

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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ZONING COMMISSION

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SPECIAL PUBLIC MEETING  
1200<sup>th</sup> MEETING SESSION (2<sup>nd</sup> OF 2006)

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THURSDAY

FEBRUARY 9, 2006

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The Special Public Meeting of the District of Columbia Zoning Commission convened in Room 220 South, 441 4<sup>th</sup> Street, N.W., Washington, D.C., 20001, pursuant to notice at 6:45 p.m., Carol J. Mitten, Chairperson, presiding.

ZONING COMMISSION MEMBERS PRESENT:

CAROL J. MITTEN	Chairperson
ANTHONY J. HOOD	Vice-Chairperson
GREGORY JEFFRIES	Commissioner
MICHAEL G. TURNBULL	Commissioner (AOC)
KEVIN HILDEBRAND	Commissioner

OFFICE OF ZONING STAFF PRESENT:

SHARON S. SCHELLIN	Acting Secretary
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OFFICE OF PLANNING STAFF PRESENT:

MAXINE BROWN-ROBERTS  
 STEVE COCHRAN  
 ELLEN McCARTHY, Interim Director  
 ARTHUR ROGERS  
 JENNIFER STEINGASSER

OFFICE OF THE ATTORNEY GENERAL PRESENT:

ALAN BERGSTEIN, ESQ.  
MARY NAGELHOUT, ESQ.

This transcript constitutes the minutes from the Special Public Meeting held on February 9, 2006.

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## P-R-O-C-E-E-D-I-N-G-S

(6:45 p.m.)

CHAIRPERSON MITTEN: Good evening, ladies and gentlemen. This is our -- I guess we're having our second special public meeting of the Zoning Commission of the District of Columbia for Thursday, February 9, 2006. My name is Carol Mitten and joining me are Vice-Chairman Anthony Hood and Commissioner Kevin Hildebrand is coming back for this special session, and Commissioners Greg Jeffries and John Parsons are here as well.

The item on the agenda for proposed Action is Case Number 04-33, which is our inclusionary zoning text, and if you recall, we had a meeting where we basically voted on the concepts that we wanted to see included and then they needed to be converted into text, which has been done, and now the text is before us and we need to vote on the text in order for it to be ready for advertisement. I believe, Ms. Schellin, are there copies of that available to folks? Is it on the table by the door? So if anybody would like to follow along with what we're looking at, there are copies on the table by the door. And I guess we'll just start right into it.

And I would like to thank the Office of the Attorney General, Mr. Bergstein, in particular, for taking on the task of converting this into text that we can vote on.

I had one opening question, which is, there doesn't

seem to be a Section 2602.

MR. BERGSTEIN: And it was a good section, too. I noticed that today and, if I could, there's one other error that I wanted to point out as I went through this for the one hundredth time, and that is, if you could look on Page 4, Line 22, it begins by saying, "Except as provided," and it says, "in 2601.2," and there is no "2601.2." It really should have been "2603.3," which is the provision that indicates those uses of structures which, for which the section is applicable to. So I did want to point that out. There are some other minor things that I caught, but that was the most egregious.

CHAIRPERSON MITTEN: Thank you.

VICE-CHAIRPERSON HOOD: So in correcting that, that would then be "2602.3?"

MR. BERGSTEIN: Essentially, I think for the purposes of this meeting, just use the sections as is and I'll just make the conversion later.

CHAIRPERSON MITTEN: Okay, great. So let's just take it one page at a time, if we could, and if no one has any suggestions -- and let's keep -- we can do just the regular editorial stuff off-line, so just anything that's substantive. Is there anything on Page 1?

(NO RESPONSE.)

CHAIRPERSON MITTEN: Is there anything on Page 2?

(NO RESPONSE.)

CHAIRPERSON MITTEN: Is there anything on Page 3?

(NO RESPONSE.)

COMMISSIONER JEFFRIES: Madam Chair, the only question I have is, you know, like at the top of Page 2, it says, "To produce affordable housing throughout the District of Columbia." It isn't really doing that throughout the entire District of Columbia, is it? I mean, we're not going to be in one or two? I mean, that might be we can do some drafting later, but it just doesn't seem fully accurate.

CHAIRPERSON MITTEN: I take your point. Although if you look at it in total, the letter "B," it says, "To leverage private development combined where appropriate with zoning density increases to produce affordable housing throughout the District of Columbia." I guess in that sense, you know, there's a quality about it that's inclusive and a quality about it that's selective at the same time.

Okay, Page 4?

(NO RESPONSE.)

CHAIRPERSON MITTEN: The one thing that I just would want to clarify is under 2603.1(b) -- first I would want to have it be (a), as it is, (b) as it is until you get to the semicolon and then it would be, "and (c) or either" just to make it a little bit easier to follow. I think there could be a letter "C" there instead of trying to cram all that into (b), since we're having a series.

Okay? Do you guys know what I mean? Okay, we have 2603.1(a), our map within the inclusionary zoning overlay, and then I edited out "District, and". "(b) have ten or more dwelling units

including off-site inclusionary zoning units; and (c) or either.” And then go into it. That’s all. Okay?

So now, here’s the substantive. Where it says, “have ten or more dwelling units and then it says including off-site inclusionary units,” I just want to make sure that’s what we intend because I — it’s the number of units — well, this is the thing, do you count the units before the bonus or not?

MR. BERGSTEIN: What this is trying to say, and it’s actually said twice here, is that if you’re a development, and the BZA has permitted another development to send its inclusionary obligation to you — so let’s say you have eight of those units and two market-rate units, you count the eight inclusionary units even though they’re not market-rate because you’ve taken on someone else’s obligation.

CHAIRPERSON MITTEN: I’m asking a different question.

MR. BERGSTEIN: Okay.

CHAIRPERSON MITTEN: But we can get there.

