

New York NY: *Mandatory Inclusionary Housing*

INTRODUCTION

The city's new mandatory inclusionary program – called the *Mandatory Inclusionary Housing Program* (MIH) – was passed in March 2016. It is one part of the new mayor's multi-pronged housing plan, called "Housing New York", aimed at providing 80,000 new affordable units across the city by 2024.

This program will be applied to new developments in 15 designated neighborhoods across the city. It will be linked to other efforts in these particular neighborhoods that will include the public investment of \$1 billion for infrastructure improvements, and an overhaul of the out-of-date zoning code to allow for higher approved densities and remove unnecessary development barriers.

This new mandatory program supplements an existing voluntary program that will continue to operate in other areas. This voluntary program – called the *Inclusionary Housing Program* (IHP) – was adopted in 1987, and then extended in 2005 (see the Appendix).

The new mayor in the 2013 electoral campaign was critical of the less than satisfactory results of the voluntary program, and made mandatory inclusionary zoning one of the central features of his proposals to address the affordable housing crisis in the city.

PROVISIONS

Subject Developments

This inclusionary program will apply to new developments providing 10 or more new units in pre-zoned parts of 15 identified neighborhoods across the city.

The specific areas affected will be determined after a comprehensive planning study of each neighbourhood, followed by a statutory public review. Together this can take 1-2 years. Only part of these neighbourhoods are likely to be up-zoned and made subject to the affordable housing obligation.

The first re-zoning for East New York in Brooklyn has been completed. Others are in the pipeline. (The first re-zoning was completed so quickly because the planning study for the area was initiated when new mandatory provisions were still being considered.)

Spot re-zoning for specific developments outside the designated areas also can be initiated by developers, but the re-zoning must go through same process and will be subject to the mandatory rules – including the obligation to provide affordable housing according to the prescribed of options noted below.

Housing Obligation & Income Targets

The provision of the affordable housing will be mandatory. The production of affordable housing will be a condition of development approval when developers build in one of the subject areas.

Developers will be required to provide affordable housing according to one of four options. The options target different income groups. Those options with lower income thresholds demand fewer affordable housing units.

The option or options available to the developers will be selected by the city after the comprehensive re-zoning process. The intent is to relate the affordable housing obligation to the different local market conditions and needs.

These are the two primary options:

- 25% of the total residential floor area for affordable housing – 15% for incomes averaging 60% of the average median income (AMI), and 10% at 40% AMI; and/or
- 30% of the area for incomes averaging 80% AMI.

There are also two supplementary options:

- 20% of the area for incomes averaging 40% AMI (this is called the “deep affordability option”) and/or
- 30% of the area – 20% for incomes averaging 115% AMI, 5% at 70% AMI, and 5% at 90% AMI (this is called the “workforce option”).

At a minimum, the developers will be required to build to one of the two primary options. In some cases, they might be allowed to choose between one or other of the primary options. In still other cases, they might be allowed to choose between one or both of the primary options and one or both of the supplementary options.

These provisions set a maximum for the average of the incomes, and not a maximum for each unit. In the case of the workforce option specifically, none of the units can go to incomes over 135% AMI.

Compliance Alternatives

The affordable housing obligation can be met through new construction, preservation and/or rehabilitation of existing units.

Provision off-site is allowed, but another 5% of the units must be provided as affordable.

Developments with 11-25 units have the option to pay into a city affordable housing fund. These payments will be reserved for ten years for use in the same community district.

Cost Offsets

No specific cost offsets have been identified in this program.

The requirement to provide affordable housing will be tied to a pre-determined up-zoning – that is, a permitted density increase determined through a comprehensive planning study and public review process. Once established, the increased density will be available as-of-right when the affordable housing obligation is met.

No financial subsidies will be provided for meeting the mandated obligation. Subsidies might available in order to provide additional affordable units or make them more affordable. It is also possible that there could be financial assistance in cases of proven hardship.

Reduced parking requirements are the only regulatory concession offered, but this concession is not limited just to the inclusionary developments.

There are no automatic fee waivers but it is possible that some might be negotiated. In this case, the most likely possibility is a waiver of the city's mortgage recording tax which is quite high.

Development Standards

The affordable units can be limited to the bottom 65% of the residential floors in any mixed-income development. In other words, the top floors can be reserved for the premier market units.

The affordable units must have the same size as the equivalent market units.

Affordability Controls

The affordable housing must be kept permanently affordable through a restrictive covenant registered on the property. The registration on the property is seen to be more permanent than a registration on the building only.

