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Using (and Misusing) Incentive Zoning

Incentive zoning is a system by which municipalities can allow deviations from the use and bulk requirements of the zoning code (known as bonuses or incentives) in return for the developer providing amenities that the municipality could otherwise not require. New York communities have employed incentive zoning most successfully in creating affordable housing, but have also gained other community benefits, ranging from conservation of important habitat to preservation of the Broadway Theatre District. But misapplied, incentive zoning undermines solid community planning by allowing important protections of the zoning code to be bypassed or misused, reducing the planning process to a site-by-site zoning for sale bazaar whereby a municipality grants valuable development rights for little if any real gain. In effect, it becomes contract zoning between the municipality and the politically connected. Incentive zoning also risks concentrating negative impacts in one area of the community, raising the specter of environmental justice impacts, and authorizing projects that create significant harm to the targeted neighborhood.

As explained by the Court of Appeals, incentive zoning differs from traditional *Euclidian*[1] zoning by offering incentives to developers for assisting in a community's betterment rather than restraining overdevelopment through bulk and use regulations:

> Incentive zoning is based on the premise that certain uneconomic uses and amenities will not be provided by private development without economic incentive. The economic incentive frequently used … is the allowance of greater density within a proposed building, more floor area than permitted under general zoning rules, if developers provided certain amenities for the community. The amendment awards bonus points which entitle developers to expand their construction in return for increased construction of other, uneconomic projects such as low-cost housing, slum rehabilitation or public facilities.[2]

The key, as the Court notes, is the trade-off for benefits that the market would not otherwise provide to the community. Essential to the incentive zoning concept is that the amenities gained must be true additionalities; that is, they are benefits the municipality cannot require as valid extractions or mitigating conditions under the zoning statutes[3] or the State Environmental Quality Review Act ("SEQRA").[4] Indeed, SEQRA's mandate that all approvals must be restrained by obtaining the maximum practicable mitigation of impacts,[5] precludes measures that address project-caused impacts, such as traffic mitigation, from qualifying as an "amenity" justifying a grant of incentives. Further, since mitigation of negative impacts is not merely authorized but mandatory, incentive zoning cannot be employed in a manner that would create additional harm to a host neighborhood.

This Article examines the history of incentive zoning in New York, explains the state enabling statutes, and examines methods to use this tool to obtain true premiums from developers that benefit communities without harming the host neighborhoods. Incentive zoning, like all zoning, must comply with the comprehensive plan, must provide amenities at least relatively equal to the incentives given away, and, as the Court of Appeals explained, must provide what the market otherwise would not. Above all, the grant of incentives must do no harm to the community. "Relaxations, which override zoning regulations, may involve items such as land use, lot coverage, height or parking, ***but not human safety.***"[6]

The 1961 New York City Zoning Ordinance—the Birth of Incentive Zoning

In the late 1950s, as New York City was inching towards the first comprehensive overhaul of its original 1916 Zoning Ordinance, two particularly influential projects were constructed: the 1952 Lever House and the 1958 Seagram Building. Both featured well received open plazas and public areas.[7] New York City zoning has always been preoccupied with the preservation of light and space, with concern over ever taller buildings casting shadows over their neighbors being a significant factor in the adoption of the original 1916 Code.[8] Hoping to create an incentive for developers to provide additional public open space as at the Lever House and Seagram Building, the 1961 Ordinance included a density bonus opportunity. The basic Floor Area Ratio ("FAR")—the total square footage of the building divided by the square footage of the lot—was set at 15, but granted a 20% increase to a FAR of 20 if a project included a public plaza or arcade.[9] The incentive was an as-of-right FAR bonus. In other words, as long as the plaza or arcade was built, the developer was entitled to the FAR bonus. New York City has also used incentives as a method of addressing localized concerns such as blight in the Chinatown area,[10] and to support Lincoln Center as an international center for the performing arts.[11]

Developers certainly saw the benefit in incentive zoning, and from 1963 to 1975, over 12 million square feet of bonus space was granted to 91 buildings.[12] But the first wave of developments that took advantage of the new incentive zoning opportunity showcased the pitfalls of the device by producing, at best, inconsistent results. The leading study on the program noted:

> Measured in qualitative terms, however, the results are uneven. At their best, the spaces have furnished members of the public—residents, employees, and visitors—with public places for accidental and planned social, recreational, cultural, and utilitarian experiences otherwise obtainable only within the City's publicly owned parks and other facilities or within privately owned privately controlled domains. At their worst, by design and operation, the spaces have been hostile to public use. Many spaces are nothing more than empty strips or expanses of untended surface, while others have been privatized by locked gates, missing amenities, and usurpation by adjacent commercial activities, in contravention of the spirit or letter of applicable legal requirements. This study has found that 41 percent of the 503 public spaces are of marginal value, most of them produced under the minimal legal standards governing the design of "as-of-right" plazas and arcades from 1961 to 1975.[13]

The main danger of incentive zoning—as present today as it was at its inception—is that the device would be nothing more than a pathway for greater private profit with little or no public gain, or even worse, significant public harm. In a proper program the "amount of the bonus is calculated to equal or slightly to exceed in value the cost that the developer incurs in providing the amenity."[14] But excessive giveaways and poor placement of public space plagued the program.

