

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**
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Appeal of Steuart Investment Company

Appeal No. 18041

DISTRICT OF COLUMBIA'S PRE-HEARING STATEMENT

The Appellee, the District of Columbia Department of Consumer and Regulatory Affairs ("Appellee" or "DCRA"), by and through undersigned counsel, respectfully submits its pre-hearing statement in opposition to the December 21, 2009 appeal filed by the Appellant, Steuart Investment Company. The appeal challenges the October 20, 2009 determination of DCRA's Zoning Administrator that the combined lot development proposed by Appellant was in violation of Chapter 17 of the Zoning Regulations. The appeal must be denied as the Appellant has failed to show that the Zoning Administrator erred in finding the proposed combined lot development did not comply with the Zoning Regulations.

I. The Proposed CLD

This appeal concerns two lots located in the Downtown Development Overlay. Appellant sought to develop both lots as part of a combined lot development ("CLD"). Under the Appellant's proposed CLD, Square 483 Lot 9 would be developed entirely for commercial use ("the Commercial Lot") and neighboring Square N515 Lot 62 would be developed entirely for residential use ("the Residential Lot"). The Commercial Lot is 56,339 sq. ft. and is located in the DD/C-3-C zoning district. The Residential Lot is 42,824 sq. ft. and is located in the DD/C-2-C zoning district.

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18041
EXHIBIT NO. 17

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The Downtown Development Overlay seeks to create a balanced mixture of uses in the downtown area, including retail, hotel, residential, entertainment, arts, and cultural uses. *See* 11 DCMR § 1700.3(a). In part, the regulations pertaining to this overlay attempt to achieve this balance by requiring a certain amount of residential or other “preferred uses” to be constructed along with any commercial development. Since it is not always practical or desirable for all buildings to be mixed-use buildings, the Zoning Regulations permit the use of CLDs, which allow a developer to construct the required residential use on another lot. *See* 11 DCMR § 1708.1(e) (“the required gross floor area to be devoted to preferred uses may be transferred from the sending lot to a receiving lot”).

In this case, the Commercial Lot, being located in a DD/C-3-C district, is required to have a minimum of 3.5 FAR of residential use, and the Residential Lot, being located in a DD/C-2-C district, is required to have a minimum of 4.5 FAR of residential use. *See* 11 DCMR §§ 1706.4(b), 1706.5(b). Thus, the Appellant is required to develop 197,187 sq. ft. (3.5 FAR x 56,339 sq. ft.) of residential gross floor area (“GFA”) on the Commercial Lot. The Residential Lot is required to develop a minimum of 192,708 sq. ft. (4.5 FAR x 42,824 sq. ft.) of residential GFA. In the Appellant’s proposed CLD, it attempts to transfer all of the Commercial Lot’s 197,187 sq. ft. of required residential GFA to the Residential Lot so that it can dedicate the entire Commercial Lot to commercial use. *See* Tab B of Appellant’s Appeal at lines 6 and 23.

As the Zoning Administrator states in his October 20, 2009 letter, this aspect of the proposed CLD is not permitted by the Zoning Regulations. Under § 1706.4(a), the maximum FAR permitted in a DD/C-2-C district is 8.0. The proposed CLD would increase the Residential Lot’s FAR to 9.1, which is in excess of the 8.0 limit. *See* Tab B of Appellant’s Appeal at line 27. Although § 1706.7(b) permits a developer to exceed the 8.0 FAR limit in a DD/C-2-C zone, it

limits the amount of residential FAR that may be transferred by a CLD to 3.5. In this case, the Appellant is proposing to transfer 4.6 FAR to the residential receiving lot (197,187 sq. ft. / 42,824 sq. ft. = 4.6 FAR), which is in excess of the 3.5 limit stated in § 1706.7(b). Therefore, the proposed CLD is prohibited by 11 DCMR § 1706.7(b).

