



New York City development tools: Inclusionary air rights - part 1 - by Michael Smith & Patrick O'Sullivan

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As real estate owners and developers continue to adapt to the COVID-19 pandemic, many are seeking ways to enhance the development potential of their properties. In this four-part series, we will discuss “tools” available to owners that can improve a project’s economics, which are particularly valuable given tighter market conditions. With increasing fiscal constraints at both the city and state

levels in New York, these tools, namely, inclusionary air rights, the FRESH program and mandatory inclusionary housing, allow the city to promote objectives such as affordable housing and community development while not needing to provide subsidy, creating a “win-win” for both the city and owners.

This first part of our series focuses on inclusionary air rights. We will provide an explanation of the applicable zoning provisions and a step-by-step guide to the process of generating inclusionary air rights.

In the city, bonus inclusionary development rights, or “inclusionary air rights,” are generated when an owner voluntarily creates permanent affordable housing through new construction, substantial rehabilitation or preservation beyond what is otherwise required. Owners can either (i) use the inclusionary air rights to develop a bigger building than is permitted as-of-right under the Zoning Resolution on the property containing the affordable housing, known as the generating site, or (ii) sell the inclusionary air rights to other owners within (x) the same community district, or (y) an adjacent community district that is within half mile of the generating site. Additionally, inclusionary air rights projects can also take advantage of programs such as Affordable Housing New York Program (421-a tax exemption) if the project independently satisfies each applicable program’s requirements.

To determine the bonus square feet generated by a project, an owner needs to identify the applicable “bonus ratio”, which is the ratio of bonus square feet generated by a specific project to affordable housing square feet preserved or created by the generating site. The bonus ratio can range from 1.25 to 3.5. By way of example, if the generating site preserves 100,000 s/f of affordable housing, and the applicable bonus ratio is 1.25, then the generating site will receive 125,000 s/f of bonus square footage from the New York City Department of Housing Preservation and Development (HPD).

To begin the process, the generating site owner (the Applicant) delivers an affordable housing plan to HPD, which must include: (i) information regarding the Applicant’s ability to preserve affordable housing beyond what is otherwise required; and (ii) identification of the administering agent that will ensure that the designated units are rented in accordance with the regulatory agreement that the Applicant will execute with HPD. Then, the Applicant presents its affordable housing plan to the local community board. After the local community board delivers its comments, HPD will review the plan. Following HPD plan approval, the Applicant and HPD negotiate and execute a regulatory agreement, which will include the property’s rent and affordability requirements and the required capital improvement or construction work. The regulatory agreement typically also provides for the funding of reserves to ensure the maintenance and permanence of the affordable units.

Upon the Applicant’s completion of the work outlined in the regulatory agreement and HPD’s review of such work, HPD issues a Certificate of Completion of Affordable Units and Certificate of Eligibility, which specify the amount of inclusionary air rights generated by the project. The next part of this four-part series will discuss how to execute a sale and transfer of inclusionary air rights.

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