Noted New York Times Architecture Critic Ada Louise Huxtable was particularly dismissive of the early results. For example, she lamented that that a plaza in front of the then new General Motors building contributed "to the rape of the [Grand Army] plaza … a clear demonstration of how the new zoning, like the old zoning, is to be used exclusively as a tool for profit."[15] Huxtable was by no means opposed to public plazas provided by private developers, noting the success of two joint plazas at 140 Broadway, but even there she was concerned that the incentives available would undo the public good for private gain: "It

only takes one opening in the wrong place, one 'bonus' space placed according to current zoning (read 'business') practice, to ruin it all."[16] Success, she wrote, was no accident, but was "done by concerned, coordinated effort. This is planning."[17]

Disentrancement with the quality of the amenities received versus incentives granted grew, as studies showed the provided plazas and arcades were often either in inappropriate locations, or provided little value to the public.[18] Urbanist William H. Whyte, who "played a major role in the formulation of the City's policies,"[19] was particularly critical of the plazas and the lack of functional amenities, famously noting "it is difficult to design a space that will not attract people. What is remarkable is how often this has been accomplished."[20] In response, in 1975, the City amended the incentive zoning statutes to introduce discretionary reviews and tighter design standards. This process repeated a number of times over the years in response to criticism of the program. By 1989, "[i]nducements to create shops along Fifth Avenue in midtown Manhattan, pedestrian bridges and malls along Greenwich Street in lower Manhattan, open-air plazas in the theater district and landscaping on the sidewalks and center strip of Broadway on the Upper West Side have been scrapped, as have more than a dozen other incentive zoning programs…."[21] By 1996, the City had eliminated the as-of-right density bonus for public plazas that had started it all.[22]

Incentive zoning has provided New York City with a number of successes, not only in properly located and designed plazas and arcades, but also by encouraging the construction of Broadway Theatres,[23] and by providing subway improvements, such as the underground concourse linking the Lexington Avenue and E and F lines subway lines.[24] A combination of elective bonuses and mandatory requirements was used to create the complicated coordinated network of pedestrian, public transit and vehicular accesses to the World Trade Center,[25] which Huxtable called an "extraordinarily shrewd and progressive scheme, at once a visionary and pragmatic investment in the future."[26] There are significant lessons for today's planners from what worked and what did not in the formative years of this tool. First, poor planning, such as placing plazas in inappropriate locations or creating useless open space, leads to meaningless benefits. As by definition incentive zoning degrades a community's stated zoning scheme while providing extra profits to developers, it is all the more important that the amenities received in exchange should properly and adequately enrich the community. As Huxtable noted, "[a]s much as we need open space, it can be destructive of an urban pattern in the wrong place as it can be beneficial in the right one."[27] Good planning remains the key today, to both legal compliance as well as successful use of incentive zoning.

Second, incentive zoning only works when true community benefits are provided, be it saving theatres or improving public transportation. On-site preservation of open space, for example, is hardly a community-wide benefit. Indeed, in reality it is a benefit that flows to the developer through a higher value property.[28] This analysis has been characterized as the "but for" test, which asks if it is really necessary to offer the incentive to get the amenity. Professor Kayden has summarized the necessity issue, noting that unnecessary incentives that create more harm than good should not be allowed:

> Many amenities-such as parks, plazas, and covered pedestrian spaces-make a development project more attractive to tenants and thus may pay for themselves through higher rents. Several studies have demonstrated, for example, that parkland and public squares adjacent to buildings increase the capitalized value of such buildings. ***If the private market would provide the desired public amenity without behavior-altering government intervention-because the amenity increases the attractiveness of the project and pays for itself-then it is not only unnecessary but harmful to offer incentives that themselves may exact a social cost, such as the loss of light and air, or more congestion.***[29]

Exemplifying this second point is the City's experience with its inclusionary zoning program addressing affordable housing needs. "Inclusionary zoning is an affordable housing tool that links the production of affordable housing to the production of market-rate housing … through policies either require or encourage new residential developments to make a certain percentage

of the housing units affordable to low- or moderate income residents."[30] Starting in 1987, the City offered density bonuses for developers constructing affordable housing near their office towers.[31] But the City was not satisfied with the results of that offering. In 2016, after conducting a financial feasibility study to determine appropriate levels of affordable set-asides, which factored in the other financial subsidies available,[32] the City adopted a mandatory inclusionary zoning requirement.[33] Thus, the City obtains the benefit it wants without giving developers zoning incentives, avoiding the social costs such as those Professor Kayden identified.

