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Inclusionary Boroughs

When the City Council voted to enact a modified rezoning proposal for Williamsburg-Greenpoint on May 11, it effectively authorized a dramatic remaking of that section of Brooklyn. It also brought to a close an exhausting planning and political process that established new parameters for housing policy and land use practices in the city.

The rezoning of 184 Brooklyn blocks, from industrial to residential and mixed uses, came on the heels of a similar rezoning of the Hudson Yards area of Manhattan, completed in January. Only a decade ago, those actions would have been seen as provocative encroachments into the city's industrial heartland. But the relentless decline of the city's industrial sector muted that element of controversy, and the policy debate instead focused on the communities' demands for affordable housing and open space, and the extent of the private and public sectors' obligation to provide it.

The most significant policy change heralded by the Hudson Yards and Greenpoint-Williamsburg actions, and subsequently by a rezoning of West Chelsea, is the expansion and reinvigoration of the city's inclusionary housing program. Previously relegated to R10 districts, the program has jumped several zoning districts and a river, for the first time being applied outside of Manhattan and in districts as low as R6. Having crossed those thresholds, inclusionary zoning is now seen by government officials, planners, and advocates as a tool available to achieve affordable housing and community development goals elsewhere in the city.

In recent years, economic and political conditions coalesced to create a favorable environment for an expanded inclusionary housing effort. In November 2002, CHPC issued a white paper, *A Proposal to Enhance Tax and Zoning Incentives for New Housing Production*, which proposed an inclusionary zoning bonus for lower-density districts that could be used in conjunction with 421-a tax incentives to stimulate affordable housing production. The paper was motivated by the recognition that federal, state,

and city funds for traditional forms of housing subsidy were likely to be scarce for the foreseeable future. Although the recommendations were not immediately embraced by the Bloomberg administration, they stimulated a lively discussion among public officials, civic organizations, and professional associations.

As often happens with new policy initiatives, the political process ultimately absorbed some of CHPC's recommendations while altering or rejecting others. The net result is widely considered to represent a step forward for the city's efforts to create affordable housing and integrated communities. However, the highly customized manner in which inclusionary zoning was implemented may impede its broader application while furthering the city's drift toward "special district" zoning.

We Are Not Alone

As in New York, housing price inflation and federal program cutbacks have encouraged other cities to explore inclusionary zoning. San Francisco, San Diego, Boston, Los Angeles, and Denver are among the large cities that have adopted or expanded inclusionary housing programs in recent years. Smaller cities that have implemented inclusionary programs include Santa Fe, Sacramento, and Austin. They join suburban jurisdictions such as Montgomery County, Maryland and Fairfax County, Virginia, which pioneered inclusionary zoning techniques.

Cities that have adopted, or are actively considering, inclusionary programs are typically "hot markets" where housing prices have soared and development activity is robust. Caught between rising housing prices and declining federal funding for housing assistance, such jurisdictions have a strong motive to devise new means of producing affordable housing. With residential markets strong enough to support a degree of cross-subsidy within new developments, inclusionary zoning is seen as an attractive "off-budget"

technique. Cities that have been less successful in revitalizing their economies and in attracting new development have, in contrast, not jumped onto the inclusionary bandwagon.

There are as many variations on inclusionary zoning as there are jurisdictions that employ it. The nature of the set-aside requirements, the income groups targeted, the duration of the affordability restrictions, whether affordable units can be provided off site as well as on, and whether developers can make payments in lieu of providing the housing directly, are all important program variables. But the fundamental—and most contentious—distinction is whether the program is mandatory or voluntary. In mandatory programs, developers are required to set aside a portion of new developments for below-market sales or rentals, whereas voluntary programs rely upon zoning density bonuses or other incentives to induce developers to provide affordable units. Even that distinction can be blurred, however, in jurisdictions that do not have as-of-right zoning, or when the incentives are structured so as to leave developers no real choice.

