

ZONING

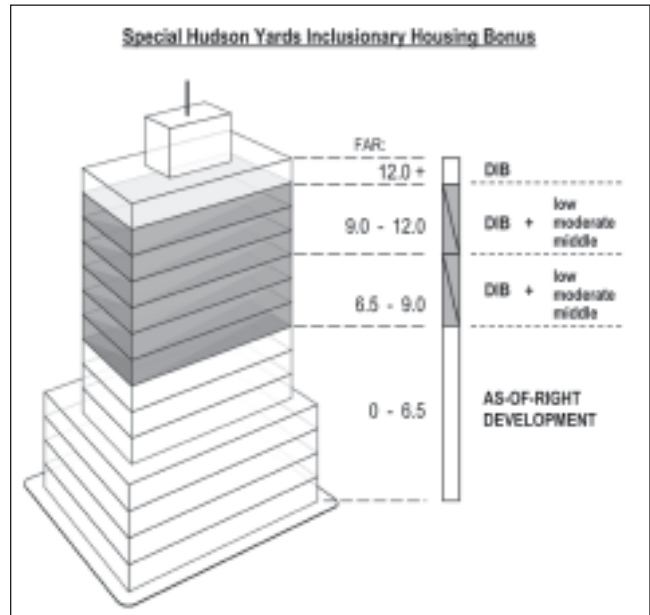
Inclusionary Housing in New York City's Zoning Resolution

By Howard Goldman

New York City is credited with the first comprehensive Zoning Resolution in the United States. Adopted in 1916, the Zoning Resolution was less than 100 pages in length and dealt with the core issues of zoning -- the separation of incompatible uses and the height and bulk of buildings, so as to protect the public health, safety and welfare in a City that was rapidly changing.

The 1916 Resolution was replaced by the 1961 Zoning Resolution, which introduced several new zoning concepts developed in the 1950's, including the calculation of permitted density based upon floor area ratio ("FAR"), a multiple by which lot area is multiplied to yield permitted floor area in a building, and "incentive zoning" -- the granting of discretionary bonuses to increase the permitted FAR in exchange for a socially desirable amenity. The favored bonus at that time was for plazas and other forms of open space to create "green oases" that could be enjoyed by the public amid the dense urban landscape.

It was not until 1987 that inclusionary housing was added as a bonus to the Zoning Resolution through a text amendment that permitted a density increase in exchange for the provision of low income housing. The City Planning Commission's report on the adoption of this zoning amendment reflected a number of questions and uncer- *(continued on page 75)*



CURRENT DEVELOPMENTS
ENVIRONMENT

WATERSHED

DEP OFFICERS CAN ISSUE TRAFFIC TICKETS

DEP officers enforced traffic laws while patrolling the City watershed. DEP officers issued Andrew Van Buren a speeding ticket while driving within the New York City watershed. Van Buren challenged the ticket, arguing that the DEP officers acted outside the scope of their authority which, he argued, was limited to protecting City-owned property within the watershed, water facilities, and direct water sources. He also claimed that issuing speeding tickets violated the municipal home rule law because the local town never consented to DEP patrolling the watershed. The lower courts agreed, dismissing the ticket.

*On appeal the Court of Appeals reversed, finding that DEP officers were police officers under the criminal procedure law and as such were authorized to enforce the vehicle and traffic *(cont'd on page 77)**

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■ Zoning

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tainties. In what districts would the bonus be available? Would it be mandatory or discretionary? Where and how could the lower income housing be provided, and who could reside in it? How much bonus floor area should be made available?

In each of these respects, the Commission took a decidedly conservative approach:

- The bonus would be available only in the highest density residential districts, primarily located in Manhattan, allowing a base FAR of 10, bonusable to 12 with inclusionary housing. It would not be available in any of the lower density districts located throughout the City.

- The use of the bonus would be strictly voluntary and not mandatory. If a developer chose not to utilize it, there would be no penalty or reduction in FAR. In fact, a developer could choose to provide a plaza bonus in lieu of inclusionary housing and still obtain the maximum 12 FAR.

