE OF ZONING
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TO: Zoning Commission for the District of Columbia

FROM: Jennifer Steingasser, Deputy Director for Development Review & Historic Preservation

DATE: October 12, 2010

SUBJECT: Public Hearing report for Zoning Commission Case No. 04-33D for Text Amendments to of 11 DCMR Chapter 26 – Inclusionary Zoning

ZONING COMMISSION
District of Columbia

I. RECOMMENDATION

CASE NO. 04-33D
EXHIBIT NO. 5

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

- Adopt on permanent basis, the amendments set forth below to §§ 2602 and 2505 of Title 11 DCMR Chapter 26 – Inclusionary Zoning with the adjustments proposed by OP and DHCD in the report to expand the exemption to those projects funded by federal or District government that comply with the minimum IZ requirement and minor adjustments to improve the language and enforcement
- Authorize the issuance of a Notice of Final Rulemaking,

The proposed amendments follow. The text in **bold** is as advertised, proposed changes to the advertised text are shown ~~struck through~~ for deletions and underlined for additions

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,
 - (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 resource if:**
 - (i) ~~At least eighty percent (80%) of its~~ **The dwelling units that will be reserved for low- or moderate-income households as defined by the federal or local government resource, whether to be sold or rented, equal or exceed the number of units that would have been required to have been set aside pursuant to §§ 2603.1 and 2603.2;**
 - (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 ten (10) 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.**
 - (iv) **The Controls and the obligations of subparagraphs (f)(i) through (iii) are stated as declarations within a the draft covenant at building permit application, which ~~may~~ **shall** be the covenant required by the federal or District government, ~~that is recorded in the Land Records of the District of Columbia prior to the issuance of a Certificate of Occupancy~~, and is 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 and zoning modifications 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 §§ 2603.1 and 2603.2 applied.**
- 2604.5** **If the affordability levels units required by the federal or District program are ~~greater than what would be set aside for households earning less than low or moderate income as~~ required for the property’s zone district pursuant to §§ 2603.3 or 2603.4, a development utilizing bonus density need only comply with the applicable requirement of §§ 2603.1 through 2603.4 once the control period for the federal or District program expires.**

Subsection 2605.1 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. AMENDMENT BACKGROUND

In the setdown report to the Zoning Commission dated July 16, 2010, OP introduced an emergency amendment to Title 11 DCMR Chapter 26 – Inclusionary Zoning. This application was made 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 rental projects being funded by the United States Department of Housing and Urban Development (HUD). The letter of request from DHCD was submitted with OP's set down report.

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 tenants that are no longer income qualified "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 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 seven projects awaiting final funding approval between now and November 2010. DHCD believed that emergency action was needed to ensure these affordable housing projects could proceed to construction.

A. Proposed Amendment to Advertised Text

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 can be counterproductive for developments where the number of affordable units exceeds the minimum number of units required by IZ. For this reason OP, at DHCD's request, has adjusted the proposed amendment to allow for the IZ exemption as long as the project meets IZ's target incomes and percent of units requirement.

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 federal and/or District funding employs shorter control periods than those required by IZ, the bonus density is not available to exempted projects unless the subsidy covenanted affordability levels will be perpetually met once the development is no longer bound by its funding obligations.

III. RESEARCH AND ANALYSIS

OP conducted research in several areas in preparation for this hearing report. Areas included common practice from other jurisdictions, interviews with developers of Low Income Housing Tax Credit (LIHTC) projects, review of programs administered by DHCD and their current, pipeline and a non-quantitative review of IZ's impact on the financing of affordable units.

A. Other Jurisdictions

Staff at DHCD reviewed four other jurisdictions and how their IZ programs interact with affordable housing programs including New York City, San Francisco, Montgomery County and Fairfax County.

