

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 21-23

Z.C. Case No. 21-23

Office of the Attorney General

**(Text Amendment to Subtitle I §§ 502.3, 516.2, 531.4, 539.2,
547.3, 555.2, 562.3, 569.2 to Apply IZ to Certain D Zones)**

March 30, 2023

ORDER OF DISMISSAL

On March 30, 2023, the Zoning Commission for the District of Columbia (the “Commission”) held a properly noticed public meeting to consider set down for a public hearing of a petition from the Office of the Attorney General (the “Petitioner” or “OAG”), for proposed text amendments to Subtitle I §§ 502.3, 516.2, 531.4, 539.2, 547.3, 555.2, 562.3, and 569.2 of Title 11 of the District of Columbia Municipal Regulations (“DCMR”) (Zoning Regulations of 2016 [“Zoning Regulations”], to which all references are made unless otherwise specified) to apply Inclusionary Zoning (“IZ”) requirements to the D-1-R, D-3, D-4-R, D-5, D-6, D-6-R, and D-7 zones.

For the reasons stated below, the Commission hereby **DISMISSES** the Petition without prejudice.

FINDINGS OF FACT

Background; Emergency Action Request

1. On December 2, 2021, the Petitioner submitted a petition (the “Petition”) proposing text amendments to Subtitle I §§ 502.3, 516.2, 531.4, 539.2, 547.3, 555.2, 562.3, and 569.2 to apply IZ requirements to certain Downtown (D) zones which are currently exempt from the IZ program. OAG requested the Commission take emergency action to adopt the Petition pursuant to § 6(c) of the District of Columbia Administrative Procedure Act (82 Stat. 1206; D.C. Official Code § 2-505(c) (2016 Repl.)), authorize the immediate publication of a Notice of Proposed Rulemaking, and grant a waiver of Subtitle Z § 502.1 to authorize a 30-day notice period prior to a public hearing. (Exhibits [“Ex.”] 1-3.)
2. On January 4, 2022, the Office of Planning (“OP”) submitted a report recommending the Commission not take emergency action to adopt the Petition. In its report, OP stated that “there is no accompanying economic data or financial modeling to assess the impact of such an immediate change” and that it was “important to the integrity of the [IZ] program that the economic impacts of amendments be understood.” OP advised that it would analyze the Petition and its potential impacts and report back to the Commission as part of its setdown report. (Ex. 8.)

3. On January 12, 2022, OAG submitted a supplemental statement reiterating its request that the Commission take emergency action and set the Petition down for a public hearing. OAG's statement argued that the Mayor's 2019 housing initiative (Mayor's Order 2019-036, the "Mayor's Housing Order") and the Comprehensive Plan (Title 10-A of the DCMR, the "CP") identify an affordable housing crisis in the District and that emergency action was necessary to ensure that certain pending zoning applications in the affected D zones would be subject to IZ requirements rather than be exempt from IZ. OAG's statement noted that setdown of the Petition would give OP sufficient time to complete an economic analysis as well as allow the Commission to receive public comments on the issue. (Ex. 10.)
4. At its public meeting on January 13, 2022, the Commission considered Petitioner's request to take emergency action to adopt the Petition and determined that further economic analyses were needed to better understand the consequences of applying IZ to the proposed D zones. The Commission denied the emergency action request and asked both OAG and OP to submit economic data and analyses addressing the implications of expanding the IZ program to the proposed D zones. (Transcript ["Tr."] from January 13, 2022 public meeting at pp. 47-70.)
5. On May 12, 2022, OP submitted a report providing its initial analysis of the Petition, which found that applying IZ to the proposed D zones could result in fewer IZ units being produced because of the impacts on market rate housing that is tied to IZ. Furthermore, OP found that the Petition was inconsistent with CP policies which recommend a balance between new affordability requirements and incentives/relief. (*Policies H-1.1.2, H-1.1.3, H-1.1.6, CW-1.1.5; and Actions H-1.2.E, CW-1.1.E.*) Given these CP inconsistencies and the Petitioner's failure to provide an economic impact analysis as requested by the Commission,¹ OP recommended that the Commission suspend setdown of the case until after OP conducts stakeholder engagement and the Commission holds a public roundtable on the topic.² (Ex. 11A, 12.)