MR. BERGSTEIN: Okay.

CHAIRPERSON MITTEN: If you —

MR. BERGSTEIN: This is a threshold of whether or not you have to have a set-aside --

CHAIRPERSON MITTEN: Right.

MR. BERGSTEIN: And then bonus it all that flows from that. So the first question is how many dwelling units do you have, do

you propose to have in your plans? So let's say you propose to have 15. So, that's what that does, but then the reference to the -- including off-site inclusionary unit means if, of those 15, seven are off-site inclusionary units, they're still counted towards the threshold even though you are providing affordable units within the 15. Am I answering your question?

CHAIRPERSON MITTEN: Okay, yes. And I think what I had in my head, I worked through it without saying it out loud.

Okay, does anybody else have any questions about that?

COMMISSIONER JEFFRIES: Oh, not on that, but are we still on Page 4?

CHAIRPERSON MITTEN: Yes, we are.

COMMISSIONER JEFFRIES: Perhaps I have a question for Mr. Bergstein. So the Metropolitan Statistical Area Median, as certified by the Mayor, how does that jive with just the area medium income per HUD?

MR. BERGSTEIN: I don't know if I can answer the question, but the idea is that the Act will address that. The Act is going to specify because I can't -- you have left the pricing process out of this, so I've tried, with the help of OP, to create as much as we can and then leave it to the Act to provide a specificity, but to technically answer your question, I think you're going to have to turn to the Office of Planning because I relied upon that, them to produce

language.

CHAIRPERSON MITTEN: I guess, maybe just to get straight to it, is why didn't you use the phraseology "Area Median Income," which is what we've all been throwing around all the time?

COMMISSIONER JEFFRIES: I mean, I thought you were going in another direction. I was just --

MR. BERGSTEIN: I think I took the Petitioner's language in terms of -- I took their definitions of "low-income household" and "moderate-income household" and the only change I made was that I indicated that that would be as specified by the Mayor into the Act, but I used the Petitioner's language.

CHAIRPERSON MITTEN: Let's ask the Office of Planning. Do you see any distinction between this language and "Area Median Income?"

MR. ROGERS: No, when they refer to the area in "Area Median Income," that is referring to the Metropolitan Area, so this Actually is the full title, if you will.

CHAIRPERSON MITTEN: Okay.

COMMISSIONER JEFFRIES: So, it's the same thing. Okay.

MR. BERGSTEIN: It's the same thing.

COMMISSIONER JEFFRIES: Okay, good. That's all I wanted to know.

CHAIRPERSON MITTEN: Is there anything else on

Page 4?

COMMISSIONER PARSONS: Well, I wanted to talk about the Mayor on Line 7. Maybe this is standard language, Mr. Bergstein, but it seems pretty loosey-goosey. Who is able to re-delegate these things? I mean, can some division chief say, "This afternoon, I delegated this to Fred?" or is this a published delegation of authority that can be relied upon?

MR. BERGSTEIN: It will be published. What will happen is the -- when our office writes legislation for the Council, which is the only entity that can Actually create the rest of this program, we always write the Mayor in terms of who's supposed to do things. And then it's up to the Mayor to decide which agency is the best agency to accomplish or to implement.

COMMISSIONER PARSONS: Right.

MR. BERGSTEIN: And then, so the Mayor will publish a Mayor's Order, which will be published in the DC Register, and the Mayor will specify that pursuant to what and whatever, such and such is being authorized to implement the provisions of the Act. In terms of sub-delegations within the agency, I can't speak to that. But usually, there is a sub-delegation order or there might be a reorganization order. But up to the agency level, it will all be formalized and published in the DC Register.

COMMISSIONER PARSONS: So once it gets to the Director's level, they can't do that on an ad hoc basis whenever they

feel like it. They'd have to publish a subsequent order saying, "I, in turn, have re-delegated this to some area?"

MR. BERGSTEIN: Those aren't published.

COMMISSIONER PARSONS: Oh.

MR. BERGSTEIN: The Actual sub-delegations within agencies, but usually that's because agencies -- their Actual structure, their real hard structure, is within the reorganization Acts. So DDOT has about five different administrations and their Organization Act says here are the five administrations, here are their functions. What we're doing here is creating a responsibility that's not in anybody's Reorganization Act and so it's going to be up to the Mayor to designate the agency that he thinks is the best fit and that it's going to be up to the Director of that agency to determine which of the existing offices would be the best place for it to go.

COMMISSIONER PARSONS: I understand.

MR. BERGSTEIN: But that type of sub-delegation within an agency is not, to my knowledge, published, but it's also my experience that it doesn't tend to vary a lot. Once the responsibility lands in a part of an agency --

COMMISSIONER PARSONS: Okay.

MR. BERGSTEIN: -- then it merely -- it's all to the budget process. It stays pretty well put.

COMMISSIONER PARSONS: All right, thank you.

CHAIRPERSON MITTEN: All right. Page 5?

(NO RESPONSE.)

CHAIRPERSON MITTEN: Page 6?

I just wanted to clarify, because either I mis-remembered this or we need to make an adjustment, my recollection of this was -- and I'm looking at -- we have 2604.1 and we have 2604.2. So on the one hand, we have basically stick-built and we have one requirement and then we have steel and concrete construction and we have another requirement. And I thought that the 50/50, 50 percent low, 50 percent moderate, went with the stick-built, not with a particular zoning category, which is the way that this has been organized. 2604.3 doesn't pair up with 2604.1, which is, I thought, how we had done it.

COMMISSIONER JEFFRIES: Where?

CHAIRPERSON MITTEN: To my mind, they go in pairs. 2604.1, which is stick-built, is supposed to be paired with the 50/50, 2604.3. And that 2604.2, which is the concrete and steel frame, is supposed to be paired with 2604.4. But that's not the way they're written. Did I remember that wrong?