The increase in resale price will be limited to the increase in the AMI for the relevant household size.

ADMINISTRATION

The administration of the program involves mainly two city departments:

- The Department of City Planning is responsible for special permits and re-zonings. This includes conducting the planning studies and public review process that sets the new zoning for the affected neighbourhoods. Through the City Planning Commission, the department also works to determine which option(s) will be applied in the mandatory program.
- The Department of Housing Preservation & Development administers the both the voluntary and mandatory programs. This includes confirming when a development is eligible to participate in the program, and then ensuring its compliance with the rules. It also provides subsidy loans for the development of affordable housing.

PRODUCTION

The city has projected that this program will produce 12,000 affordable units by 2024, or 1,500 units per year on average. This would represent roughly 7% of the total projected housing construction in the city over that time.

OBSERVATIONS

This program (like the voluntary one as well) is applied only in certain types of areas – namely, ones that are either potentially or currently facing substantial housing redevelopment pressure that would upset the existing income mix of these areas. Inclusionary programs are seen as a way of harnessing the energies of private development to provide new and much-needed housing, but also that provides affordable housing and maintains economically diverse neighbourhoods.

The program works on the principle that whenever development potential is unlocked by up-zoning, the developers who benefit from this public action should be required to include affordable housing in their residential developments.

As a consequence, great emphasis is placed on protecting the affordability of the affordable housing on a permanent basis. This is seen as crucial to ensuring that all of the economic benefits of new development do not fall eventually into the private hands, and that lower-income households are not driven out as economic conditions improve in these neighbourhoods.

This mandatory program is different than conventional inclusionary zoning programs in three notable ways:

- It is being applied only in certain designated growth neighbourhoods, rather than universally across the entire city. (And it will co-exist with the existing voluntary program in still other areas.)

- It is being linked to public infrastructure investments for improving parks, streets, schools and other community amenities in these areas. Notably, these monies are not to be used for financial subsidies for the affordable housing itself.
- It is also being tied to the reforms to the local zoning code that will set new as-of-right density limits in these areas, and remove existing development barriers.

The new program incorporates some significant changes to the city's earlier program. It turned from the use of voluntary contributions to mandatory obligations, stopped the reliance on financial subsidies to provide the affordable housing, and extended the range of income levels being served.

The changes were made to address deficiencies in the earlier voluntary program. They are particularly intended, not only to increase the amount of affordable housing being provided, but also to provide it in a wider range of areas.

It is also notable that the new program intends to boost output while removing subsidies. This reflects a growing conviction that these limited resources could be more effectively and appropriately spent in other ways, particularly as the developers could provide housing for the targetted incomes without getting both density increases and financial subsidies.

APPENDIX: Inclusionary Housing Program (IHP)

This voluntary inclusionary program was first established in 1987, and then extended in 2005. The first is now called the 'R10 Program', and the second the 'Designated Areas Program'. Changes to the rules for both programs were made in 2009.

The two IHP programs differ mainly in the areas where applied and in the density bonus offered (see below). The latter was developed to apply the same incentive-based approach to a wider set of areas. Both continue to operate independently of each other, and also the mandatory program.

In both cases, the areas have been zoned ahead of time to allow as-of-right development at a permitted base floor area ratio (FAR) when not providing affordable housing, or at a higher bonused FAR when providing the prescribed affordable housing.

PROVISIONS

Provisions specific to the R10 Program

This program applies to all of the city's highest density residential (R10) zones. These zones are found chiefly and widely in Manhattan, but elsewhere only in downtown Brooklyn and a small part of Long Island City.

In these areas, the base permitted density had been set at a FAR of 10, but this program allows new developments providing affordable housing to earn a bonus of 20%, increasing the permitted maximum FAR up 12.

Provisions specific to the Designated Areas Program

This program applies certain designated areas across the city that were zoned for medium- and high-density. All of these areas have experienced growth or are expected to grow in the near future.

These areas have base densities with FARs ranging from 2.2 to 9. The program generally provides a density bonus of 33% above the permitted FAR base. The exception is in two zones with a FAR of 2.2, where only a 10% bonus is allowed.

The rezoning to allow for increased density comes only after a comprehensive planning study and a statutory public review process. Only part of one of the originally designated areas will be up-zoned and subjected to the affordable housing requirements.

The rezonings under this program started in 2005 and continued through 2011. It is now applied in about two dozen areas ranging from individual blocks to corridors and large parts of the neighborhoods.