OAG Submissions

6. In addition to the Petition (Ex. 3.) and OAG's January 12, 2022, statement (Ex. 10.) referenced above, OAG submitted a letter dated March 29, 2023 (the "OAG Response Letter") in response to OP's setdown report and recommendation against setdown. (Ex. 15, 16.) Both the Petition and the OAG Response Letter are discussed in further detail below.
7. The Petition proposed text amendments which would apply the District's IZ program to the D-1-R, D-3, D-4-R, D-5, D-6, D-6-R, and D-7 zones, which are currently exempt from IZ requirements. The Petition stated that this change would help create more affordable housing in furtherance of the Mayor's Housing Order, the goals outlined in the Mayor's 2019 Housing Equity Report, and the CP by applying IZ set-aside requirements to areas of

¹ In a letter submitted to the record on April 18, 2022, OP stated that, since OAG had not submitted an analysis of the economic impacts of applying IZ to the D zones, OP was not submitting a report on that economic impact analysis or providing its own economic analysis. (Ex. 11.)

² As noted in its setdown report, OP ultimately held a Roundtable on Housing and Affordable Housing with stakeholder groups on November 1, 2022. (Ex. 13.)

the District which are experiencing an increase in residential development and are in need of more affordable housing. (Ex. 3.)

8. The Petition stated the proposed text amendments would not be inconsistent with the CP and would further CP policies and actions that encourage the development and expansion of affordable housing and family-sized housing in high-cost areas (*Policy H-1.1.8; Actions H.1.1.D, H-1.3.A.*); support the production and preservation of affordable housing for low- and moderate-income households (*Policy H-1.2.1.*); recommend meeting affordable housing production targets (*Policy H-1.2.2.*); support the distribution of mixed-income housing equitably across the District (*Policies H-1.2.3, H-1.2.11, H-1.5.1.*); suggest reviewing and considering the expansion of the IZ program as needed to encourage affordable housing production (*Action H-1.2.E.*); and encourage the production of both renter- and owner-occupied housing (*Policy H-1.3.2.*). (Ex. 3.)
9. The OAG Response Letter provided additional arguments in favor of setting down the Petition for a public hearing. In the letter, OAG listed more policies and actions from the CP's Framework, Land Use, and Housing Elements and the Central Washington and Lower Anacostia Waterfront/Near Southwest Area Elements prioritizing the creation of affordable housing in amenity-rich areas such as the Downtown area. The OAG Response Letter also cited the Mayor's 2023 DC Comeback Plan, which sets a goal of adding 15,000 new residents to Downtown by 2028, as further justification for applying IZ to the proposed D zones since the Comeback Plan identified the comparative lack of affordable housing as a driver of outmigration from the District. (Ex. 15, 16.)
10. The OAG Response Letter stated that the economic analysis provided in OP's setdown report, as detailed below, was based on outdated data that did not take into account the effects of the Covid-19 pandemic and the shift to telework. OAG stated that holding a public hearing will allow the Commission to receive additional data about the market dynamics of the Downtown area and the impact that applying IZ to the proposed D zones would have on the production of housing and affordable housing. (Ex. 15, 16.)
11. The OAG Response Letter noted that the Zoning Regulations allow the Board of Zoning Adjustment to grant special exception relief from IZ requirements where an applicant can demonstrate that compliance "would deny an inclusionary development owner economically viable use of its land." (Subtitle C § 1007.1.) Therefore, OAG stated that the Petition would not impede development in the proposed D zones, since applicants could seek a special exception on a case-to-case basis if they are unable to comply with IZ. In addition, OAG stated that the special exception process would allow the Board or the Commission to consider "the individual economic circumstances of a specific project at a particular time, instead of relying on outdated data from a larger area." (Ex. 15, 16.)

OP Setdown Report

12. On March 20, 2023, OP submitted a setdown report (the "OP Setdown Report") recommending the Commission not set down the Petition for a public hearing. (Ex. 13.) OP stated its recommendation was based on the Petition's inconsistency with the CP; the lack of available zoning incentives (e.g., bonus density) in the D zones to counterbalance

the requirements of the IZ program; OP’s economic impact analysis which found that the proposed amendments may have a negative impact on residential development; and current economic uncertainty in Downtown and Central Washington. (Ex. 13.)