The New York Enabling Statutes

In 1991, New York became the first state to enact standard enabling legislation for incentive zoning,[34] codified as Town Law § 261-b, Village Law § 7-703, and General City Law § 81-d. The stated purpose of the incentive zoning statutes is "to advance the [municipality]'s specific physical, cultural and social policies in accordance with the town's comprehensive plan and in coordination with other community planning mechanisms or land use techniques."[35] Incentive zoning is "based on the premise that certain uneconomic uses and amenities will not be provided by private development without economic incentive." Western New York Dist., Inc. of Wesleyan Church v. Village of Lancaster, 17 Misc. 3d 798, 817, 841 N.Y.S.2d 740 (Sup 2007).

The incentive zoning power is not self-executing. To offer the incentives and receive the benefits, a municipality must enact an incentive zoning system as part of the local zoning scheme.[36] Incentive zoning enactments must comply with the normal procedures for amending the zoning ordinance or enacting a local law, including all applicable environmental, notice and public hearing requirements.[37]

Local enactments creating incentive zoning programs must, at a minimum:

(1) Specify the incentives that may be granted to the applicant;

(2) Specify the community benefits/amenities that the applicant may offer the Town;

(3) Indicate the criteria for approval and method of determining the adequacy of community amenities to be accepted in exchange for zoning incentives granted by the Town;

(4) Describe the procedure for obtaining incentives, including the application and review process, and placing terms and conditions on any approval; and

(5) Provide for a public hearing, with a requirement that notice of said hearing be given by publication in the official newspaper at least five days in advance of the hearing.[38]

The local provision must also specify those zoning districts where bonuses may be granted, and this information should be incorporated into the local zoning map.[39]

Of particular importance is that the sought after community benefits must be specifically identified in the locally adopted incentive zoning scheme, as well as the specific zoning incentives that will be traded away for those amenities.[40] This safeguard of specificity helps guard against ad hoc deals between a developer and Town officials that don't properly benefit (or perhaps even harm) the community. A local incentive zoning scheme that is overly broad and non-specific violates this important safeguard.

Similarly, the state enabling statute requires that the locally adopted incentive zoning scheme allows only incentives which are in accordance with the Town's comprehensive plan.[41] This further safeguards against incentive zoning arrangements that

harm the community. Put differently, both the locally adopted incentive zoning scheme and the individual incentive zoning arrangement for a particular project should first and foremost do no harm to the community.

Cash Payments in Lieu of Amenities

If the municipality finds that a suitable community benefit/amenity is not immediately feasible or practical, it may require the applicant to make a cash payment in exchange for the requested incentive, in an amount determined by the municipality.[42] If cash is accepted in lieu of amenities, the payment must be placed in a trust fund and used "exclusively for specific community benefits authorized by the" governing body.[43] That is to say, cash payments in lieu of amenities may only be used for the purpose for which that payment was earmarked by the legislative body, and cannot be rolled into a municipality's general fund, as "government may not place itself in the position of reaping a cash premium because one of its agencies bestows a zoning benefit upon a developer. Zoning benefits are not cash items."[44]

As a matter of good practice, in cases where a cash payment is being offered in lieu of amenities, the municipality should wait to issue any building permit(s) granting zoning a bonus until the cash payment is received.[45] The following Town of Ogden Zoning Code provision addresses the issues raised by cash-in-lieu payments:

> § 211-9 **Cash in lieu of amenity or bonus.**
>
> If the Town Board finds that a community benefit is not suitable on site or cannot be reasonably provided, the Town Board may require a cash payment in lieu of the provision of the amenity or bonus. These funds shall be placed in a trust fund to be used by the Town Board exclusively for amenities specified in these provisions. Payments shall be made by the applicant prior to the issuance of any permit, stripping of any ground cover, site grading, or any other site improvements or construction activities.[46]

Promoting Affordable Housing

Within the incentive zoning enabling statutes the State Legislature has emphasized the importance of the tool to address affordable housing needs. Before any incentive zoning system can be enacted the municipality must evaluate the impact of providing zoning incentives on the potential development of affordable housing: (1) gained by any incentives granted to an applicant, or (2) lost if an applicant provides an amenity to the municipality.[47] To proceed with the enactment, the municipality must find that there is approximate equivalence between potential affordable housing lost or gained, or, that the municipality will take action to compensate for any potential affordable housing development lost if an incentive zoning system is created.[48]