II. The Purpose of 11 DCMR § 1706.7(b)

Section 1706.7(b) states:

(b) Except for historic landmarks and properties listed in § 1707.4 in the Downtown Historic District, the maximum FAR limitations in §§ 1706.4, 1706.5, and 1706.6 shall not apply to any lot that devotes the increase in gross floor area entirely to residential use on-site; provided:

- (1) The increase in gross floor area shall not be used to meet the minimum residential requirements of §§ 1706.4, 1706.5, or 1706.6; and
- (2) The maximum residential FAR that may be accepted through combined lot development is listed in the following table:

Zone District of the Lot Receiving Housing	Maximum Allowable Combined Lot Transfer (FAR)
DD/C-2-C	3.5
DD/C-3-C	6.0
DD/C-4	8.0

(3) The relief from maximum FAR limitations provided by this paragraph does not alter or modify the obligation to comply with all applicable Zoning Regulations affecting the lot, nor does it alter or modify an applicant's burden of proof when seeking zoning relief.

See 11 DCMR § 1706.7(b).

This provision eliminates the maximum limits on FAR for residential construction in the Downtown Development Overlay; provided that the CLD complies to the conditions in (b)(1) and (2). The density (FAR) that this provision allows developers to add above the matter of right FAR limit is called “bonus density.”

The purpose of § 1706.7(b) was to increase to amount of residential units that would be built in the overlay and to incentivize their construction. It was added as an amendment to Chapter 17 in 2001. In the order creating the provision, the Zoning Commission stated:

[T]he lifting of FAR restrictions on residential development will allow for additional dwelling units. This not only makes residential development more attractive; but also, by increasing the number of units per building, fixed operational costs per unit will decrease.

See Zoning Commission Order No. 943 (July 26, 2001) at p. 3.

Although the Zoning Commission wanted to permit residential buildings to exceed the matter of right FAR limits, the Commission included § 1706.7(b)(2) to ensure that the FAR limits would not be exceeded by CLD transactions. This intention is reflected in the Office of Planning's report to the Zoning Commission at the time § 1706.7(b)(2) was created. The report states:

Since the goal of this zoning change is to encourage the development of additional housing downtown, the bonus residential FAR should not be permitted to relieve other commercial sites of their housing requirement through combined lot development. *Residential FAR eligible for transfer should be limited to the amount of non-residential FAR permitted on the residential lot under the current regulations.*

See Office of Planning report dated January 25, 2001 at p. 11, attached hereto as Exhibit A (emphasis added).

The same Office of Planning report proposed suggested limits on the transfer of residential FAR through CLDs. The chart containing the Office of Planning's suggested limits was included verbatim by the Zoning Commission in the final rulemaking. Compare 11 DCMR § 1706.7(b)(2) and Exhibit A at p. 16. The chart in § 1706.7(b)(2) serves to limit the transfer of residential FAR to the amount of non-residential FAR permitted on the receiving, residential lot. For example, because a lot in a C-2-C district is permitted to have 3.5 commercial FAR (8.0 – 4.5 required residential minimum FAR), that lot is only allowed to receive 3.5 residential FAR through a CLD.

Similar to the rationale for lifting the residential FAR limits, the purpose of § 1706.7(b)(2) is to maximize the amount of housing that will be built. The Office of Planning explained in its report that “the bonus density should not be transferable in a combined lot situation ..., as that would defeat the goal of the bonus to provide additional housing units.” See Exhibit A at p. 14. Section 1706.7(b)(2) maximizes housing by (1) prohibiting developers from disposing of their required residential FAR in unbalanced CLD transactions; and (2) by increasing the number of CLD transactions that will occur in the Downtown Development Overlay.