13. The OP Setdown Report stated that the Petition is inconsistent with the CP because the increased requirements of applying IZ to the IZ-exempt D zones are not appropriately balanced by offsetting zoning incentives or relief, such as greater building height or density, since there is no available bonus density in most D zone areas. The OP Setdown Report cited several policies and actions from the Housing Element (*Policies H-1.1.2, H-1.1.3, H-1.1.6, H-1.1.8, H-1.2.1, H-1.2.2, H-1.2.3, H-1.3.2, H-1.5.1; Action H.1.2.E.*) which encourage affordable housing policies to balance regulation with incentives to create both market rate and affordable housing in high-cost areas of the District and therefore would not be advanced by the Petition. The OP Setdown Report also cited *Policy CW-1.1.5* and *Action CW-1.1.E* from the Central Washington Area Element, which discuss how zoning and other regulatory incentives should be implemented for creating affordable housing and converting buildings from retail/office to residential in Central Washington. Moreover, as part of its analysis of the CP through a racial equity lens, the OP Setdown Report provided disaggregated race and ethnicity data which found that the geographic area of the D zones experienced large population increases for all race and ethnicity groups between 2010 and 2020. In particular, the Black or African American population increased 42% in the D zones compared to a decrease of 6% Districtwide. OP stated that the proposed amendments’ negative impact on new housing could increase housing cost burdens and make housing in the D zones less attainable for residents of color who are the majority of lower-income households in the District. (Ex. 13.)
14. The OP Setdown Report stated that since there is no bonus density available to offset an IZ requirement in the proposed D zones, “the cost of the IZ units would be absorbed by a reduction in land value; a reduced land value directly limits the ability to get financing; a lack of financing or an increased cost of financing is a disincentive to the private market to invest in more housing and may cause property owners to delay or drop residential development in favor of waiting for the office market to return.” The OP Setdown Report provided an economic impact analysis which estimated that applying IZ to the proposed D zones could reduce the value of land for residential development by approximately 19-30%, which would threaten the production of additional housing in the D zones. OP noted that the Central Washington Planning Area is currently on track to nearly meet its affordable housing production goal by 2025. In addition, the Mayor’s 2023 DC Comeback Plan established a new goal of adding 15,000 new residents to Downtown by 2028, which OP estimates will require approximately 9,000 new housing units. In light of these goals, OP stated that the Petition could negatively impact the creation of more housing and affordable housing in the D zone areas, including Downtown. (Ex. 13.)
15. The OP Setdown Report noted that there are programs and tools other than the IZ program to encourage affordable housing creation in the D zones, including tax benefits available under the Tax Abatements for Housing in Downtown Act of 2022; the affordable rental covenants pilot program; the Local Rent Supplement Program; affordability requirements for District-owned land dispositions; and increased funding for the Housing Production

Trust Fund. In addition, OP cited other programs including IZ Plus and text amendments which have been filed by OP to expand the applicability of the IZ program as well as encourage residential development in the District, as examples of alternative tools to further the District's affordable housing priorities. Therefore, IZ is not the only means available to create affordable housing opportunities and is not designed to reach the most vulnerable low-income residents. (Ex. 13.)

ANC Setdown Form

16. The Commission did not receive any ANC Setdown Forms or other reports from any Advisory Neighborhood Commissions ("ANCs").³

Public Meeting

17. At the Commission's public meeting on March 30, 2023, representatives of OP testified and presented OP's recommendation that the Commission not set down the Petition for a public hearing. OP's representative restated the issues and arguments identified in the OP Setdown Report. (Tr. from March 30, 2022, meeting at pp. 14-27.)
18. At the March 30, 2023, public meeting, the Commission considered the Petitioners' filings and OP's filings. The Commissioners questioned OP about the data provided in its presentation at the public meeting. In response, OP indicated that its data was based on current market estimates and that the effects of the Covid-19 pandemic on office and residential land values were expected to occur over the long-term and equate to an approximately 20-30% decline if IZ were applied to the proposed D zones. The Commissioners then engaged in a discussion about whether holding a public hearing was appropriate in these factual circumstances as all of the Commissioners did not agree that some application of IZ to the proposed D zones was appropriate. The Commissioners discussed the importance of creating affordable housing opportunities in the District and highlighted some of the strengths and limitations of the IZ program in facilitating such opportunities. Ultimately, all of the Commissioners were not convinced, based on the arguments in the case record presented by both the Petitioner and OP, that some application of IZ to the proposed D zones was an appropriate and supportable policy. Because all of the Commissioners did not agree on that premise, the majority of the Commissioners believed that holding a public hearing would only give more life to a policy position that the Commission does not find appropriate at this time. Accordingly, the majority of the Commissioners were persuaded by OP's overall findings and concurred with its conclusion that IZ requirements should not apply to the proposed D zones. At the conclusion of its deliberations, the Commission dismissed the Petition without prejudice. (Tr. from March 30, 2022, meeting at pp. 27-58.)