As a practical matter, incentive zoning can encourage affordable housing development in and of itself. For example, affording exemptions from open space requirements or building permit charges/fees, or providing for expedited permitting can help to lower the costs of development and make affordable housing projects more economically feasible.[49] Similarly, granting zoning incentives in the form of density bonuses can encourage developers to include affordable units in development projects that might otherwise have none.[50]

Affordable housing provisions are now common in New York, and can be tailored to address different community needs. Different codes have different levels of complexity, and address different populations. For example, the Village of Briarcliff Manor provides for a bonus in the Residential Townhouses RT4B District, available during site plan review:

> § 220-10(B)

> (1) Development density. The basic density per acre allowed by these regulations shall not exceed four dwelling units per gross acre, except as permitted and regulated below. The maximum permitted density may be increased by 50% of the total basic density as a bonus if the applicant constructs at least 50% of the permitted increase as moderate cost dwelling units, which dwelling units shall hereinafter be known as "moderate income dwelling units." During the process of detailed site plan review, the Planning Board shall have the authority to limit the basic density and the bonus density where the Board determines that such may be necessary or appropriate because of the specific characteristics of the individual site.[51]

The Town of Orangetown created its Planned Adult Community (PAC) floating zone "to address certain senior citizen housing needs in the Town of Orangetown by encouraging the development of a range of housing types and prices for active senior citizens consistent with the Town's Comprehensive Plan."[52] It provides

> 4.66. Affordable units.
>
> A. As a condition of approval of the PAC, the Town Board may provide one additional bonus density unit per acre for the inclusion of affordable housing, provided that at least 50% of said bonus is set aside for affordable housing, and further provided that total bonus (affordable and market rate) does not exceed the maximum number of units per acre, as set forth in § 4.69 below.
>
> B. All affordable units shall be owner occupied and shall be sold at a price not to exceed 3.3 times 80% of the median family income for Rockland County, applicable to a family of four persons, as established annually by the U.S. Department of Housing and Urban Development. A covenant shall be recorded in the County Clerk's office, which shall provide that resale of any affordable housing units may not sell for a price exceeding 3.3 times 80% of the median family income for Rockland County, applicable to four persons, as established annually by the U.S. Department of Housing and Urban Development.[53]

The Orangetown Code goes on to provide how the occupants of affordable units are to be selected, and promotes an economically diverse community by requiring that affordable units be of the same size as other units and dispersed throughout the development "avoiding designated affordable units being located adjacent to one another."[54]

Another common approach is to promote affordable units in multifamily developments. The Town of Bethlehem Code provides:

> § 128-51 (E) (2) Affordable housing for multifamily development.
>
> (a) This incentive may be applied to any multifamily dwelling development project pursuant to this chapter. The calculation of the incentive is based on the maximum density for the project as determined by the Planning Board.
>
> [1] If more than 25% of dwelling units qualify as affordable, ten-percent increase in the total number of units.
>
> [2] If more than 33% of dwelling units qualify as affordable, fifteen-percent increase in the total number of units.
>
> [3] If more than 50% of dwelling units qualify as affordable, twenty-percent increase in the total number of units.

(b) For the purposes of this Subsection E(2), "affordable housing" shall mean residential units available for a sales price or rental fee within the means of a household income which is 80% of the median income of the Town of Bethlehem as defined by the United States Department of Housing and Urban Development.[55]

Specific Benefits, Specific Amenities

What these three affordable housing provisions have in common with other successful programs is that they follow two mandates of state law. First, they outline very specific incentives available for providing specifically delineated amenities. The enabling legislation uses the term "specific" in defining "incentives or bonuses" and "community benefits or amenities" as well as "incentive zoning" itself.[56] What the Legislature has done is serve notice that incentive zoning is not a blank check to barter away zoning limitations. The community must identify specific benefits wants in return for relaxing its zoning code, in specific zones, for a specific purpose. Generic ordinances which simply list broad categories plucked from the state definitions do not meet the mandate of the enabling legislation.

Incentive Zoning and the Comprehensive Plan

As specifically stated in the above-cited Orangetown provision, the incentive zoning scheme must be adopted and implemented in accordance with a community's Comprehensive Plan.[57] All planning is required to be compliance with a comprehensive plan, but the Legislature made it a particular mandate for incentive zoning: "The purpose of the system of incentive, or bonus, zoning shall be to advance the [municipality's] specific physical, cultural and social policies in accordance with the [municipality's] comprehensive plan and in coordination with other community planning mechanisms or land use techniques. The system of zoning incentives or bonuses shall be in accordance with a comprehensive plan …."[58]