Provisions shared by both programs

To take advantage of the density bonus, the developments must provide affordable housing floor space at least equal to both of the following:

- 20% of the total new housing floor space; and
- the following percentage of the additional bonused floor space:
 - 80% whenever a subsidy is used;
 - 50% when no subsidy is used and the units are provided through preservation; and
 - 28.5% when no subsidy is used and the units are provided through new construction or substantial rehabilitation.

The latter provisions were added in 2009 as a way of promoting more affordable housing without the use of subsidies.

In addition to the density bonus, this program offers access to financial subsidies coming from various city, state and federal programs and including property-tax abatements, tax-exempt bonds, and low-income housing tax credits. The main city contribution is the form of tax abatements for periods of 5 to 25 years (with the possibility of an extension), depending upon the level of affordability and location.

Initially, in the R10 program developers were prohibited from using both a density bonus and tax abatement because the bonus was considered to provide an adequate benefit on its own. The designated areas program allowed both from the outset, and R10 was changed to be consistent in 2009.

The affordable units can be rental or ownership, and provided through new construction, preservation and/or substantial rehabilitation of existing housing. Both programs were opened to affordable ownership housing in 2009.

They can be provided either on-site, or off-site provided the other site is within the same district or within a 1/2 mile of the bonused development.

All floor area must be accommodated within the established height and setback provisions.

The affordable units must be affordable to households earning at or below 80% of AMI. In certain areas, some units may be set aside for higher income households, but only if a greater percentage is provided. No subsidies can be used for units above the 80% threshold.

All of the affordable units must be remain permanently affordable. Maintaining permanent affordability often has required setting aside a large capital reserve for future maintenance of the rental units.

OUTPUT

From their start to mid-2013, the two programs have produced about 4,500 affordable units. More specifically, the designated areas program delivered 2,770 units in 41 projects (or about 325/year on average), and the R-10 program 1,750 in 60 projects (or about 65/year).

For the period of 2005 to mid-2013, when both were operating, they produced a combined 3,540 units. During that time, approximately 220,000 new housing units (160,000 in buildings of 4 or more units) were constructed across the city. That means that the affordable housing produced by the two programs together represented 1½% of the total construction activity.

Most of the units were concentrated in just four neighbourhoods: Hudson Yards and West Chelsea in Manhattan's Westside, and Greenpoint and Williamsburg in Brooklyn. These four accounted for 75% of the affordable housing coming out of the designated areas program.

In Manhattan, nearly all of the units were produced on-site in new large buildings. In Brooklyn, about half were new on-site and about half off-site, with most of these through preservation of existing housing. The preservation typically involved partnering with non-profit organizations.

Little affordable housing was provided in the twenty or so other neighbourhoods included in the program. The output there amounted to less than 700 units, even though significant development had occurred in some of these places.

Nearly all of the affordable units relied on tax, grant and other financial incentives as well as the density bonuses. The main city contribution was in the form of tax abatements for the affordable rental properties.

The above output figures do not reflect the rent-regulated affordable units lost through demolition. One estimate puts the loss at 1,000 units.

ASSESSMENT

Overall, the two voluntary programs have not performed well, considering the need for affordable housing and the level of construction activity in the city. They produced relatively little affordable housing, and that was poorly distributed across the city.

The program works on the principle that whenever development potential is unlocked by up-zoning, the developers who benefit from this public action should be required to include affordable housing in their residential developments.

The program is seen as taking advantage of redevelopment pressures to provide much needed new housing, but in a way that enhances rather than upsets the existing income mix of the affected neighbourhoods.

As a consequence, great emphasis is placed on protecting the affordability of the affordable housing on a permanent basis. This is seen as crucial to ensuring that all of the economic benefits of new development do not fall eventually into the private hands, and that lower-income households are not driven out as economic conditions improve in these neighbourhoods.

The lack of production cannot be attributed to the lack of development activity. There was considerable development in many areas where there little or no affordable housing output. One of the prime reasons for the lack of production is that the large majority of the eligible developers chose not to participate in the program.

Another reason is the limited scope of the programs. The designated areas program in particular applies only within limited areas of certain neighbourhoods. So, relatively few developers were able to participate, and those that did only had to provide a small percentage of the floorspace for affordable housing.

The production came at a considerable cost to the public purse, as virtually all of the affordable provision received substantial financial subsidies. As noted earlier, there has been the growing conviction that these subsidies were not necessary to achieve

the targetted affordable housing, and the monies could be better spent in other forms of housing assistance.

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