- New York, NY – the voluntary IZ program allows affordable units to cross qualify to the most restrictive income requirement, which is similar to the District's approach. However, IZ permanent affordability activates after other restrictions have expired. This is very similar to the emergency amendment set down when the bonus density is used.
- San Francisco, CA – the mandatory IZ program exempts other affordable housing programs that simply exceed the IZ minimum required percent of units. This is primarily due to San Francisco IZ's much higher target income of 120% of AMI. Occupants' incomes are allowed to exceed qualifying income of 120% AMI and there are no lease termination procedures, so conflicts do not exist with federal programs. San Francisco recently extended IZ affordability requirements to the life of the project, which may result in the city reviewing the exemption for other affordable projects due to their shorter time limits.
- Montgomery County, MD – the mandatory IZ program targets households at around 65% of the AMI, but permits occupants' income to rise to 130% of the qualifying income limit, which is similar to federal rules. However, when this happens the developer must make the next unit available and amend their covenant or terminate the occupants' lease. This is very similar to attempts the District made initially to allow the filing of a new Certificate of Inclusionary Zoning Compliance and covenant. Their rules also subordinate IZ to public funding sources.
- Fairfax County, VA – the mandatory program follows HUD rules for tenant termination and permits the developer to shift affordability requirements to other units. However, developers must apply to have other affordable units qualify to meet the IZ requirement through a "equivalency" determination. This would be similar to amending the District's Certificate of Inclusionary Zoning Compliance.

B. Developer Interviews

OP interviewed two developers familiar with federal tax credit projects and while they thought that most of the conflicts could probably be solved with proper management they did see the potential for the conflicts creating difficulties. For example, a person at 60% of AMI in a LIHTC project would be occupying a unit to meet an IZ requirement at 80% of AMI. As their income increased over 60% of AMI they would still be in compliance with both programs until their income increased by 33%. At that point they would be earning 84% of the AMI and exceed the maximum income for the 80% of AMI IZ unit. If however, they were a 50% of AMI household for an IZ unit, then any increase in income would mean they would be out of compliance with IZ but not the LIHTC rules. Current IZ administrative regulations would require the owner terminate the occupants lease. Requiring the termination of a lease contrary to the LIHTC rules can threaten an investors tax credits.

C. Impact on Financing and Marketing of Affordable Units.

When IZ was originally introduced to the Zoning Regulations pro-formas were used to test five market rate scenarios, but an affordable housing scenario was not included. It's likely that IZ does have implications under certain scenarios. For instance, IZ would require a stick built construction project provide half of the IZ affordable units at 80% of AMI and half of the units at 50% of AMI, while a LIHTC project subsidizes to target 60% of AMI. Therefore a small additional public subsidy would be needed to meet the differences in rent between 50% and 60% of AMI.

Affordable for-sale projects may run into marketing difficulties when the same project has units with two different control periods. If the prices are equal, units with 15 year control periods would be more marketable than units with longer control periods. DHCD might need to provide additional buyer incentives through grant programs like the Home Purchase Assistance Program (HPAP).

D. Affordable Housing Programs and DHCD's Pipeline

DHCD administers twelve funding programs; a complete list of which is found at the end of this report. Most of these programs are funded by federal sources, but local programs include the Housing Production Trust Fund (HPTF) and the Property Acquisition and Disposition Division (PADD). It is fairly commonplace that a project will have more than one subsidy in order to make it financial feasible. Typically the most restrictive requirements apply when using multiple sources. If there is a conflict, then subsidies with the senior liens are given priority. Federal subsidies usually hold the first position, but since IZ covenants are placed prior to building permit approval, IZ is in the first position

DHCD's current pipeline totals 57 different projects under review for financing, some of which are part of larger developments using different subsidies. Of these, OP estimates that IZ is applicable to seven or 12% of the projects. Of the seven, three are rental using federal dollars and one is rental using local dollars. The other three projects are ownership developments where administrative conflicts may not be as significant but there are marketing difficulties.

IV. CONCLUSION

The Office of Planning recommends that the IZ exemption apply to all projects that are being financed or otherwise subsidized under District programs that apply affordability restrictions, whether due to District or federal resources being utilized. This exemption is consistent with the intent of the IZ program, which was to supplement, not supplant, the production of affordable housing pursuant to such programs. DHCD affordability goals are established pursuant to a five-year consolidated planning process, that is consistent with the District's comprehensive plan, and which undergoes annual action planning based on available resources, market conditions and need for affordable housing and community development. The goals and requirements of the IZ program should be pre-empted in instances where the regime that the IZ program was intended to complement already exist, otherwise, an overwhelming administrative burden and a lack of certainty will undermine the effectiveness and efficacy of the already existing affordable housing programs in the District

It was not the intent that IZ would require the District to double administer affordability requirements (IZ and public financing affordability) in the same development - both in the overlapping of units and IZ units beside affordable units created through public financing. In both of these scenarios, multiple District agencies or multiple divisions within one agency are monitoring units in the same development.