These provisions command that adoption of an inventive zoning scheme, as well as the granting of specific incentives to the developer, be accompanied by in-depth study of community needs. Thus, in *Asian Americans for Equality v. Koch*, the Court of Appeals upheld a density bonus crafted as encouragement for the creation of affordable housing because the record showed that the amendment had been enacted after careful study, preparation, and consideration, in accordance with a well-considered plan, to achieve a legitimate governmental purpose.[59] What will not stand muster in adoption of an ordinance or in the granting of specific benefits where, is when, as Huxtable feared, there is a pathway to profit made without good planning. "What is mandated is that there be comprehensiveness of planning, rather than special interest, irrational ad hocery."[60]

The comprehensive planning requirement ties in with the need for identifying specific incentives and benefits by zone. A statute allowing incentives for undescribed benefits would not satisfy the enabling statute because absent planning showing the need for specific benefits, it fails the comprehensive planning test, as would a local provision merely authorizing undefined incentives to be granted in all zones without correlation to the needs of the community and costs imposed on the host neighborhood. For example if a statute allowed change of use as an incentive without specifying what the new uses could be, such carte blanche zoning would be the polar opposite of comprehensive zoning. Rather, only uses the market would not otherwise provide—to use the Court of Appeals' terminology—and benefitting the community should be permitted, and this can only be identified after a thorough study of community needs. Otherwise, the incentive zoning is simply improper spot zoning.

Consideration of Property Rights and Price

A key element of incentive zoning is that the incentives "may" be provided to an eligible developer. Incentive zoning enacted under the enabling statute is never as-of-right. The available incentives are, by definition, "adjustments to the permissible population density, area, height, open space, use, or other provisions of a zoning ordinance, local law, or regulation," and never represent outside limits available to a developer.[61]

This guides the municipality in two ways. First, the underlying as-of-right zoning must withstand constitutional takings claims. If the permissible zoning fails to provide a developer a legitimate return on investment, but instead requires involuntary exactions to obtain a fair return, it is unlikely to pass muster. Not surprisingly, some have charged that as-of-right uses and bulk regulations have been deliberatively set too low to coerce exactions from developers.[62] This concern partly animated Justice Scalia's decision in *Nollan v. California Coastal Commission*: "One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulations which the State then waives to accomplish other purposes. . . ."[63] Communities should not establish as-of-right zoning limitations that preclude a fair return on investment and rely upon incentive zoning to extract concessions not otherwise available. Similarly, communities should not address hardships or unique circumstances through incentive zoning—that is purpose of the variance procedure.

Second, it demonstrates that the amenity must present a true benefit to the community, a benefit beyond what can be required of a developer as project mitigation. For example, a project's impacts command the installation of a traffic light to address increased traffic, such an improvement can never qualify as an amenity because it is a mandatory requirement under SEQRA to minimize harm, or a proper condition under the standard zoning provisions.

Assuming the as-of-right zoning provides a reasonable return, the question of pricing becomes a different question. "The bonus awarded for each amenity must be carefully structured, however, to make the cost-benefit equation favorable enough to induce the developer to provide the desired uneconomic benefit to the city but sufficiently limited to avoid a windfall to it."[64] Accordingly, municipalities must evaluate the value of the benefits granted versus the amenities received as part of its review process.

Only True Amenities Need Apply

As noted above, a significant concern with incentive zoning is that the community receive value for the incentives given to the developer. Essential to this understanding is that the amenities are true benefits to the community not otherwise obtainable from the developer, not mere mitigation measures or improvements that actually improve the value of the development. Incentive zoning laws should incorporate this principal to clearly signal they are more than invitations to bargain for benefits. A good example is found in the Town of Beekman Incentive Zoning Law:

> Incentives shall be granted only when the community benefits or amenities offered would not otherwise be required or likely to result from the applicable planning process before the Planning Board. Such benefits shall be in addition to any items that are or would be required under other provisions of this chapter or State law, including any mitigation measures required pursuant to the State Environmental Quality Review Act.[65]

The Beekman Law goes on to provide specific benefits that can qualify for incentives:

(1) Permanent conservation of natural areas or agricultural lands;

(2) Provision of passive or active open space and related improvements;

(3) Permanent protection of scenic views;

(4) Public Parks and recreational facilities;

(5) Public access to waterfronts;

(6) Public trails and trail linkages; or

(7) Cultural or historic facilities deeded to municipality or qualified not for-profit agencies.[66]
Taken together, the two provisions ensure that the Town receives genuine community benefits. Thus, a developer building a new trail in the community can receive an incentive, but a developer simply preserving (or improving) an existing public access on-site cannot, because such a preservation requirement can be readily imposed as part of a site plan approval, indeed, such preservation would be required.[67]

First, Do No Harm: Limitations on Incentives Granted

Though it can be a flexible development tool, incentive zoning is not a blank check for developers to bypass inconvenient or undesirable zoning restrictions. In fact, by law, incentive zoning is only allowed in areas where the Town Board has investigated the potential effects of any incentives granted and amenities provided, and determined that there are adequate public resources/services to support the requested incentives.[68]