COMMISSIONER JEFFRIES: Well, I certainly remember that the 50 and 80 percent was tied to stick and then for steel and concrete, we were at 80 percent, I think. But your question is in terms of what you're trying to achieve in terms of the bonus density, tied to those two events?

CHAIRPERSON MITTEN: I just thought -- well, Mr. Rogers is wanting to help us ever so much.

MR. ROGERS: If I remember correctly, it generally went fairly closely with the Office of Planning's proposal, and the only time we had affected the distribution of the units between affordability levels was in mixed-use districts. So in the high-density residential districts, there was still going to be a split between 80 percent and 50 percent of AMI. It was only in the higher density mixed-use districts such as the C-2 and in C-2-B on up, and W-2 and W-3 that it would, that all the units would be just at 80 percent of AMI.

CHAIRPERSON MITTEN: So it wasn't broken down. It didn't break on what I thought it did, the building type?

MR. ROGERS: Not by the distribution of the units. Where the break was, between stick-built and steel and concrete, was the 75 percent of the bonus for stick-built and 50 percent of the bonus for steel and concrete.

CHAIRPERSON MITTEN: Okay, okay. So, Mr. Bergstein got it right and I mis-remembered.

Oh, right. Okay. All right. It's not nice getting old.

Anyone else on Page 6?

VICE-CHAIRPERSON HOOD: I just wanted to step back one point. I want to make sure I understand 2603.5. I let that one slide by.

CHAIRPERSON MITTEN: Oh, 2603.5, okay.

VICE-CHAIRPERSON HOOD: "An owner/occupant of an inclusionary unit may sell the unit to the Mayor at such price as the

Mayor may offer.” What does that mean?

CHAIRPERSON MITTEN: Mr. Bergstein’s going to tell us.

MR. BERGSTEIN: This was — began with a discussion that involved both the ability of the Mayor — and again, at the beginning, the way the text was written, it indicated the DC Housing Authority, and my preference is to say “Mayor” and then the Mayor can decide who’s going to be able to buy the stuff. So the first issue was should the Mayor, before a C of O is issued, be able to buy a certain number of units in a for sale development and you came up with, I think, 25 percent. Then the second question was the control period, and you decided that the control period would be for the existence of the building. So then you had a discussion about, well, should there be any circumstance in terms of this wealth acquisition notion that the owner of an affordable unit could be able to sell a unit at a price that was greater than the control pricing. And my notes show that what you came up with was the ability, in essence, for the owner to approach the Mayor and say, “I would really like to sell this to you. Would you purchase it at a greater price?” And that would give the Mayor the ability to offer deep affordability with respect to existing units as well and not just only when the unit is new. So this was the exception to the rule that for so long as the inclusionary development is in existence an owner must continue to sell to the next owner based upon the pricing schedule. This exception says if the Mayor is willing

to offer you a different price, a greater price, whatever that might be, you can accept that price and sell it on that basis.

COMMISSIONER PARSONS: I don't know where you're going with this, but it seems like it could be arbitrary and that's not the intent.

MR. BERGSTEIN: Right.

COMMISSIONER PARSONS: You don't want to put "fair-market value" in there, but should be put in some qualifier? It sounds like you could offer them a dollar and say, "Take it or leave it." Well, that's not the intent.

MR. BERGSTEIN: Well, that's not --

CHAIRPERSON MITTEN: Right.

MR. BERGSTEIN: I could say, "at a price greater than" what's specified in the pricing schedule, but then it could be a dollar more. But you really, you can set -- but it has to be at least ten percent, twenty percent. I mean, you could figure out where that continuum might lie between a dollar more than the pricing schedule and market-rate.

CHAIRPERSON MITTEN: Why not just say "at least as high as the pricing schedule?"

MR. BERGSTEIN: Well, that's what I was going to say. You know, I don't know why anybody would sell for less than that, but I could say at a price greater than -- in other words, that you could sell -- the owner could sell the inclusionary unit at a price greater than the

pricing schedule if offered by the Mayor, or something like that.

COMMISSIONER PARSONS: There you go. That works.

MR. BERGSTEIN: Okay.

CHAIRPERSON MITTEN: Okay, back on 6. Anyone on 6?

Mr. Hood?

VICE-CHAIRPERSON HOOD: Madam Chair, I'm not sure if this is the appropriate time, but I know that we had -- earlier, we had exempted PUDs. I don't know if this is the appropriate time, but I'm going to bring it up at this point before we get into the development standards. First, I'm trying to remember exactly why we exempted PUDs from the IZ. If somebody could help me with that, help me refresh my memory?

COMMISSIONER JEFFRIES: Well, I was opposed to PUDs being part of IZ mainly because I felt that the PUD and the proffers that are offered by developers really help sort of forward a lot of the initiatives of the District, public amenities and so forth. Most of the PUDs, nearly all the ones that I've seen have always proffered affordable units and I just -- and I felt that we did not necessarily have to really sort of disturb the beauty of the PUD with the IZ, given that there are other proffers that we are availed through the PUD program. So, from what I've seen, I mean I've seen some very catalytic developments that have really forward a number of the initiatives of

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the District and I just don't see the need that we should put an additional layer of regulation onto the PUD for IZ. I'm just wondering — that was just my comment. I didn't think others had comments.

CHAIRPERSON MITTEN: I'm trying to resurrect this, but I think I — there was something that we did discuss. You know, we're not — we haven't decided where to map this yet. And I think part of the discussion was that we could take it up when we mapped it as it related to different areas, but I think there was at least one school of thought that was advocating for having this apply to PUDs across-the-board without it being mapped. Do you know what I'm saying?

VICE-CHAIRPERSON HOOD: Without it being mapped?