Here, the Appellant is proposing to transfer 4.6 FAR of residential use to the Residential Lot. The reason why this is a violation of § 1706.7(b)(2) is that the Appellant is attempting to transfer more residential FAR (4.6 FAR or 197,187 sq. ft.) to the Residential Lot than the amount of non-residential FAR permitted on that lot (3.5 FAR or 149,884 sq. ft.). See Tab B of Appellant’s Appeal at lines 6 and 9. This imbalance is exactly what § 1706.7(b)(2) was designed to prevent. See Exhibit A at p. 11 (quoted above).

The proposed CLD would be permitted under the Zoning Regulations if the Residential Lot was larger than the Commercial Lot, or if the Residential Lot was located in either a C-3-C or C-4 zone. In both of those instances, the sending lot is not transferring more residential FAR than the amount of non-residential FAR permitted on the receiving lot under the regulations. For example, if the Residential Lot was zoned C-3-C, then the Commercial Lot would be able to transfer the 4.6 FAR of residential use to the Residential Lot because § 1706.7(b)(2) permits the sending lot to transfer up to 6.0 FAR in that instance.

III. Appellant's Argument

The Appellant argues that § 1706.7(b) does not apply because this CLD transaction does not implicate bonus density. This argument is rooted in a flawed premise that a lot in a CLD transaction is not subject to the requirements of its own zoning district. The Appellant believes that where two lots are located in two different zone districts, and where each district has a different maximum FAR limit, you calculate the maximum FAR limit by averaging together the requirements of the two districts. By averaging together the maximum FAR limits found in sections 1706.4(a) and 1706.5(a), Appellant believes the maximum FAR limit to be 8.85 for the two lots. *See* Tab B of Appellant's Appeal at line 12. Under Appellant's interpretation, so long as the combined FAR of the two lots is not above 8.85, no bonus density is being used and § 1706.7(b) does not apply. This argument is erroneous and problematic for several reasons.

First, the concept of averaging together requirements of different zoning districts is not found anywhere in the regulations and the Appellant has not put forth any support for this.

Second, Appellant's interpretation of the regulations renders § 1706.7(b) meaningless and contradicts intention of the provision. Appellant's proposed averaging of the maximum FAR requirements for the two lots allows it to transfer more residential FAR from the sending lot than the amount of non-residential FAR permitted on the receiving lot. Again, this is what § 1706.7(b)(2) was designed to prevent. *See Exhibit A* at p. 11.

As explained above, § 1706.7(b) was added to allow residential development to exceed the maximum FAR limit on a lot, but it prohibited developers from doing so through CLDs. *See Exhibit A* at p. 2, 11, 14, 16 ("the extra density should not be eligible to generate TDR's, engage in Combined Lot Transfers or meet the minimum housing requirements"). Nevertheless, Appellant is attempting to exceed the FAR limit in a C-2-C zone by transferring 4.6 FAR of

residential use to the Residential Lot. When this FAR is added to the required 4.5 residential FAR minimum for the property, the total FAR for the Residential Lot is 9.1. Since the maximum FAR for properties in a DD/C-2-C zone is 8.0, the Appellant is utilizing 1.1 FAR of bonus density. *See* 11 DCMR § 1706.4(b). The Appellant runs afoul of § 1706.7(b)(2) by attempting to dispose of more of its residential requirement on the Residential Lot than is permitted.

Appellant's interpretation also ignores the obvious symmetry between the § 1706.7(b) and the FAR limits in § 1706.4(a) and 1706.5(a). For example, a lot in a DD/C-2-C zone is required to have a minimum of 4.5 residential FAR. When this lot receives 3.5 residential FAR through a CLD transaction, it will reach its maximum FAR of 8.0. Under § 1706.7(b), the builder may continue to add residential FAR to this lot (in excess of 8.0), but it cannot do so through CLD. *See* 11 DCMR § 1706.7(b) and Exhibit A at p. 11. By averaging together the requirements of two different zoning districts, Appellant disrupts this symmetry and renders § 1706.7(b)(2) ineffective. This is not the result intended by the Zoning Commission or the Office of Planning when § 1706.7(b) was created.