In some cases, elements of a mandatory and voluntary program are combined. In Denver, for example, set-asides are mandatory for for-sale housing developments but are voluntary for rental projects. Furthermore, the city provides density increases, other regulatory relief, and even subsidies to help offset the cost of providing the affordable units.

The critical question in the mandatory-voluntary debate is whether mandatory set-asides suppress new housing development. None of the impact studies usually cited employed the type of rigorous statistical controls that would make their findings fully convincing. Urban land theory is equally ambiguous. It suggests that most of the cost of affordability mandates will be absorbed by landowners, but it does not follow that there would be no effect on new housing prices or production. If, for example, inclusionary mandates

reduce residual land values by a large amount, land owners may choose to use their sites for non-residential purposes or simply hold them for their speculative value. In that case, housing production could suffer and market prices could rise. In the absence of definitive empirical research, it seems prudent to assume that imposition of a mandatory set-aside would have some negative effect on market-rate housing construction.

In some large cities, concern about the potential impact on new construction—and real estate industry opposition—have stalled grass-roots pressure for inclusionary mandates. In Chicago, for example, Mayor Richard Daley has quietly stifled City Council legislation imposing set-aside requirements, while in Los Angeles, which already has a voluntary inclusionary housing program, neither Mayor Villaraigosa nor his predecessor have supported mandatory set-asides. It is not surprising that the jurisdictions that have adopted strict mandatory programs, such as San Francisco or the Town of Southold, New York, are those where voter concern about overdevelopment is already acute.

Although neighborhoods invariably resist greater zoning density, New York's broader political culture remains remarkably pro-development. That the city's perpetual housing crisis can only be solved by encouraging more housing supply is a view widely shared by housing advocates, the business community, government, and the press. As long as that viewpoint dominates political opinion in the city, it is difficult to see New York as fertile ground for a mandatory inclusionary zoning program.

Mixing in Manhattan

The Bloomberg administration invested a great deal of political capital and planning effort in creating a framework for the redevelopment of the Hudson Yards area. While plans for a multi-use stadium generated the most press attention, it was the zoning text passed by the City Council on January 19 that actually paved the way for redevelopment.

The new zoning text creates a Special Hudson Yards District that comprises a number of special subdistricts, each establishing a unique zoning environment. The zoning framework incorporates several significant innovations that reflect the city's need for infrastructure financing and the community's demand for mixed-income housing development. One establishes a form of impact fee financing, whereby developers can obtain additional floor area density by contributing \$100 per square foot to a District Improvement Fund (DIF), the proceeds of which will be used to finance an expansion of the No. 7 subway line, parks, and other infrastructure improvements in the area. Another is a customized inclusionary housing program, the first significant expansion of the program since 1987.

Citizens Housing and Planning Council

50 East 42nd Street, Suite 407, New York, NY 10017
Please call (212) 286-9211 for membership information.

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The inclusionary program pertains to some of the residential and mixed-use areas of the district. In those areas, the as-of-right building density can be increased, generally from 6.5 FAR to 12.0 FAR, through a combination of DIF contributions (or development rights transfers) and inclusionary zoning bonuses. The increased floor area can only be obtained in a constant proportion of five square feet from the DIF to six square feet from inclusionary bonuses. In effect, any use of the infrastructure bonus triggers the inclusionary bonus and obligations as well, and any use of the inclusionary provisions entails a commitment to the infrastructure program.

Aside from creating the linked infrastructure and inclusionary housing bonuses, the Hudson Yards program makes other significant departures from the city's earlier inclusionary housing policies. In the standard R10 program, a developer receives 3.7 additional square feet of building area for every square foot of affordable housing provided on site, and can do so in any feasible increments until 20 percent additional FAR is achieved. In the Hudson Yards program, any use of the inclusionary bonus (or, in effect, of the DIF bonus) triggers an inclusionary requirement equal to 10, 12.5, or 15 percent of the total residential floor area on the zoning lot, depending on the income groups targeted. This requirement thus provides a strong disincentive against partial use of the bonus.

