

Boston MA: *Inclusionary Development Policy*

INTRODUCTION

Boston's inclusionary program, called the *Inclusionary Development Policy*, was established in early 2000 through an executive order of the mayor. Since then, it has been modified by subsequent executive orders in 2003, 2005, 2006 and 2007.

Before this time, the city had imposed inclusionary conditions on city-owned lands sold to private developers for residential development. This policy had notable successes, but the overall output was limited because it was applied only to relatively few developments.

The full inclusionary program was a response to the very high and rapidly rising house prices in the city, and a severe shortage of conventional funding to provide more affordable housing. A key trigger was the revelation that two high-profile luxury developments had been given major regulatory concessions but without providing any affordable housing. This led to a major public campaign, marshalling many non-profit organizations and affordable housing advocates, to change city policy. The mayor, who was and has been a strong champion of affordable housing, reacted quickly through the executive order.

The city has been active in many other ways in supporting affordable housing. Deserving particular note is its linkage program, passed in 1983, that parallels the inclusionary program by requiring commercial developments to contribute fees toward affordable housing as a condition of development approval.

The mayor established this program in the absence of any state legislation on inclusionary zoning. The program was considered permissible under the city's home rule status. There was also a precedent in the state; the program adopted in 1972 in Newton (a suburban community in the Boston metropolitan area) established the same fundamental approach used later in Boston.

The state in 2005, through legislation dealing with smart growth, adopted provisions that support a voluntary form of inclusionary zoning. Specifically, it authorized an incentive-based system for encouraging developers to provide 20% of the units in market-rate developments as affordable. This built upon a long-standing earlier system – its *Section 40B* permit process – that has provided an alternative and conducive way for developers to obtain development approval for these developments.

There are now dozens of jurisdictions in the state that use inclusionary zoning. Most were passed before this legislation, and most are voluntary.

The program is administered by the Boston Redevelopment Authority (BRA). This is a self-supporting and quasi-independent agency, established jointly by city and state legislation, and combining the powers and responsibilities of a housing, planning and economic development authority. Among other things, it can acquire (including by eminent domain), sell and lease land; issue revenue bonds to finance its projects; and provide financial assistance to its programs and projects – all without Council approval. It also has the approval authority over all projects requiring zoning relief, built on public lands or using public subsidies.

The city of Boston, which currently has a population of over 600,000 people, also serves as the central core for a wider metropolitan area of at least 4.4 million.

PROVISIONS

Subject Developments

The program applies to residential developments with 10 or more units in these two categories:

- those requiring zoning relief; and
- those financed by the city or one of its agencies, or developed on land owned by them.

These provisions nominally make it look like a mandatory program with limited application. The reality is something else. Because the city's zoning code is so out-of-date, virtually all residential developments need zoning relief of some nature. So, in effect, it is a mandatory program that affects virtually all developments above the size limit.

Housing Obligation

These developments are required to provide affordable housing equal to 15% of the market units. This rate is equivalent to 13.04% of the total units of the project, which is how the set-aside requirement is most commonly set. This figure was originally 10% (or 9.09%), but was increased in 2003.

Targeted Incomes

At least half of the affordable ownership units must be affordable to households earning at or below 80% of the local area median household income, and the remainder to households at or below 100%. In addition, the average of the prices must be affordable at least at 90%.

The rental units must be affordable at or below 70%.

Originally, the upper threshold for the ownership units was set at 120% (rather than 100%) and the average of 100%. Also, the same thresholds were used for the rental units.

The original thresholds were changed in 2006, when the income limits were temporarily changed from a yardstick based on the median income of the greater metropolitan area to one based on the city median. Non-profit groups and affordable housing advocates had lobbied for this change because the median income for the metropolitan area was significantly higher than that for the city alone, and so set income thresholds that were considered to be too high for the city.

BRA tried this approach for a year but returned to metropolitan figures for a variety of reasons. The city figures, which were based on a much smaller census sample, proved to be less reliable. This approach also caused confusion because the state and federal programs continued to use the metropolitan yardstick, and the affordable housing developers and financial institutions were accustomed to using the other figures. In making the change back, BRA did take the opportunity to lower some of the income thresholds.

Cost Offsets

The program does not explicitly provide any cost offsets, but it does allow developers to negotiate relief from all of the city's zoning provisions – such as, density, height, setback, and coverage – through the re-zoning process.