Lastly, Appellant's reading of § 1708.1(g) is overly broad and ignores other limiting provisions. This section explains in general terms how the mechanics of CLD transactions work. It is a general statement that is limited by a number of different provisions, including §§ 1706.4, 1706.5, 1706.6, and 1706.7. The Board has held that the "plain language of a statute (and similarly a regulation) must be determined in the context of the regulations as a whole." *See Appeal No. 17677 of L. Napoleon Cooper* (2008) at p. 6. When § 1708.1(g) is read in the context of the Zoning Regulations as a whole (and specifically the limiting provisions listed above), the language of § 1708.1(g) cannot be interpreted to relieve a developer from complying with the requirements of each zoning district.

IV. Alternatives for the Appellant

The Appellant also argues that the Zoning Administrator's interpretation of the regulations is inflexible and creates an "absurd result." This argument also fails as there are alternate paths that the Appellant could take to proceed with the development of its two lots- all of which comply with the regulations and are not absurd. One alternative for the Appellant would be to convert a portion of the building on the Commercial Lot to be used as residential. Under § 1706.7(b)(2), the Appellant is allowed to transfer 149,884 sq. ft. (3.5 FAR x 42,824 sq. ft.) of residential GFA to the Residential Lot. The Appellant could then satisfy its minimum residential requirement by developing 47,303 sq. ft. of residential GFA (197,187 sq. ft. – 149,884 sq. ft.) on the site of the Commercial Lot. *See* 11 DCMR § 1706.5(b).

If the Appellant wanted to keep the Commercial Lot strictly for commercial use, it could engage in a second CLD transaction. Under this scenario, the Appellant could transfer the permitted 149,884 sq. ft. of residential GFA to the Residential Lot and then transfer the remaining 47,303 sq. ft. to a third lot. CLD transactions involving more than two lots are contemplated in regulations and, in line with the goal of the Zoning Commission, result in the building of more housing. *See* 11 DCMR § 1708.1 ("Two (2) or more lots may be combined...").

For the reasons set forth above, the Zoning Administrator did not err in determining that the proposed CLD did not conform to Chapter 17 of the Zoning Regulations.

Respectfully Submitted,

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March 23, 2010



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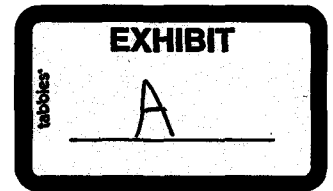
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A



GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF PLANNING



Office of the Director

Memorandum

TO: District of Columbia Zoning Commission
FROM: Andrew Altman
DATE: January 25, 2001
SUBJECT: Zoning Commission Case # 00-30T (Downtown Development
District Zoning Amendments Hearing Report)

This hearing report describes a package of housing incentives being proposed by the Office of Planning as text amendments to the Downtown Development District Zoning Overlay. It provides the Office of Planning's analysis and recommendations. These incentives are being recommended in response to concerns voiced and suggestions made by Mayor Anthony Williams' Downtown Housing Task Force and in the Downtown Action Agenda process. For background information, OP's set down report is attached.

I. SUMMARY OF RECOMMENDATIONS

The Office of Planning recommends the Zoning Commission amend the District's Zoning Regulations to permit the following. A full discussion is found in the Recommendation section.

Combined Lot Transfers

- Require recordation of a covenant binding the "receiving" site to construct an amount of housing equal to the commercial development rights, which are being transferred.
- Require establishment of an escrow account to hold transaction funds until 50% completion of the housing project has been certified.
- If the required housing is not completed within 5 years, the escrow monies are deposited in the Housing Production Trust Fund for construction of housing within the DDD boundaries.

Residential Density

- Residential housing projects in designated Housing Priority Areas in the DDD may be relieved of their density restrictions, so long as the building height is consistent with the Act to Regulate the Height of Buildings of 1910 except on properties listed in §1707.4 (Historic District) or individually designated landmarks.
- The extra density should not be eligible to generate TDR's, engage in Combined Lot Transfers or meet the minimum housing requirements.