Additionally, the governing board must also determine that, before permitting incentive zoning, "there will be no significant environmentally damaging consequences and that such incentives or bonuses are compatible with the development otherwise permitted."[69] Thus, as a leading community development website notes, "Incentive zoning will only produce a public good if the market can absorb the increased density happily. So don't choose an area where the neighbors will be highly opposed."[70]

Incentive zoning needs to be carefully considered before use because it can impose significant harm on a particular neighborhood for the benefit of the community. Improper application can also reduce public faith in the zoning scheme. "Zoning expresses conclusions about theoretically objective physical planning criteria such as street, sidewalk, sewer, and water pipe capacity; light and air availability at ground level; and compatibility of new buildings with the existing neighborhood. Thus, any overriding of that zoning, no matter what the proposed amenity, intrinsically delegitimizes the entire regulatory system."[71]

Conclusion

Incentive Zoning can be a powerful tool for achieving benefits not otherwise available to local communities. But history has shown that if misused it can cause serious long lasting damage. Too often incentive zoning arrangements ignore sound comprehensive planning, the "amenities" received by the municipality have been minimal or even illusory, or could have achieved through normal zoning procedures. Too often incentive zoning has been used primarily as a bypass device to avoid land use restrictions, for the politically connected, and becoming contract zoning at that point. But incentive zoning can be an appropriate land use tool when communities stand by their plan, insist that value of the amenities received have approximate equivalency with the value of the incentives granted to the developer, and ensure that the arrangement does not cause harm to the community.

Footnotes

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1 See Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816, 54 A.L.R. 1016 (1926) (upholding an ordinance dividing a community into different use zones each with their own bulk restrictions as constitutional).

2 Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 129, 531 N.Y.S.2d 782, 786, 527 N.E.2d 265 (1988).

3 Conditional zoning has long been recognized as a valid tool in New York by the courts (*see, e.g.*, Church v. Town of Islip, 8 N.Y.2d 254, 203 N.Y.S.2d 866, 168 N.E.2d 680 (1960); *Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 439 N.Y.S.2d 326, 421 N.E.2d 818 (1981)*), and the Legislature has provided direct authority to impose mitigating conditions in zoning enabling legislation. *See e.g.*, N.Y. Town Law § 274-a(4) ("The authorized board shall have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to a proposed site plan.").

4 N.Y. Envtl. Consv. Law Art. 8.

5 N.Y. Envtl. Consv. Law § 8-0109(8).

6 Harold Kalman, Heritage Planning: Principles And Process, at 69 (2014) (emphasis added).

7 Marcus, Norman, New York City Zoning—1961-1991: Turning Back the Clock—But with an up-to-the-Minute Social Agenda Essay, 19 Fordham Urban L.J. 707, 715 (1992).

8 John A. Peterson, The Birth of City Planning in the United States 1840-191, at 311 (2003).

9 New York, NY, Zoning Resolution, Art. III: Commercial District Regulations, Ch. 3: Bulk Regulations for Commercial or Community Facility Building in Commercial Districts, § 33-14 Floor Area Bonus for Urban Open Space; New York, Ny, Zoning Resolution, Art. III: Commercial District Regulations, Ch. 3: Bulk Regulations for Commercial or Community Facility Building in Commercial Districts, § 33-15 Floor Area Bonus for Arcades.

10 Special Manhattan Bridge District, Section 116 (this District, the focus of *Asian Americans for Equality v. Koch, supra* note 1, terminated in 1991).

11 Special Lincoln Square District, New York Zoning Ordinance, Section 82.

12 J. Kayden, Incentive Zoning In New York City: A Cost-Benefit Analysis 11, 23 (Policy Analysis Series No. 201, 1978).

13 Jerold S. Kayden, The Department of City Planning of the City of New York, and the Municipal Art Society. Privately Owned Public Space The New York City Experience (2000) (herein the "Kayden Study"). The Kayden Study is a meticulously detailed study—and critique—of each privately owned public space in New York City.

14 John J. Costonis, The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks, 85 Harv. L. Rev. 574, 576 (1972).

15 Ada Louise Huxtable, Will They Ever Finish Bruckner Boulevard? at 51(1989). Perhaps best demonstrating Huxtable's elegiac point that the decisions under incentive zoning are made "not by planners but by profiteers" (*id*. at 52), today the reviled General Motors sunken plaza is occupied by the flagship Apple Store, "one of the best-known and most successful retail sites in the world." Vicky Ward, The Untold Story of How the Apple Store Cube Landed in Midtown, New York Magazine, September 28, 2014, available at http://nymag.com/daily/intelligencer/2014/09/story-behind-the-apple-store-cube.html.

16 Ada Louise Huxtable, Sometimes We Do It Right, New York Times (March 31, 1968).

17 *Id*.