CHAIRPERSON MITTEN: Before, you know, that it would be all PUDs that included ten units or more, regardless of where we decided to map it, or if we decided to map it. And I think that was another part of the concern, was compelling density in a — because that's what you would be doing in areas where we really haven't — because we haven't mapped it yet, we haven't fully confronted, whether that's something that we want to compel in all those different locations.

VICE-CHAIRPERSON HOOD: No. Under the PUD that's being proffered now because that's the thing to do in affordable housing. I'm just wondering if we may want to re-think that or re-look at that and maybe, maybe I'm just not clear on it. Maybe we want to put this in the IZ or at least make it clear that we may want to include a

PUD and make it clear that we potentially at least give the Applicant some flexibility in that we encourage affordable units or affordable housing under a PUD and include the PUD in the IZ. I don't know, we might want to re-think that.

COMMISSIONER JEFFRIES: So, Vice-Chair, are you saying that it's possible that, you know, within the regulations that discuss the PUD that Chapter -- was it 24?

CHAIRPERSON MITTEN: Yeah, 24.

COMMISSIONER JEFFRIES: Yeah, that we might include language within that chapter to talk about a certain affordable housing proffer?

VICE-CHAIRPERSON HOOD: I would think so, but I want to make sure I understand exactly why we excluded PUDs and, from what I'm hearing, we might want to re-think that.

COMMISSIONER JEFFRIES: Well, the "we" doesn't include me.

VICE-CHAIRPERSON HOOD: Okay. I'm just saying, I'm just putting that out there. I'm not saying we have to. I'm just saying we might want to. I'm speaking for myself.

COMMISSIONER PARSONS: Yeah, I come down on the side of eliminating or not including PUDs, and I was persuaded, I think it was either Ms. McCarthy or Ms. Steingasser who was talking to us about the success they've had in bringing PUDs to us, and we're aware of that, with this taken care of. And to somehow -- I'm being

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redundant, but to put out a call to all PUDs that even though we haven't mapped this, you will be penalized or you will be incentivized to do this just didn't make sense to me. So I would not be in favor of including them either.

VICE-CHAIRPERSON HOOD: All you need is one more and then I'll forget about it.

COMMISSIONER HILDEBRAND: I guess my question would be this. Once the IZ policy is mapped and you have created this inclusionary zoning district, would an owner of property within that district who decides to proffer a PUD fall under IZ policy? It seems to me the answer would be yes because he's in the IZ district. So certain PUDs will be under the IZ policy and others in other districts won't be. But the PUD still gives you the mechanism to get affordable housing in those areas where the inclusionary zoning is not mandated. Is that -- am I --

CHAIRPERSON MITTEN: No, you're right. I think you're right. Let me just toss this out there for people to think about because I'm uncomfortable with just making a blanket requirement because we haven't mapped it. And I think that's what we said, that until we look at the map, we'll decide what we want to do with PUDs in that particular area. But what if we were to say that in the event -- and this would be a modification of 24 and not part of this, Chapter 24, is that in the event that an applicant avails themselves of additional density under the PUD guidelines, in -- for a project that will contain ten or

more units, so they're already -- we're not compelling them to do it. They are doing it. We're saying if you're going to do that, then you have an affordable housing requirement, which is what the Office of Planning has been encouraging. This would sort of solidify the policy as the policy of the Zoning Commission. So we're not forcing people to do it, we're just saying if you're going to go after the bonus, then you're going to do what we're trying to do here, which is -- it's the other direction. Here, in IZ, we're saying, we're imposing a requirement and we're offsetting it with a bonus. We're just saying if you're going to get the bonus, you're going to give us what, you know, what we expect.

COMMISSIONER HILDEBRAND: My only concern with that is that we're setting up the IZ policy to be in perpetuity as long as the building exists and currently, the PUD process allows the developer to establish what the affordability period is. It will be affordable for "X" number of years. And I think one of the statements that kept coming up in the hearing was that the inclusionary zoning policy was one of a kit of parts of affordable housing. And to have a policy that creates permanent affordable housing, I think, is wonderful, but I think to encourage developers to also proffer affordable housing that is there for a fixed period of time is not a bad element either because I think developers in areas where there aren't IZ policies will be more likely to proffer affordable housing if it's for a fixed period of time instead of in perpetuity.

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CHAIRPERSON MITTEN: I hear what you're saying. I think that from the economics of the developer, the control periods that have been suggested are of 20 years. The developer, the up-front developer, is basically indifferent from an economic standpoint. So, I don't -- I think it's more from a social policy standpoint that it might be desirable, not that developers are going to have different behavior because of it.

VICE-CHAIRPERSON HOOD: Let me just say this and, Commissioner Hildebrand just alluded to something that maybe I missed or maybe wasn't thinking of, and I know we haven't gotten there, but when we do map this, some applicants who fall up under that PUD, that area where it's mapped, into a PUD are going to be inclined or have to fall upon the IZ guidelines, and those outside that are not mapped won't. I just see a problem. I may be wrong or maybe I don't understand it, but I just see a problem. And I know we haven't gotten to the mapping, but I just see an issue and I think we need to re-look at this, and I know my colleagues don't agree with it, but I can tell you, to me, it just -- from the standpoint from where I'm looking, it doesn't seem fair. I don't know, it just doesn't seem fair.

COMMISSIONER JEFFRIES: But, and I'm having some difficulty, and I know we haven't gotten to mapping yet, but, you know, clearly this IZ is going to be sort of in the high-population, high-density areas, near transit or near metro stations and so forth, and so those are typically -- not always -- the cases where the PUDs would show

up anyway. So, you know, -- and then my second issue is I'm just concerned about all the other proffers that we normally would see in a PUD. I mean, are we going to see an onslaught of developers just, once again, proffering their affordable housing and then all the other things that come along, you know, might fall to the wayside. I don't know.