Recreation Space Requirement

- The residential recreation space requirement should be reduced to 5% in zone districts DD/C-2-C and DD/C-3-C for Housing Priority Areas B & C.
- Housing Priority A requirements should be reduced to 5% in zone districts DD/C-2-C and DD/C-3-C, however the Commission should consider an option of allowing this only if developers make a contribution to an open space fund.

II. ZONING ANALYSIS

There are three zone districts affected by the changes being proposed: DD/C-2-C, DD/C-3-C and DD/C-4. Currently, those districts have the following characteristics:

Zoning Characteristics	DD/C-4	DD/C-3-C	DD/C-2-C
Density			
• Total	10.0 FAR	9.5 FAR	8.0 FAR
• Residential	2.0 FAR	3.5 FAR	4.5 FAR
• Commercial	8.0 FAR	6.0 FAR	3.5 FAR
Height	Height Act Maximum	Height Act Maximum	Height Act Maximum
Required Recreation Space (50% req. outside)	5%	10%	15%

Figure 1

In addition, each of these zones permits combined lot development, with the timing restrictions to be discussed later in this report.

Current Housing Market

Any changes to the Downtown Development District regulations should first be viewed in the context of the Downtown Office/Housing market over the last ten years. Since the DD regulations were proposed and finally enacted in 1991, there has been very little real estate development anywhere in the District, much less in the Downtown Housing Priority Areas. The economy of the District, for a variety of reasons, lagged behind that of the region for 8 of the past 10 years. It has only been since 1998 (see Figure 1) that new housing permits in the District have started to recover. Even more telling are the number of larger projects (5 or more units) in the District that might exemplify Downtown housing.

Another piece of evidence suggesting the District economic health has improved is the early results of 2000 Census. The US Census Bureau recently announced that the 2000 Census places the District's population at 572,059. While this is a 5.7% decline from 1990, it is 10.2% (52,000 people) higher than what had been predicted.

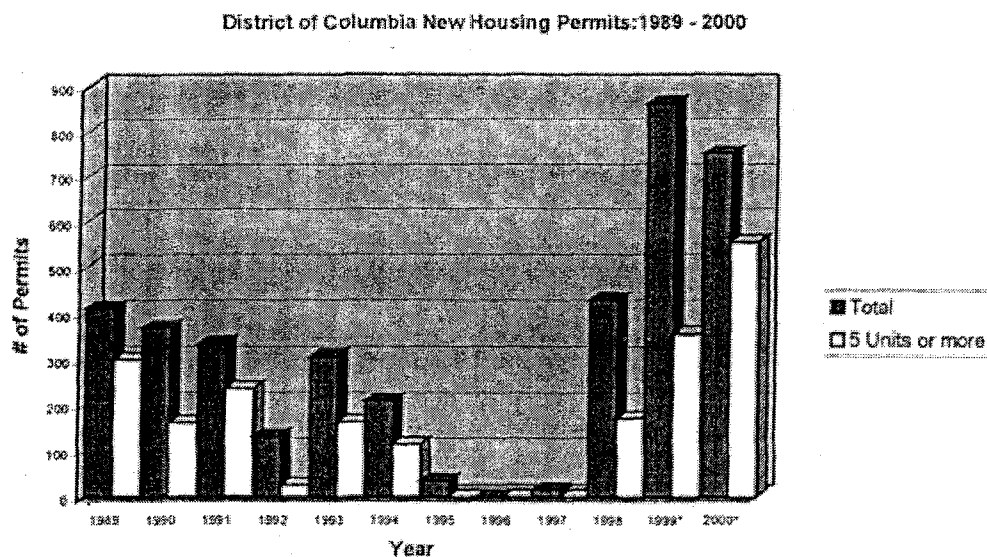


Figure 2. Source: US Census Bureau, *DC Office of Planning, January 2001.