The most common and effective of these regulatory concessions is an increase in the permitted density. This has been provided in most, but not all, developments.

Over the last few years, due to very strong local housing market, BRA in some cases may have provided less than what might be considered the full cost offset. In these cases, the developers apparently are relying on the rising housing prices to cover the shortfall.

Compliance Alternatives

The original program was directed solely at providing inclusionary units on-site with the market units. While it did accept the payment of fees-in-lieu as an alternative, this was allowed only under narrow circumstances – namely, only when the developers could clearly demonstrate that building the units on-site would make their developments financially infeasible.

The current program since 2006, while still placing priority on on-site provision, allows somewhat more flexibility. It is now open to both the payment of fees-in-lieu and the construction of the affordable units off-site. BRA, while still retaining the discretion to approve these options or not, has approved them when they serve the city's housing policies and needs better than on-site construction. In both options, the developers must provide for the same number of affordable units as required on-site.

One of the reasons for this change is that the on-site construction previously had led to certain anomalies, such as the provision of affordable units in luxury projects having costly amenities and located downtown away from neighbourhood services.

The fees-in-lieu are determined in one of two ways. The developer must pay the higher of these two: \$200,000/unit, or half the difference between the market prices and affordable prices of the units. In effect, \$200,000/unit is the minimum charge. In the high-priced downtown area, the alternative has produced payments of \$500,000/unit or more.

The \$200,000 figure was based on the full subsidy that must be provided on average by BRA when creating an affordable unit. The figure was originally set at \$52,000/unit, based on the average city subsidy (not total subsidy) used to build an affordable unit at time. This rate was increased to \$97,000 in 2005 based upon the change in CPI.

These funds are used to subsidize other affordable housing projects and programs in Boston. Half of the funds is specifically reserved for areas where the affordable housing provision is below the citywide average.

Development Standards

The program requires the affordable units to be comparable in size and quality to the average of all market-rate units in the development.

There are no regulations regarding timing and distribution of the units.

Affordability Controls

All of the regulations for this program are developed by BRA staff, and then subject to the approval of the BRA board.

Legal Agreement

The affordability controls are enforced through covenants registered both on the title of the property and the mortgage. The developers must use a standard legal agreement developed by BRA. The legal agreement also gives BRA the first right of purchase whenever the inclusionary units are sold within the control period.

Registering the agreement on the mortgage is seen as providing two benefits. BRA is warned of any default, and can move to buy the unit in advance of foreclosure. Also, it is notified whenever the owners seek to re-mortgage, and can intervene to protect owners from predatory or over-extended lending.

Control Period

The affordability of the affordable units are controlled for 30 years, with a subsequent extension of 20 more years at the discretion of BRA, for an effective total of 50 years. This two-step approach was used to circumvent restrictions in state law.

During this time, the affordable units can be resold only to another corresponding eligible household or to BRA.

If the units are sold after 50 years, they can be sold on the open market and without any recovery of windfall.

Eligibility Criteria

To be eligible for the inclusionary units, the buyers must earn less than the permitted household income, and have assets of less than \$100,000.

The buyers are not required to have completed a homebuyer education course.

Through its lottery selection process, BRA gives preferences to various types (and combinations of those types) of households. Those preferences generally favour the following households in this order: those displaced by urban renewal, city residents and first-time homebuyers.

First-time homebuyers are defined as buyers that have never owned a residential property, but exceptions to this rule can be made for cases of extreme hardship.

Sales Process

In this program, the developers and the subsequent homeowners are responsible for finding suitable buyers and selling the unit. Their lawyers also are responsible for ensuring the conditions of the covenant are met and then passed forward.

BRA is involved in the sales mainly in determining the maximum sales price, in validating the eligibility of the potential buyers, and assisting in the lottery process used in the sales. BRA does not maintain a waiting list of pre-certified buyers, but it does maintain a list of applicants that have expressed interest in buying an affordable unit, and passes the names on to the sellers as appropriate.

The developers are required to pre-screen the buyers, collect the relevant documentation required by BRA and sell the units through a lottery. Once the actual buyers are identified through the lottery, the documentation is sent to BRA for checking and approval before the sales can be completed.

The homeowners when planning to sell their homes must notify BRA of their intentions, and for a limited period allow BRA to exercise its rights of purchase.