Madam Chair, I'm willing to sort of step back from this for a minute and wait for the mapping, but I feel very strongly that -- I mean unless I hear something that's more compelling, you know, I just find the PUD to be a very useful tool for the District and I think it has moved many of their initiatives forward and, you know, to add one more thing onto it, I think, just becomes somewhat burdensome.

CHAIRPERSON MITTEN: Well, if I could, maybe just summarize where I think we are, which is -- and I'm speaking consensus-wise, not individually -- that at the moment, we are unwilling to make a blanket requirement sort of pre-mapping, that we would address the issue of requiring PUDs to fall under the inclusionary zoning rules, but once we get to mapping, we will revisit the issue as we map the overlay. Is that a fair representation?

COMMISSIONER JEFFRIES: Very good.

CHAIRPERSON MITTEN: Okay, okay. Thank you.

MR. BERGSTEIN: I need some clarification. Are you then saying that -- right now, there is a requirement that says that if you meet all the other things and you're mapped in IZ, then you have

to comply and one of the exceptions is planned unit developments. Are you saying that later you're going to entertain, as part of the mapping, taking out that requirement, because at this point, no matter what you do, they're exempted. If you take this language out, then when you map it you would decide on a case-by-case basis whether or not PUDs within particular boundaries of the overlay would be mapped or not. But the way -- would be subject to it, but the way this is written now, because you have a text that says in all circumstances PUDs are exempt even if the property is located within the IZ district, that's the way it's going to be unless you build in some conditional language later. I just want to understand.

CHAIRPERSON MITTEN: Let me ask you, just from, you know, building, the Zoning Ordinance perspective, what's the better approach? What would be more clear for people, for us to remove this now and add it back, add back an exclusion if, in the event we decided that, or --

MR. BERGSTEIN: Well, I guess I'd be curious how you would, as part of the mapping, indicate that within -- would you do it by squares and lots that say, you know, the following are the squares that are in the IZ overlay, but for which PUDs are exempted, and the following are the squares for which PUDs aren't exempted? I mean, is that how you would accomplish it in terms of the mapping process?

CHAIRPERSON MITTEN: Well, the way I would see it is that we would, for a given overlay district, we would -- they'd either be

exempted or not. We wouldn't piecemeal it to the degree that you said. It's either an area where we would want to compel that or not.

MR. BERGSTEIN: So you envision the IZ as being like the Neighborhood Commercial Overlays, so that you would create certain distinct overlays within the IZ overlay and within each overlay you have distinct sets of rules such as where PUDs apply?

CHAIRPERSON MITTEN: Well, potentially -- I mean, it's hard to answer that question without having done it yet, you know.

MR. BERGSTEIN: But my --

CHAIRPERSON MITTEN: Let Mr. Hildebrand just jump in here.

COMMISSIONER HILDEBRAND: My question is where is the blanket exemption in the IZ policy for PUDs?

MR. BERGSTEIN: It's on Page 5, 2603.3.

PARTICIPANT: Line 19.

MR. BERGSTEIN: No, actually 16. Well, Line 19 is where it calls it out, but basically everything before it says, "if you're mapped within the IZ overlay, if you have ten or more units, you fall within this class of development, the requirements apply." 2603.3(c) says, even if all those things are true, if you are a dormitory, if you are a rooming house, et cetera, it does not apply and that's where unexpired and approved PUDs are mentioned. So it's a blanket exception for all PUDs within the IZ overlay. If a PUD is not in the IZ overlay, it doesn't apply anyway because the other criteria are not

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met.

COMMISSIONER HILDEBRAND: I guess when I had read that, I assumed it was talking about existing PUDs, not PUDs from this point forward.

MR. BERGSTEIN: No, because PUDs are all grand fathered anyway. If you have an existing PUD, it's subject to the zoning as it existed. This concerns all new motels, hotels, dormitories, and new PUDs as well. And you're right, Madam Chair, the way this started was the petition actually called for PUDs everywhere to be subject to the requirement and you decided in the first instance that that would not be the case. You would only want PUDs within the mapped areas and then you decided to exclude those as well. So that's what this does.

CHAIRPERSON MITTEN: Yes.

COMMISSIONER HILDEBRAND: So if you think there's a real probability that you would want to have PUDs made subject to inclusionary requirements if they are within the overlay, then I would suggest you take this out for now and then deal with that issue later. It won't have any impact until we actually start mapping.

CHAIRPERSON MITTEN: Right. Okay. Okay, I could see doing that. So 2603.3 will read, in part, "Single room occupancy, developments, and developments in R-1, R-2 and C-4 zoned districts."?

VICE-CHAIRPERSON HOOD: I will tell you, Madam

Chair, that I guess we can wait until we map it to revisit that, and I'm hoping we revisit the whole issue because obviously, at least from my standpoint, I was very unclear exactly how that was being moved. But we'll hopefully deal with that at a later time.

CHAIRPERSON MITTEN: Okay.

COMMISSIONER JEFFRIES: And I hope that I'm with the majority on this one.

VICE-CHAIRPERSON HOOD: Sometimes you've got to stand alone.

COMMISSIONER JEFFRIES: Yeah, and I might stand alone on this one.

CHAIRPERSON MITTEN: Oh, you won't be standing alone tonight.

Okay, is there anything else on 6 before we move on?

(NO RESPONSE.)

CHAIRPERSON MITTEN: Okay, Page 7?

(NO RESPONSE.)

CHAIRPERSON MITTEN: Page 8?

COMMISSIONER JEFFRIES: Page 8, at the bottom, 2606.9, Line 27. It says, "All inclusionary units shall be reasonably disbursed?"

CHAIRPERSON MITTEN: Yes.

COMMISSIONER JEFFRIES: Mr. Bergstein?