18 Kayden Study, at 16-17, William H. Whyte, The Social Life of Small Urban spaces (1979). William H. Whyte, City: Rediscovering The Center (1988).

19 Kayden Study at 16.

20 William H. Whyte, City: Rediscovering The Center 109 (1988).

21 Thomas J. Lueck, The Bulk-for-Benefits Deal in Zoning, N.Y. Times, July 23, 1989.

22 1996 New York Zoning Resolution, § 35-15.

23 New York Zoning Resolution art. VII, ch. r, § 81-00 et seq. (1971). Under the Special Theater District zoning, Broadway area developers could earn a 20% bonus including a legitimate theater in their plans, resulting in five new theatres being proposed. *See* Richard Weinstein, How New York's Zoning Was Changed to Induce the Construction of Legitimate Theaters, in The New Zoning: Legal, Administrative, And Economic Concepts And Techniques 131 (N. Marcus & M. Groves eds. I970).

24 Lueck, *supra*.

25 New York, Zoning Resolution art. VIII, ch. 6, § 86-oo et seq. (1971). *See* John Costonis, The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks, 85 Harvard L.R. 574, 577 n.13.

26 Huxtable, Concept Points to "City of the Future," N.Y. Times, Dec. 6, 1970, § 8, at 1.

27 Huxtable, *supra* note 13, at 52.

28 Tom Fox, Urban Open Space: An Investment That Pays 34-35 (1990).

29 Jerold S. Kayden, Market-Based Regulatory Approaches: A Comparative Discussion of Environmental And Land Use Techniques In The United States, 19 BC Envtl. Aff. L. Rev. 566, 570 (1991) (internal footnotes omitted) (emphasis added).

30 NYU Center for Housing Policy, The Effects of Inclusionary Zoning on Local Housing Markets: Lessons from the San Francisco, Washington D.C. and Suburban Boston Areas (2008), *available at* http://furmancenter.org/files/publications/IZPolicyBrief.pdf. Inclusionary zoning techniques can include density bonuses, or other types of incentives such as tax credits, waiver of review proceedings. See James A. Kushner, Subdivision Law & Growth Management § 6:27(2d ed. May 2017 update).

31 Josh Barbanel, The Alchemy of a Zoning Bonus, N.Y. Times, Dec. 14, 2003.

32 BAE Urban Economics, Inc., Market & Financial Study NYC Mandatory Inclusory Housing (2015), available at http://www1.nyc.gov/assets/planning/download/pdf/plans-studies/mih/bae_report_092015.pdf.

33 NYC Planning website, Mandatory Inclusionary Zoning, http://www1.nyc.gov/site/planning/plans/mih/mandatory-inclusionary-housing.page.

34 J. Spencer Clark, Rocking the Suburbs: Incentive Zoning as a Tool to Eliminate Sprawl, 22 BYU J. Pub. L. 255, 264 (2007). Prior to the enabling legislation, municipalities could enact incentive zoning through the Municipal Home Rule Law, and the enabling legislation specifically preserves the validity of pre-existing legislation and bonuses granted thereunder, Town Law § 261-b(4), Village Law § 7-703(4), and General City Law § 81-d(4).

35 N.Y. Town Law § 261-b(2); N.Y. Village Law 7-703(2); N.Y. General City Law 81-d(2).

36 Town Law § 261-b(3)(a); Village Law § 7-703(3)(a); General City Law § 81-d(3)(a).

37 *Id.*

38 Town Law 261-b(3)(e); Village Law § 7-703(3)(e); General City Law § 81-d(3)(e).

39 Town Law § 261-b(3)(b); Village Law § 7-703(3)(b); General City Law § 81-d(3)(b).

40 Patricia E. Salkin, 3 N.Y. Zoning Law & Prac. § 32A:78 ("Communities must establish both the incentives to be received and the bonuses to be provided. State law requires the incentives to be specifically laid out, rather than just broad categories inviting contract for zoning bargaining," citing Town Law § 261-b(3)(e); Village Law § 7-703(3)(e); General City Law § 81-d(3)(e)).

41 Town Law § 261-b(2); Village Law 7-703(2); General City Law 81-d(2).

42 Town Law § 261-b(3)(h); Village Law § 7-703(3)(h); General City Law § 81-d(3)(h).

43 *Id.*; 1 N.Y. Zoning Law and Practice § 7:17 (Nov. 2016) ("In the event that money is received, this amount is to be deposited into a trust fund to be used by the municipality exclusively for the specifically authorized community benefits.").

