

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR

July 7, 2014

Allison Prince, Esq.
Christine Roddy, Esq.
Goulston & Storrs
1999 K Street, NW- Suite 500
Washington, DC 20006



Re: Imposing Inclusionary Zoning Requirements on an Existing Residential Building

Dear Ms. Prince,

We met on April 11, 2014, to discuss the implications of imposing the inclusionary zoning program on an existing residential building. Typically, projects that include an addition that is greater than 50% of a building's existing gross floor area ("GFA") trigger the requirements of the inclusionary zoning ("IZ") program. You questioned whether this is true for surviving density in an existing residential building. I reviewed the materials you provided and I find that an addition to an existing residential building will not trigger the IZ requirements for the existing building. An addition to an existing building that is greater than 50% of the existing GFA will trigger the IZ requirements for only the addition. The existing residential building will neither trigger an affordable housing requirement nor will affordable units be required in the existing building. My rationale for my conclusion is detailed below.

Section 2602.1 of the Zoning Regulations states,

[T]he requirements and incentives of this chapter shall apply to developments that:

(a)...

(b) Have ten (10) or more dwelling units (including off-site inclusionary units); and

(c) Are either:

(1) New multiple-dwellings;

(2) New one-family dwellings, row dwellings, or flats constructed concurrently or in phases on contiguous lots or lots divided by an alley, if such lots were under common ownership at the time of construction; or

(3) An existing development described in subparagraph (i) or (ii) for which a new addition will increase the

gross floor area of the entire development by fifty percent (50%) or more.

Plain Language of Section 2602.1

The plain language of Section 2602.1 supports my conclusion that the inclusionary zoning requirements apply only to the addition where there is an existing residential building. Subparagraph (c)(3) notes that the IZ requirements apply to an “existing” “new” residential building. This seemingly conflicting language can be reconciled if read to say that IZ applies to newly-created residential units within an existing building. This application would capture buildings converted from office to residential use. In sum, IZ would apply to an existing building where residential units did not previously exist. This section does not, however, apply to existing residential building. Accordingly, any Addition¹ to a residential building would only apply to the addition and not to the existing building.

This interpretation is consistent where there are residential additions to non-residential buildings. For instance, a residential Addition to a commercial office building, a hotel or a dormitory would only trigger IZ for the addition. It would clearly not apply to the office building, hotel or dormitory. Similarly, an Addition to an existing residential building would only trigger IZ for the addition, not the existing building.

Consistent with other Sections of Zoning Regulations

To read Section 2602.1 any other way would be inconsistent with Section 2602.2, which recognizes that there is a time limit to applying IZ retroactively. Section 2602.2 imposes IZ on new residential units if more than 10 units are constructed over the span of two years. Under the logic of this section, a project that constructs 9 units on “lot 1” in “year 1” would not trigger IZ, nor would the neighboring project that constructs 9 additional units on “record lot 2” in “year 3.” It doesn’t follow that the same projects would trigger IZ for both buildings if the second building was built as an addition three years later rather than as a neighboring project. Similarly, given the time limit on retroactive application of IZ, it does not follow that an apartment building that has been in operation for over 50 years would trigger IZ by virtue of an addition. Such an interpretation would undermine any incentive for property owners to improve their property.

This is also consistent with our current interpretation of grandfathered conditions. For instance, a project with a non-compliant rear-yard cannot construct an addition that exacerbates the rear-yard nonconformity. Section 2001.3 does not suggest, however, that the existing non-conformity needs to be corrected and that a portion of the existing building needs to be razed in order to create a compliant rear yard. Applying this same analysis to IZ, the Addition must comply with IZ, but the existing building does not need to be reprogrammed to comply with IZ.

¹ “Addition” refers to those additions that exceed 50% of the existing GFA of a building and include at least 10 new residential units.

Consistency with other District Regulations

I understand that other laws and regulations, namely the Tenant Opportunity to Purchase Act (“TOPA”), would preclude applying IZ to existing units. It is my understanding that TOPA will not permit the displacement of existing tenants in order to establish affordable units in an existing building. It also precludes the recordation of a covenant against the property, which directly conflicts with IZ requirements. Even further, applying IZ to an existing building would violate TOPA because it would devalue the existing tenants’ potential property interests.

My interpretation, as set forth in this letter, comports with TOPA, whereas, any other interpretation would create a conflict with another District requirement, making implementation of the IZ requirements all but impossible.

Application of IZ to Only the Addition

Now that I have established that IZ only applies to an Addition where there is an existing building with a certificate of occupancy for residential use, I would like to clarify how the affordable housing requirement is calculated and how it is applied. Where an addition to an existing residential building exceeds 50% of the gross floor area of the existing building, IZ will apply only to the proposed addition. The affordable housing requirement will be the greater of 8% or 10% of the proposed residential density in the addition or 50% or 75% of the bonus density utilized.² The 20% bonus density provided in Section 2604, however, is calculated based on the entirety of the site, including the existing residential building. Basing the calculation of the bonus on the entire site will afford an opportunity to capture additional affordable units – the more bonus density used, the more affordable housing that is required. All units can be placed in the addition and still be found in compliance with Section 2605.6.

Please let me know if you would like to discuss this further; otherwise, I confirm my interpretation that the IZ requirements do not apply to existing residential buildings, even where there is an addition that exceeds 50% of the existing gross floor area of the building.

Sincerely, 
Matthew Le Grant
Zoning Administrator

cc: Art Rodgers, Office of Planning

File: Det Let re IZ on Existing Residential to Prince 7-7-14

² Whether 8% or 10%, or 50% or 75% is required depends on the zone district, as outlined in Sections 2603.1 and 2603.2.