MR. BERGSTEIN: That was the Petitioner's language

and I was fairly happy with it. Unless you're going to go into mathematical formulas, I think that the understanding is fairly clear that there has to be a sort of random non-concentration of inclusionary units. And I think the language does that. And I really can't suggest anything more specific than that unless you come up with some sort of formula by flaw or by type or whatever.

COMMISSIONER JEFFRIES: It's just, you know, I'm remembering in my days when I wrote -- I used to underwrite loans, that word "reasonably" always got, I always sort of got nervous around it. So, it sort of left a huge gray zone, but that's fine.

MR. BERGSTEIN: I actually have no problem myself in taking out that "reasonable." We always used to trade "reasonables" when we negotiate. But if you want it to read that they'll be disbursed -- I think "reasonable" implies that there might be some circumstances where that may not be able to occur and I think that's the intent of that degree of flexibility.

COMMISSIONER JEFFRIES: That's fine.

CHAIRPERSON MITTEN: At the risk of showing how bad my memory is again, I'm going to ask a question about 2606.4. I thought that what we were driving at with the discussion was that whatever type of units there were disbursed, or the kinds of units, they would be in proportion within the development, not exclusively efficiency and one-bedroom, but whatever unit type. Is that your general understanding?

COMMISSIONER JEFFRIES: Yeah.

CHAIRPERSON MITTEN: Okay.

COMMISSIONER JEFFRIES: So that shouldn't --

CHAIRPERSON MITTEN: Mr. Bergstein, do you follow what I'm saying?

MR. BERGSTEIN: Right. So in other words, in essence, whatever are the general types of market-rate units --

CHAIRPERSON MITTEN: Yes.

MR. BERGSTEIN: -- it should be the same proportionality?

CHAIRPERSON MITTEN: Yes.

MR. BERGSTEIN: That's fine.

CHAIRPERSON MITTEN: Okay, anyone else on Page 8?

COMMISSIONER PARSONS: I wanted to talk about 2606.7, which says, "All inclusionary units shall have the same gross floor area." And then I want to jump to Page 10, 2608.2(f). This deals with a different circumstance, but here, we're not providing the same gross floor areas as comparable, but "comparable." I wondered what the term "comparable" meant here. It seems like a lot of room for wiggle. Maybe I brought this up too early, but I wanted to compare the two statements.

CHAIRPERSON MITTEN: No, I think you're --

COMMISSIONER PARSONS: Obviously, in the same

building, it should be the same gross floor area.

MR. BERGSTEIN: I'm glad you brought that up, Mr. Parsons, because actually, as I was reading it, I believe what they're talking about there is, again, we're talking about -- this is off-site compliance.

CHAIRPERSON MITTEN: There on Page 10.

MR. BERGSTEIN: And I believe they're talking about, and I may be wrong, but I was actually going to add in, in Line 28, to say, "being created in their place." In other words, we're talking about not comparing units within the same building, but comparing units between the off-site development and the on-site development.

COMMISSIONER PARSONS: Correct, and I agree with that. But I'm just worried about how we begin to define the word "comparable" later, as it comes along to us.

MR. BERGSTEIN: Well, the other option is to say that it shall be of the same size and type as the market-rate units. And I just don't know whether or not, when you're dealing with an off-site development that may have been -- again, it's supposed to be owned by the same entity.

COMMISSIONER PARSONS: Right.

MR. BERGSTEIN: But the extent to which you can really always get that, as opposed to ask for a "comparability" standard, which is what's here.

CHAIRPERSON MITTEN: I think it would be better --

the distinction I see is in 2606.7, it says, "the same gross floor area," which means identical, as opposed to "comparable," which is sort of in the ball park.

COMMISSIONER PARSONS: Right.

CHAIRPERSON MITTEN: So I think we should define what we mean by "comparability" like plus or minus something.

COMMISSIONER PARSONS: Yes, thank you.

CHAIRPERSON MITTEN: So, what's the plus or minus?

COMMISSIONER JEFFRIES: Wait a minute. So you want to actually put "plus or minus?"

CHAIRPERSON MITTEN: No, I want to define what "comparable" is --

COMMISSIONER JEFFRIES: Oh, oh.

CHAIRPERSON MITTEN: -- for this section.

COMMISSIONER PARSONS: You know, I don't think it ought to be more than two or three percent.

CHAIRPERSON MITTEN: I was thinking five myself.

COMMISSIONER PARSONS: All right, I'll do the five.

CHAIRPERSON MITTEN: Okay. Can we define --

COMMISSIONER PARSONS: Going once.

CHAIRPERSON MITTEN: Going once.

(LAUGHTER.)

CHAIRPERSON MITTEN: Can we define "comparable" then in the --

COMMISSIONER JEFFRIES: Wait, wait. The problem, Madam Chair, is that you want to get -- you want to be able to define what "comparable" means.

CHAIRPERSON MITTEN: Right, so that it's not -- so that later people will not think ill of us for leaving them adrift without telling them what we were thinking.

COMMISSIONER JEFFRIES: So if I had a one-bedroom, a market-rate, one-bedroom for 700 and then I had a low-mod unit for 650, that's not necessarily comparable to you?

CHAIRPERSON MITTEN: Right.

COMMISSIONER JEFFRIES: You just -- okay.

CHAIRPERSON MITTEN: We want the close, but they don't need to be identical.

COMMISSIONER PARSONS: So we're going with five?

CHAIRPERSON MITTEN: Plus or minus five. So in 2606.7, you'll have to deal with the semantics of replacing the word "same" with "comparable" but not sounding -- you don't want it to say an inclusionary unit shall have comparable floor, gross floor area as the comparable market-rate unit. But I'm confident that you can deal with that, or if I had more time to think about it ---

COMMISSIONER PARSONS: Absolutely.