Perhaps the most significant innovation in the Hudson Yards inclusionary program is the elimination of the "double-dipping" prohibition. Previously, inclusionary units that generated density bonuses were disallowed from receiving subsidy funds through federal, state, or city housing programs and could not be counted towards the 20 percent affordability set-aside required under the city's 421-a tax exemption program. CHPC had criticized the prohibition as inconsistent with modern techniques of affordable housing finance, which often utilizes multiple sources of subsidy. In relaxing the prohibition, the city is now seeking to encourage 80-20 inclusionary residential buildings.

The rezoning of West Chelsea, passed by the Council on June 23, also contains some novel inclusionary provisions. Inclusionary FAR bonuses are available to sites zoned C6-3 and C6-4, but generally only after those sites have received additional FAR transferred from sites in the High Line Transfer Corridor. Developers may also purchase additional FAR with contributions to a new West Chelsea Affordable Housing Fund.

Breakthrough in Brooklyn

Well before City Planning's Greenpoint-Williamsburg rezoning proposal had been finalized and issued, several groups,

including CHPC, had been anticipating that inclusionary housing would become a major issue there. Local interest in an inclusionary zoning approach was encouraged by the Pratt Institute Center for Community and Environmental Development, the Los Sures Community Development Company, The St. Nicholas Neighborhood Preservation Corporation, Community Board 1, and local churches. Underlying calls for a strong affordable housing component in the plan were community fears that gentrification of the area would be intensified by the rezoning.

At first DCP and HPD were reluctant to employ inclusionary zoning, preferring to address community demands for affordable housing through existing subsidy programs. Eventually, however, the agencies determined that a voluntary inclusionary zoning program would be a useful component of the rezoning and would help it gain Council approval. The city's inclusionary housing proposals for Greenpoint-Williamsburg were unveiled at a CHPC symposium in June 2004, and refined over the course of the next 10 months. Final alterations in the program were made in negotiations between the Administration and the Council, in which Assemblyman Vito Lopez reportedly played a pivotal role.

The zoning package eventually adopted actually has two inclusionary housing components. The first relates to the waterfront areas. The city's waterfront zoning regulations require a Waterfront Access Plan, which, in effect, create special zoning districts. Under the WAP, the major sites on the Brooklyn waterfront were initially zoned at an underlying density of 4.3 FAR, which was later lowered to 3.7 to make the inclusionary option more compelling. If the inclusionary housing requirements are met, the densities may rise to 4.7 FAR. In order to realize the greater density, developers must make either 20 percent of the units affordable to households at 80 percent of Area Median Income, or 25 percent affordable to households at 80 percent and 125 percent of AMI.

Because of the special nature of waterfront zoning, perhaps the more dramatic departure from past zoning practice is the inclusionary provisions for upland areas. Inclusionary bonuses are extended to upland districts designated as R6, R6A, R6B, R7A, and MX zones. Such zones are widely mapped in the boroughs and the extension of inclusionary density bonuses to them may serve as a precedent for the more extensive use of inclusionary zoning throughout the city. However, in order to make the inclusionary bonus more appealing, the underlying densities of the R6 and R6A zones were lowered from 3.0 FAR to 2.7, with a boost to 3.6 if developers provide affordable

housing. For R7A sites, the density was lowered from 4.0 FAR to 3.45, which can be increased up to 4.6 if the inclusionary requirements are met. The density bonuses are awarded at a ratio of 3 square feet of total building area for each foot of affordable housing provided.

With the market environment for condominium development currently much more favorable than that for rental housing development, a comprehensive inclusionary housing program will require a for-sale housing option. In order to expand the program to condominiums, however, a number of policy, administrative, and legal issues need to be settled. The Brooklyn inclusionary program circumvents those issues by allowing affordable rental units to be provided off-site or, in the case of large waterfront sites, to be built in separate buildings on the same site as market-rate condos.