³ Other comments were submitted to the record by the Committee of 100 on the Federal City (Ex. 9, 14.) and the Ward 5 Councilmember (Ex. 17.). However, the Commission did not consider these other submissions at setdown and based its setdown decision only on the Petitioner's filings and the recommendations of OP in accordance with Subtitle Z § 500.9.

CONCLUSIONS OF LAW

1. Once the Commission receives a petition, it must decide whether to schedule a public hearing on the petition. This decision is commonly referred to as “setdown.” After considering the petition, the recommendations of OP, and the ANC Setdown Form of the affected ANC, the Commission may decide to dismiss the petition or set it down for public hearing. (Subtitle Z § 500.9.) If the Commission dismisses a petition without a public hearing, it must issue an order that includes a statement of reasons for the dismissal. (Subtitle Z § 500.11.)
2. Pursuant to § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163; D.C. Official Code § 6-623.04 (2018 Repl.)) and Subtitle Z § 405.8, the Commission must give “great weight” to the recommendations of OP. The Commission finds the OP Setdown Report, which provided an in-depth analysis of the proposed text amendment and the CP as evaluated through a racial equity lens and recommended that the Petition should not be set down for a public hearing, persuasive.
3. After careful consideration, the Commission concludes that the Petition should not be set down and dismisses the Petition without prejudice for the following reasons. The Commission is persuaded by OP’s finding that the Petition would not further advance CP policies that emphasize the need to balance new zoning requirements, such as IZ set-aside requirements, with appropriate incentives and/or relief. In this case, the Petitioner has not provided adequate evidence of how the application of the IZ program to the proposed D zones could be properly balanced by incentives and/or relief. The Commission believes the proposal would therefore likely discourage residential development in the D zones, including Downtown, where more housing and affordable housing is needed in light of the goals reflected in the CP and Mayor’s initiatives. While special exception relief would be an available remedy for applicants who are unable to comply with the IZ program, as noted by the Petitioner, the Commission nevertheless is not convinced that applying IZ requirements to the proposed D zones is a policy that would further advance the CP goal of creating more affordable housing. The Commission notes that there are other affordable housing programs besides IZ, as highlighted in the OP Setdown Report, which are available to ensure that affordable housing continues to be encouraged and preserved across the District.
4. The Commission also finds persuasive OP’s finding that the proposed text amendment, when evaluated through a racial equity lens, would likely result in negative impacts on the District’s racial equity goals by making it more difficult to develop both affordable and market rate housing in the D zones where housing is needed to keep pace with the population growth identified in the OP Setdown Report. The Commission notes that OP conducted public outreach and engagement with stakeholders, and that such outreach informed its economic impact analysis and conclusion that applying IZ to the proposed D zones would have a negative impact on the District’s housing market. The Commission acknowledges the Petitioner’s argument that holding a public hearing would allow the Commission to receive additional data about the market dynamics of the Downtown area and would allow for more community and stakeholder input on the proposal. However, in

these factual circumstances, where at setdown, all of the Commissioners are not convinced that some application of IZ to the proposed D zones is appropriate and a majority of the Commissioners are not persuaded that the proposed amendments would create more affordable housing in the proposed D zones, the Commission believes that holding a public hearing would mislead the public.


5. As noted above, no ANCs filed a Setdown Form to the record in this case; therefore, the Commission could not consider any ANC Setdown Form recommendation in making this setdown decision.

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia orders **DISMISSAL WITHOUT PREJUDICE** of the Petition.

On March 30, 2023, the Zoning Commission **DISMISSED** the Petition without prejudice at its public meeting by a vote of **3-1-1** (Anthony J. Hood, Joseph S. Imamura, and Peter G. May to dismiss; Robert E. Miller opposed; 3rd Mayoral appointee seat vacant, not voting).

In accordance with the provisions of Subtitle Z § 604.9, this Order No. 21-23 shall become final and effective upon publication in the *District of Columbia Register*; that is, on September 22, 2023.



ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION

SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.