CHAIRPERSON MITTEN: Okay, anyone else on Page 8?

(NO RESPONSE.)

CHAIRPERSON MITTEN: Page 9?

COMMISSIONER PARSONS: Well, here we come with words that we struggled with for a long time, and now it comes down to 2608.1, Line 3, "Upon a showing that," --

CHAIRPERSON MITTEN: Yes.

COMMISSIONER PARSONS: "Upon a showing that." And we haven't quantified it, and I'm not sure we can, but I just thought we ought to talk about it a minute.

CHAIRPERSON MITTEN: I think so, too.

COMMISSIONER PARSONS: I mean, we went through all kinds of words in previous drafts as to what it would -- what then would be the "showing," what appraisals, market search, whatever, and I think Mr. Bergstein came down with a word here, but we're passing this on to -- of course, I'll still be here, but maybe some of you will be gone.

(LAUGHTER.)

COMMISSIONER PARSONS: Others to say, "Is that a "showing?" And I have no solution, but I just wanted to throw that open.

CHAIRPERSON MITTEN: No, I think you're right. And, you know, we talked about this because this is something -- we've thrown this burden onto the BZA before and what some people do, what some applicants do is they make a statement that, "I've an economic hardship," and merely the making of the statement has

become enough upon which to base it. So, clearly that's not what I would want to see. So I don't know, as meeting the test for making a showing.

COMMISSIONER PARSONS: So, would we just like financial statements and performance? I'm kidding.

CHAIRPERSON MITTEN: Yeah, I know, but I think we should say something more. How about something like this? Something like, "Upon a showing that includes specific economic analysis," which means numbers have to be on a page, at a minimum, as opposed to making an abstract statement?

COMMISSIONER PARSONS: I think we're getting there.

COMMISSIONER: Don't we get that now?

CHAIRPERSON MITTEN: No.

COMMISSIONER JEFFRIES: And again, Madam Chair, I remember you and I went back and forth on this because I think I talked about the slippery slope, you know, and now we're putting numbers that, you know, we can start to sort of debate with. I wish there was some other way that we can do this. You're saying "economic analysis." What type of economic analysis? Just in terms that, showing sort of the delta between if they were to do this, how they would be impacted versus?

CHAIRPERSON MITTEN: Well, the reason that -- I'm trying to come up with something that is not dictating down to giving

an applicant about how they should present their case to the BZA, but what I'm trying to avoid -- and you and I were taking sort of the two extremes of the slippery slope, which is you were suggesting that we shouldn't have people having to submit appraisals and financial statements and all of that, and I said, well, but I've witnessed the other extreme where there is no analysis at all; it's merely the making of a statement. So by saying that you have to show something specific, that means, as I just said, that somebody has to put numbers on a page, at least, that it's not words on a page, it's numbers on a page. And then people can begin to have, you know, a more robust discussion about economic feasibility.

COMMISSIONER JEFFRIES: So in terms of an analysis, I mean, are you going to delineate that down as it relates to what you'd like to see in the analysis?

CHAIRPERSON MITTEN: No, this is my --

COMMISSIONER JEFFRIES: So you would just leave it?

CHAIRPERSON MITTEN: This is my attempt at being -- adding a little bit more language, but not trying to dictate exactly what people would submit.

COMMISSIONER PARSONS: So you would insert, after "Upon a showing," "through an economic analysis?"

CHAIRPERSON MITTEN: "Through a specific economic analysis."

COMMISSIONER PARSONS: Right. So you can't come in here in tattered clothes and a cup and say, "I'm really in trouble."

CHAIRPERSON MITTEN: No, and now, there's also another way to go, which is we could require that expert testimony be offered so that an expert, not just somebody who has a pencil and an envelope with a back to write on. That's another way to do it. You know, full employment for appraisers is always something I've always been interested in.

(LAUGHTER.)

COMMISSIONER JEFFRIES: That's fine.

CHAIRPERSON MITTEN: Okay.

COMMISSIONER JEFFRIES: I mean something to that effect.

COMMISSIONER PARSONS: Prepared by an expert?

CHAIRPERSON MITTEN: Well, that's another little --

COMMISSIONER PARSONS: You can't force somebody to bring a witness in here. I mean, that's really micro, isn't it? I mean, you want it prepared by a certified economic analyst?

COMMISSIONER JEFFRIES: You're leaving an option. You're saying you want --

CHAIRPERSON MITTEN: I'm just suggesting that's something -- if you want to tie it down even more, that's a way to do it.

COMMISSIONER JEFFRIES: Well, but no. I was going to the former and not the latter.

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CHAIRPERSON MITTEN: Okay, fine. Okay, so the “Showing” will have to include “specific economic analysis.”

COMMISSIONER PARSONS: All right.

CHAIRPERSON MITTEN: Okay.

MR. BERGSTEIN: I’m happy to change the words “Upon a showing” to “Upon proof” if that does anything for anybody.

COMMISSIONER PARSONS: Well, that’s better. It takes it out of the “smoke and mirrors” category of showing.

CHAIRPERSON MITTEN: “Proof,” I like “proof.”

MR. BERGSTEIN: So it would be --

CHAIRPERSON MITTEN: Would you turn on your microphone?

MR. BERGSTEIN: It would be “Upon proof, based upon an economic analysis” or what was the language?

CHAIRPERSON MITTEN: Yeah, “based upon.”

COMMISSIONER PARSONS: That sounds good.

CHAIRPERSON MITTEN: “Specific economic analysis.”  
I think you got it, Mr. Bergstein.

Okay. Page 10?

(NO RESPONSE.)

CHAIRPERSON MITTEN: Okay.

COMMISSIONER PARSONS: We already took care of my little problem on (f) right?

CHAIRPERSON MITTEN: Yes, we did.

Page 11?

COMMISSIONER PARSONS: There's a little typo at the top, "may be waived?"