Generally, unless there are distressed market conditions and a need for neighborhood revitalization, the affordability requirements in public funding require a greater number of affordable units and, in many instances, a deeper level of affordability. The following chart lists the requirements of various local and federal funding sources, including the percentage of units created by program and the term of affordability. All requirements listed are minimums. The District can increase the number of affordable units, as well as the their affordability terms.

OP recommends the Zoning Commission take final action on the advertised amendments to Title 11 DCMR Chapter 26 with the proposed adjustments included in this report. The amendments will remove administrative obstacles imposed by the IZ Act on projects that are providing affordable units through federal and/or local subsidy programs. OP will be working with DHCD on a comprehensive set of amendments to the IZ Act and the administrative regulations in order remove the conflicts and fully leverage IZ potential to assist in the development of affordable units. When those are researched and finalized, OP will likely return to the Zoning Commission with further amendments to align all three components together.

A. Rodgers & S Cochran, project managers

	Description	Minimum % units affordable	Minimum term of affordability
HPTF	Long term financing program used to facilitate affordable rental and homeownership housing projects	at least 20% of units must be affordable	15 years unless the unit is located in a census tract with a poverty rate of 30 percent or more as determined by the U.S. Census Bureau's decennial census, in which case the period shall be 10 years. The affordable term resets upon a sale.
CDBG	Neighborhood revitalization - includes residential and community facilities	51% of units must be at or below 80% AMI	Determined at underwriting - often consistent with other funding sources used on a project
HOME	Formula grants to localities that communities use to fund a wide range of activities that build, buy, and/or rehabilitate affordable housing for rent or homeownership or provide direct rental assistance to low-income people.	20% units must be at or below 50% AMI, an additional 70% units must be at or below 60% AMI, and 10% must be at or below 80% AMI	New Construction - 20 years; rehabs over \$40,000 - 15 years
DMH	Financing for the acquisition, construction or rehabilitation of long-term/ permanent supportive housing units for the exclusive use of DMH consumers.	100% of units to households earning at or below 30% AMI or between 30% and 50% AMI. Restricted to DMH clients.	25 or 40 years depending on grant agreement
UNIFIED FUND	Combines revenue from "O" type activity funds to provide flexibility in the application of funds to be used for the development of affordable housing, community development, economic development, revitalization of communities, and other allowed activities.	Not set forth in establishment of Fund	Not set forth in establishment of Fund
NSP1, NSP2	Formula (NSP1) and competitive (NSP2) grants for the purpose of stabilizing communities that have suffered from foreclosures and abandonment.	Determined by grant agreement. NSP1 funds used to finance 58 units, all affordable: 16 at 30% AMI; 13 at 50% AMI; 5 at 60% AMI; 18 at 80% AMI; and 6 at 120% AMI.	15 years
CDBG-R	Additional CDBG funds authorized by the American Recovery Act of 2009 to undertake a wide range of activities intended to create suitable living environments, provide decent affordable housing and create economic opportunities, primarily for persons of low and moderate income.	See CDBG terms	See CDBG terms
TCE (ARRA), TCAP (ARRA)	TCAP is formula grant funding for capital investment in stalled Low Income Housing Tax Credit (LIHTC) projects. TCE allows developments who have been allocated tax credits in 2007, 2008 and through September 2009 to return their credits and potentially receive a cash grant in its place.	See LIHTC terms	See LIHTC terms
LIHTC (9%)	Competitive long term financing program used to facilitate affordable multifamily rental housing projects	Minimum: 20% of units for HH at or below 50% AMI - OR - at least 40% of units for HH at or below 60% AMI. This is competitive and often there is much more affordability (i.e. 100%)	Minimum of 30 years
LIHTC (4%)	Long term financing program used to facilitate affordable multifamily rental housing projects	20% of units for HH at or below 50% AMI - OR - at least 40% of units for HH at or below 60% AMI	Minimum of 30 years
HFA Bonds	Long term financing program used to facilitate affordable multifamily rental housing projects	set aside at least 20% of units for HH at or below 50% AMI or at least 40% of units for HH at or below 60% of AMI	
McKinney Act	Short term predevelopment "bridge" loans - can be used to finance the acquisition, predev. and rehab costs associated with housing development	The developer/sponsor must set aside units for households with incomes at or below 50% of the AMI adjusted by family size	A 10 year restricted use covenant, which runs concurrently with the bond and LIHTC affordability covenants