Initial Sales Price

The initial permitted selling prices, which are recalculated and reset every year, are based upon what is affordable at the targeted income threshold for the different household sizes. The calculations includes these factors:

- the prevailing interest rate as selected by BRA; and
- 33% of the household income being spent on housing payments, including mortgage, property taxes, mortgage insurance, and condominium fees (if relevant), but not utilities or home insurance.

Under state law, condo fees can be based on the price of the unit or its size. This allows BRA to use the affordable sales price as a way of setting lower condo fees for the inclusionary units.

Resale Price

The maximum permitted resale price for any unit is based upon its initial sales price increased at a standard rate of 5% per year. Allowance is also made for the capital improvements made by the owner, and the realtor and sales-related fees.

The 5% figure was selected because it was the average of the increase in residential property values in the city between 1970 and 2000.

If this permitted rate of increase ever allows the resale price to rise above what is affordable to the targeted incomes, BRA will consider three options: 1) purchasing the unit and selling at a lower affordable price, 2) allowing a higher income buyer for the unit; or 3) providing downpayment assistance to the eligible buyer to make the unit affordable.

Other Restrictions

The homeowners are not permitted to rent the inclusionary units, but BRA is open to considering special cases.

ADMINISTRATION

The Boston Redevelopment Authority is responsible for administering this program. This includes developing and revising the actual regulations within the broad framework established by the mayor's executive orders.

The program is administered by a staff of three under the direction of the Deputy Director of Housing. This figure does not include the lawyers that are involved at various times with enforcement, the book-keeping staff nor the development managers engaged with the developers.

BRA's principle on-going responsibilities are these:

- setting annually the maximum initial sale prices by unit size;
- determining case-by-case the maximum permitted resale price;
- validating the eligibility of the potential buyers;

- vetting the sales agreements and financing (and re-financing) arrangements.
- monitoring the occupancy of the units; and
- enforcing the regulations.

BRA has exercised, and only expects to exercise, its right of purchase only in certain extreme circumstances, such as these:

- when the seller is unable to sell the unit;
- when foreclosure is pending, and the unit's loss to the open market is likely;
- when the permitted resale price become too high for the targeted households;
and
- when the 30-year covenant on a unit is close to elapsing.

To facilitate the purchases, it has established a reserve fund supported by a part of the fees-in-lieu generated by the program.

When the city acquires a unit, it sells through a lottery. In the process, it can adjust the price of unit to an affordable level for the targeted income.

PRODUCTION

This program through the third quarter of 2009 has produced about 1200 inclusionary units. In the last few years, it has been producing about 150 units per year on average.

This output represents about 6% of the total number of units built during the same period in the city.

To mid-2008, the program had also generated \$19.5 million in fees-in-lieu. This represents roughly another 100 units.

OBSERVATIONS

The adoption of this program in 2000, followed by a similar one in San Francisco in 2002, represent important events in the spread of inclusionary zoning. These two are the first programs adopted by big cities. For over 25 years, inclusionary zoning had been a green-field phenomenon; it was associated mainly with fast-growing suburbs and smaller communities, but not in developed cities and downtowns. A number of other big cities have followed them, and still others are actively exploring the practices.

The program introduced two practices, not seen in the earlier green-field programs, but followed in some way by all of the later big-city programs. These two new practices involve using negotiations to determine the cost-offsets, and applying the affordable housing requirements through the re-zoning process.

Regarding the first, the city allows for negotiating the appropriate permitted density and other regulatory concession on a case-by-case basis, while firmly fixing the

affordable housing requirement. The earlier green-field programs typically fixed both sides of the equation – the housing requirement and the available concessions – and consequently do not provide for or depend on negotiation.

Regarding the second, the city applies its affordable housing requirement only on developments needing some zoning relief or otherwise receiving some benefit from the city. In contrast, the greenfield programs typically apply the requirement to all developments, including those proceeding as-of-right.

The success of Boston's approach depends on how much of the new development requires a re-zoning. Due to the city's archaic zoning system, virtually all new development needs some type of zoning relief. So, the program in effect captures all new development.

The enactment of the program through an executive order is a unique aspect of the Boston program. Similar programs in the US are adopted by local councils through lengthy zoning ordinances and associated regulations. Unlike many of these other provisions, the executive orders are notable for their brevity. More specifically, they have dealt with only three bedrock features: the affected developments, the set-aside requirement and the targeted income. The remaining requirements and regulations have been left for staff to prepare.

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