CHAIRPERSON MITTEN: Yes. Anyone else on 11?

(NO RESPONSE.)

CHAIRPERSON MITTEN: A little typo on "applicability."

Okay, Page 12, anybody?

I think the applicability that's been suggested is good.

COMMISSIONER PARSONS: I don't understand the last sentence. It's probably -- I just don't understand that. "Provisions of this chapter should become effective following the issuance of the first purchase/rental schedule."

COMMISSIONER JEFFRIES: From the Mayor. Is that from the Mayor?

CHAIRPERSON MITTEN: People can't administer, they can't implement it. They can't implement the zoning provisions without knowing what they can sell or rent units for.

COMMISSIONER PARSONS: Right, but doesn't it have more to do with us mapping it?

CHAIRPERSON MITTEN: Well, yeah.

COMMISSIONER PARSONS: Than somebody else's actions saying how they're going to implement it?

CHAIRPERSON MITTEN: But this is something that has to happen.

COMMISSIONER PARSONS: This is somebody else who's got to do something?

CHAIRPERSON MITTEN: Correct.

COMMISSIONER JEFFRIES: The Mayor?

CHAIRPERSON MITTEN: That's correct.

COMMISSIONER PARSONS: So I wanted to add "and."

CHAIRPERSON MITTEN: Okay. And mapping?

COMMISSIONER PARSONS: "And the Zoning Commission's mapping of the --

MR. BERGSTEIN: The only thing I would add is, "whichever is the last to occur." I assumed it was going to take more time to come up with a price schedule that if you had a map.

COMMISSIONER PARSONS: Oh, I see.

MR. BERGSTEIN: But if you want to do it that way, you can say one of those two things, whichever is the last to occur. You absolutely need both. You need the mapping and you need the pricing. So, I'm happy to add that in.

COMMISSIONER PARSONS: Please. Okay.

CHAIRPERSON MITTEN: Okay. Does anybody else have anything they'd like to say about inclusionary zoning at this juncture?

(NO RESPONSE.)

CHAIRPERSON MITTEN: Okay, what I'd like to suggest is our next step is to advertise the text. Is that correct, Mr. Bergstein?

MR. BERGSTEIN: Well, to take -- well, after you take the proposed action, yes, I would --

CHAIRPERSON MITTEN: Yes, that's right.

MR. BERGSTEIN: -- make the changes. I would send it as a Notice of Proposed Rule-making to the Register. By my calculations, you'd be able to take final action in April.

CHAIRPERSON MITTEN: Well, -- and that would be with a 30-day comment period?

MR. BERGSTEIN: Yes.

CHAIRPERSON MITTEN: I was, I was just thinking that I don't want to prolong things, but this is finally going to go back in and we've had a lot of people observing us and we've, you know, sort of taken all this disparate testimony and distilled this and we haven't -- since we started saying what we think, we haven't really heard from the public and I would just suggest that maybe we have a little bit longer period for advertisement because it's that important, that we should make sure we get to hear from everybody one last time before we go final. So I would suggest it be 45 days or 60 days or something along those lines.

MR. BERGSTEIN: So there's no limit. There's just a minimum 30 days, so you can make it as long as you want --

CHAIRPERSON MITTEN: Right.

MR. BERGSTEIN: -- as long as it doesn't become stale.

COMMISSIONER JEFFRIES: It's 45.

CHAIRPERSON MITTEN: 45?

COMMISSIONER JEFFRIES: That's fine.

CHAIRPERSON MITTEN: Okay, so we'd like to advertise it for 45 days.

Okay, Mr. Parsons?

COMMISSIONER PARSONS: Let's go ahead with it.

CHAIRPERSON MITTEN: Oh, okay. Then we've made some edits throughout the evening, which I think Staff has captured and Mr. Bergstein as well. And so I would take great pleasure in moving that we approve Case Number 04-33 for a publication for a period of at least 45 days.

VICE-CHAIRPERSON HOOD: Second.

CHAIRPERSON MITTEN: Is there any further discussion?

COMMISSIONER JEFFRIES: One question. Mr. Bergstein, Page 5, 2603.3. Can you read that paragraph to me?

MR. BERGSTEIN: Which one?

COMMISSIONER JEFFRIES: 2603.3.

MR. BERGSTEIN: Do you want me to read it to you?

COMMISSIONER JEFFRIES: Yes.

MR. BERGSTEIN: I mean, basically it's going to end with the word, on Line 18, "districts." It's going to delete "or approved and unexpired planned unit developments" and that will mean that when you get to the mapping phase, unless excluded, any planned

unit developments in any new planned unit developments within the IZ overlay would be included.

COMMISSIONER JEFFRIES: So, all you're going to do is just cross out "or approved or unexpired planned unit developments" and then we're just going to simply take it up during the mapping phase?

MR. BERGSTEIN: That's right. In other words, the presumption will be that the PUDs are in unless you take them out.

COMMISSIONER JEFFRIES: Okay. Okay.

CHAIRPERSON MITTEN: Okay. Then all those in favor, please say "aye."

(AYES.)

CHAIRPERSON MITTEN: All those opposed, please say "no."

(NO RESPONSE.)

CHAIRPERSON MITTEN: Ms. Schellin, I think it's unanimous.

SECRETARY SCHELLIN: Staff will record the vote five to zero to zero to approve proposed action in Case Number 04-33. Commissioner Mitten moving, Commissioner Hood seconding, Commissioners Hildebrand, Parsons and Jeffries in favor.

CHAIRPERSON MITTEN: Thank you. And I believe Mr. Parsons -- okay, I think we're ready to adjourn then, if there's nothing else.

Thank you all for coming out tonight. We're now adjourned.

(Whereupon, at 7:41 p.m. the second special public hearing was adjourned.)