- The use of the bonus would be as-of-right, i.e., without discretionary land use approvals, which would entail public and environmental review. However, the Commissioner of the Department of Housing Preservation and Development would have to approve a lower-income housing plan, subject to limited public review, to insure that it met the requirements of the zoning.

- The lower income housing generating the bonus had to be located either within the same community board as the development receiving the bonus or within a 1/2 mile radius of that development. This guaranteed a geographic “nexus” between the increased market-rate density produced by the bonus and the theoretical amelioration of that density through the provision of the lower income housing.

The lower income housing could be provided on-site or off-site, through new construction, substantial rehabilitation of existing buildings, or the preservation of a qualifying building (already populated by eligible persons) with moderate rehabilitation, at different bonus rates based on the relative costs of each. For example, on-site new construction generated a bonus of 3.7 square feet of floor area for each one square foot of lower income housing, while off-site new construction generated a bonus of 4.0 to 1. On-site substantial rehabilitation generated a bonus of 3.2 to 1, while off-site substantial rehabilitation generated a bonus of 3.7 to 1. Off-site preservation and moderate rehabilitation generated the lowest bonus of 2.0 to 1.

Income limits for persons residing in the inclusionary housing were fixed at HUD Section 8 lower income limits, equal to an adjusted gross income below 80% of the area median. In 1987, this meant \$23,600 for a family of four. And, where the bonused

housing was provided on-site, it had to be located in the same building as the market rate housing and distributed evenly throughout that building, to avoid a concentration of low income units.

In its report on the inclusionary housing text, the Commission recognized the importance of “socio-economic heterogeneity” to the well-being of the City and the need to make “every effort to reach that goal.” The Commission also stated that so many aspects of the program were new and untested, its effects on development unknown, and that a limited approach was justified until the effects could be assessed based on years of experience.

Hudson Yards adds housing provisions

The inclusionary housing provisions of the Zoning Resolution remained relatively unchanged until 2005, when the City Council approved a massive rezoning proposal for the far West Side of Manhattan intended to create 26 million square feet of office and 13.6 million square feet of residential development over a three to four decade period. The following changes to inclusionary housing were made applicable within portions of the Special Hudson Yards District (roughly 30th to 42nd Street, 8th Avenue to the Hudson River):

- Increase in percentage of bonus, from 20% (10 to 12 FAR) to 33% (9 to 12 FAR).

- Use of bonus in lower-density districts with base 6.5 FAR, bonusable to 9.0 with inclusionary housing, and 9.5 with a combination of inclusionary housing and cash contributions to a district infrastructure fund.

- Increase in permitted income limits of residents of inclusionary housing, to include 125 % (moderate income) and 175 % (middle income) of area median (for a family of four, currently \$78,500 and \$109,900, respectively). Low income was retained at 80% of area median (currently \$50,250 for a family of four). The proportions of each category that are required to yield a bonus are limited by formulas that require more affordable housing units as income categories increase.

- Permit additional forms of governmental housing assistance to be provided without disqualifying a project from inclusionary housing, including construction and financing subsidies. Previously, other governmental assistance was limited to real estate tax benefits specifically for low income housing and rental assistance for very low income units.

Thus, the Hudson Yards rezoning changed inclusionary housing in four key respects. First, it broke the barrier against using inclusionary housing only in the highest density residential districts with a base of 10 FAR. Second, it widened the eligibility requirements for tenants to include middle and moderate income. Third, it permitted use of other forms of government housing subsidies, without losing eligibility

for the inclusionary housing bonus. And fourth, while keeping the program discretionary, it lowered the base FAR in an attempt to induce the use of the bonus to regain (and exceed) lost FAR.

Greenpoint-Williamsburg goes further

The Greenpoint-Williamsburg rezoning in May 2005 followed close on the heels of the Hudson Yards rezoning. Under extreme pressure from the City Council and advocacy groups, it went even further than Hudson Yards in changing inclusionary housing and increasing the incentive to build affordable housing through utilizing the inclusionary housing bonus. While theoretically keeping the inclusionary housing bonus discretionary, it made a number of changes intended to have the effect of forcing developers, as a practical matter, to utilize this bonus.