44 Municipal Art Soc. of New York v. City of New York, 137 Misc. 2d 832, 837-38, 522 N.Y.S.2d 800 (Sup 1987). Although commentators have suggested that *Municipal Art Society* undermines incentive zoning authority, it is a more complicated case as it involved the intersection of the City's efforts as a property owner to maximize revenue while also acting as a regulator in authorizing the bonus. *See* Jerold S. Kayden, Zoning for Dollars: New Rules for an Old Game: Comments on the Municipal Art Society and Nollan Cases, 39 Wash. UJ Urb. & Contemp. L 3, 3 (1991). Further, the transaction at issue was authorized by a New York City Zoning Resolution that was not adopted under the authority of the State Incentive Zoning enabling legislation (General City Law § 81-d). What Municipal Art Society does clearly stand for is the prohibition on contract zoning, the sale of zoning benefits for general fund revenues. Cf *Residents for Reasonable Development v. City of New York, 128 A.D.3d 609, 11 N.Y.S.3d 116 (1st Dep't 2015)*(payment for parkland was not an illegal "quid pro quo" in return for floor area ratio bonus because the funds were paid directly to the Department of Parks to pay for the improvements).

45 *See* 3 N.Y. Zoning Law & Prac. § 39:61, Incentive zoning provisions, Town of Pavillion Zoning Ordinance (Nov. 2016).

46 Town of Ogden Code, available at http://ecode360.com/14755087.

47 Town Law § 261-b(3)(g); Village Law 7-703(3)(g); General City Law 81-d(3)(g).

48 *Id.*

49 3 Am. Law. Zoning § 22:44 (5th Ed. May 2017).

50 Affordable Housing and Zoning Techniques, Erie County Community Development Block Grant Consortium at 15 (Oct. 2012), available at http://www2.erie.gov/environment/sites/www2.erie.gov.environment/files/uploads/AFFORDABLE_HOUSING_ZONING_SM.pdf.

51 Village of Briarcliff Manor Code § 220-10 (2017), available at http://ecode360.com/7691303?highlight=bonus#7691303.

52 Town of Orangetown Code § 4.6, Added by L.L. No. 1-2004.

53 Town of Orangetown Code § 4.66 (2017), available at http://ecode360.com/26867331?highlight=bonus#26867331.

54 *Id.* at §§ 4.67 and 4.68.

55 Town of Bethlehem Town Code, § 128-51 (2017), available at http://ecode360.com/8994916?highlight=incentives,incentive#8994916.

56 Town Law § 261-b(1)(a, b, and c); Village Law 7-703(1)(a, b, and c); General City Law 81-d(1)(a, b, and c).

57 Udell v. Haas, 21 N.Y.2d 463, 288 N.Y.S.2d 888, 235 N.E.2d 897 (1968). *See* Town Law § 263; Village Law § 7-704). For cities, the statute uses the term "well considered plan," General City Law § 20 (25).

58 Town Law § 261-b(2); Village Law 7-703(2); General City Law 81-d(2).

59 *Asian Americans, supra*.

60 Town of Bedford v. Village of Mount Kisco, 33 N.Y.2d 178, 188, 351 N.Y.S.2d 129, 136, 306 N.E.2d 155 (1973).

61 Town Law § 261-b(1)(a); Village Law § 7-703(1)(a); General City Law § 81-d(1)(a).

62 *See* Daniel R. Mandelker, The Basic Philosophy of Zoning: Incentive or Restraint?, in THE NEW ZONING, supra note 25, at 14, 18-21.

63 Nollan v. California Coastal Com'n, 483 U.S. 825, 837 n.5, 107 S. Ct. 3141, 97 L. Ed. 2d 677, 26 Env't. Rep. Cas. (BNA) 1073, 17 Envtl. L. Rep. 20918 (1987). *See* Steven J. Eagle, On Engineering Urban Densification, 4 Brigham-Kanner Property Rights Conf. Journal 73, 91-92 (2015).

64 *Asian Americans for Equality v. Koch, supra*, 72 N.Y.2d at 129, 531 N.Y.S.2d at 786, (1988).

65 Town of Beekman, N.Y., Town Code ch. 155, § 155-55(B) (2001), available at http://www.farmlandinfo.org/sites/default/files/Town-of-Beekman-Incentive-Zoning_1.pdf.

66 Id. at § 155-55(C).

67 *See supra* note 2 and cases and statutes cited therein; *see also* Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966)(upholding local statute requiring the allocation of land in a subdivision for park purposes).

68 Town Law § 261-b(3)(c); Village Law § 7-703(3)(c); General City Law § 81-d(3)(c).

69 *Id.*

70 Useful Community Development, Incentive Zoning as a Tool for Public Purposes, at http://www.useful-community-development.org/incentive-zoning.html.

71 Jerold S. Kayden, Zoning for Dollars: New Rules for an Old Game: Comments on the Municipal Art Society and Nollan Cases, 39 Wash. UJ Urb. & Contemp. L 3, 3 (1991).

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