Give and Take

In order to strengthen the Hudson Yards inclusionary program, CHPC and others recommended the expansion of the 421-a “exclusion zone” to the Far West Side, thereby requiring developers to provide 20 percent affordable units in order to obtain tax abatements. That was subsequently done by City Council action.

CHPC’s 2002 report also noted that there is already an 80/20 option in the 421-a law that extends the tax exemption period to 25 years in the outer boroughs. However, this 80/20 option has seldom been used because 15-year exemptions are available as-of-right. The CHPC report suggested that changes to the inclusionary housing program could allow it to work in tandem with 421-a, encouraging more 80-20 developments outside of Manhattan.

The 421-a issue took a new turn with the Greenpoint-Williamsburg rezoning, as the Administration and the City Council agreed to support state legislation, subsequently passed, to extend the 421-a exclusion zone to the large waterfront parcels there. That action is seen as strengthening the incentives for developers to choose the inclusionary option. Furthermore, the administration agreed to change the 421-a rules to limit the number of negotiable 421-a certificates that can be used on the Brooklyn waterfront sites.

The 421-a exclusion zone in core Manhattan was created in 1987. The expansion of the exclusion zone to the Hudson Yards area is not a dramatic departure from past policy, insofar as the very purpose of the rezoning is to integrate the Far West Side with the Manhattan core. The limitations on 421-a tax benefits in Brooklyn, however, represent the first time since the law was enacted in 1971 that benefits have been curtailed in the outer boroughs. Given that the housing market in the boroughs has changed dramatically since 1971, and that other areas have market conditions at least as favorable

as the Greenpoint-Williamsburg waterfront, the agreement portends a debate over as-of-right tax incentives for housing development in the city.

Roll Out

The inclusionary elements of the Hudson Yards, Greenpoint-Williamsburg, and West Chelsea rezonings represent a significant new direction in the city’s planning and affordable housing policies. New York, like other large cities, has decided to utilize inclusionary zoning both to leverage the strength of market demand to produce more affordable housing, and to ensure that new neighborhoods created by rezoning do not become exclusive, high-income enclaves. Both planning and housing experts have applauded this new direction.

The three inclusionary rezonings have established some important precedents for the future use of inclusionary zoning in the city. The program has now moved beyond Manhattan and its R10 districts. The prohibition against “double dipping” has been breached, setting the stage for a more creative blending of tax policies, subsidy programs, and zoning incentives. For the meantime, the mandatory versus voluntary issue has been settled, and the affordability requirements will remain permanent. In most of the rezoned areas, as-of-right tax exemption for new housing will be restricted in order to increase inclusionary incentives.

At the same time, by pressing for the maximum attainable inclusionary requirements, affordable housing advocates and sympathetic elected officials may have inadvertently established a neighborhood-by-neighborhood precedent for inclusionary zoning that will impede the adoption of a more widely-applicable inclusionary program. Furthermore, with the new inclusionary incentives and requirements benchmarked to conditions in some of the city’s most marketable neighborhoods, future applications of inclusionary zoning, especially in less affluent communities, may appear to be weak and even inequitable by comparison.

In a broader context, the political pressures that led to the recent zoning innovations have produced regulations that are complex and highly specific to particular neighborhoods. Development professionals have long advocated for greater simplicity and uniformity in the city’s zoning regulations; the new zoning text for the Hudson Yards, West Chelsea, and Greenpoint-Williamsburg is anything but. In their inclusionary housing programs—as well as in their urban design standards, public space requirements, and infrastructure financing provisions—the recent rezonings create highly customized districts that add to the intricacies of the zoning resolution. As the political process seeks to achieve more public objectives through zoning regulation, greater complexity may be the inevitable price. --*Frank Braconi*