The Greenpoint-Williamsburg rezoning divides the 184-block subject area, bounded generally by the East River, Williamsburg Bridge, Brooklyn-Queens Expressway, and McGuinness Boulevard, into two distinct geographic areas – the waterfront and the upland. Conceptually, the waterfront is designated for higher density, permitting construction of towers, while the upland is to be maintained at a lower scale.

- With respect to the upland, the base FAR in R6A districts was lowered from 3.0 to 2.7, and in R7A districts, from 4.0 to 3.45. These FAR's may be increased to 3.6 and 4.6 respectively, utilizing inclusionary housing at a ratio of one square foot of affordable housing for two square feet of bonus floor area. Tenant eligibility is limited to low income (80% of area mean). Permitted locations are on-site and off-site new construction or preservation, within the affected community board or within a 1/2 mile radius.

- With respect to the waterfront, the standard base FAR was reduced from 4.0 to 3.7, bonusable to 4.7. Tenant eligibility standards were expanded to include moderate income. In addition, for projects not utilizing the inclusionary housing bonus, permitted tower heights were reduced and, for projects providing on-site affordable housing, height limits were increased.

- The Administration and the Council agreed to support State action to limit as-of-right 421-a benefits (partial tax exemptions for multiple dwellings) on waterfront parcels, in order to encourage the use of inclusionary housing. In addition, any development built as-of-right at 3.7 FAR will be ineligible to purchase 421-a certificates. Further limitations on the use of 421-a certificates generated off-site and used on the waterfront are intended to be adopted by the City. By limiting the use of 421-a certificates, the City estimates that 90% of all waterfront inclusionary housing will be developed on-site, within the same buildings as the market-rate units.

Promoting affordable housing

We've come a long way with respect to inclusionary housing. From its beginning as a non-entity in the Zoning Resolution, to its limited use in the highest density residential districts, to the elaborate and complex regulations of the Hudson Yards and Greenpoint-Williamsburg, inclusionary housing is a social experiment in process on a fast track.

Legitimate questions arise as to whether, and to what extent, the Zoning Resolution is the appropriate mechanism, as the City Planning Commission put it in 1987, for achieving the goal of "socio-economic heterogeneity." The question is not whether this is an appropriate goal. Most New Yorkers would cite diversity as one of the primary reasons they live here and also recognize the importance of growth and upward mobility to maintaining the City's role as capital of the world.

In using zoning to promote affordable housing, however, the City is using one of the few resources readily available to it – the ability to create density, and thereby value, through rezoning. If rezoning creates value for developers, why shouldn't the City take a piece of that value back in the form of affordable housing? In this sense, the Zoning Resolution is like a printing press that can keep churning out FAR bonuses for socially desirable goals without a cost in immediate dollars to the City, although increased density always has costs in terms of infrastructure.

On the other hand, the City Planning Commission's initial caution reflects real concerns about this approach. For one, the more complex the Zoning Resolution becomes, the more inaccessible it becomes to most people and the more susceptible to interpretation and implementation by a handful of professionals, public officials and the courts. In addition, social goals change every few years, from the separation of industrial and residential uses, to public open space, to the forms of buildings ("towers-in-the-park" vs. contextual), to mass transit improvements, to waterfront access, to the preservation of theaters, and now to "affordable housing." This encourages more and more zoning regulations.

The worst-case scenario is that the myriad of rules and regulations designed to "encourage" affordable housing, which differ throughout the City, have the effect of discouraging development, which goes to places not quite so complicated or difficult.

According to City Planning, the R10 inclusionary housing program produced or preserved over 550 units of lower income housing since its enactment in 1987. This is a relatively small number. It is more important than ever that the City and housing groups monitor the program as it has been (and is being) changed to determine the effect of such changes and adjust the program accordingly. □

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