As demonstrated above, the DC housing market has been very active for three years now. This is due to a combination of factors, including pent up demand for new housing after a long previous draught, the lack of new product, the growing demographic interest by empty nester's and young professionals in the quality of life offered by urban areas, and the hot regional economy. This has resulted in very low vacancy rates (under 1%),

rapidly rising rental rates and a spate of projects either under construction or planned. Rents for some units have risen as much as 14% a year (Delta Associates, 7/00) and a recent DCBIA newsletter indicates that more than 5,827 housing units are in the pipeline. This includes the large-scale new construction projects, the substantial rehab projects not counted by the US Census, and those in the pre-development stages. It does not take into account the many smaller rehabilitation projects.

The Office of Planning has calculated that 2,905 units (see Attachment 6) are planned in or near the downtown area over the next several years. Most of these will be the result of subsidies or publicly administered competitions such as Gallery Place, the Mather Building, Square 457, and the Wax Museum. In addition, 1,404 units (primarily south of Massachusetts Avenue) are being planned by private developers without public assistance. Even under very favorable economic conditions, it is likely to take several years to absorb all of these units. However, while there is great interest in Downtown Housing, none of the projects have yet broken ground.

Recognizing considerable economic benefit to the District from each new resident, the city has determined the promotion of new downtown housing to be an important economic development goal. While the current perception is that housing development can be profitable, that perception depends on a number of factors. These include:

- Relatively high rental rates. Rents are running over \$2.00 per square foot per month in Downtown projects and new projects in the West End and Georgetown. While it appears that there is an unmet demand for Downtown housing, the question is how deep is the market if an 800 sf two-bedroom apartment is renting for \$1,600 to \$1,800 or more per month?
- Operating costs are quite sensitive to economies of scale. The Task Force indicated that a minimum number of 150 units were needed in a development in order for operating costs to be an acceptable percentage of overall development costs. Yet assembly of sites large enough to accommodate this number of units is difficult in Downtown.
- The absence of residential serving retail, playgrounds and similar residential amenities. Can the convenience of a Downtown location overcome the absence of these amenities?
- Uncertainty over the state of the national economy. While interest rates are currently falling, recent economic turbulence, and uncertainty regarding inflation and national fiscal policy may reduce investor confidence.
- What is needed to complete this analysis is the effect of other incentives offered by the DD. For instance, the DD enables housing projects to sell Transferable Development Rights (TDR). The most recent sale of TDRs was above \$20 / square foot. TDRs have potentially great value for housing projects south of Massachusetts where they can generate at a 2:1 ratio, or doubling what a

developer can sell. Even at a conservative estimate of under \$15.00 / square foot, TDR could substantially help fill the gap in housing finances. In addition to the TDRs, there is the greater density allowed for housing and the value of Combined Lot (discussed below) to help close the gap even further.

Combined Lot Transfers

Current Regulations

The current regulations are designed to encourage the mixed-use vision intended for downtown by requiring a residential component of all development. The Combined Lot Transfer provision permitted developers to mix and match commercial and residential requirements, so that one site could "receive" all the housing requirements for one or more sites, and the commercial entitlement for that site could be transferred to the "sending" site or sites. The principles of combined lot development are discussed in endnote i.

The draft of the Task Force report stated that the principal difficulty with the current combined lot method is the linking of the office site's Certificate of Occupancy (C of O) to the residential site's certificate. This adds a layer of risk to the financing both projects that is difficult to overcome. A problem would arise if the office were to be completed, but the housing is not ready. At this point, the office developer has invested both debt and equity but cannot collect rent without a C of O. Similarly, housing projects depending on the combined lot contributions from office languish while office developers struggle to overcome these obstacles. Debt and equity investors are unlikely to participate under these conditions.

While the authors of the regulations were aware of this complication, they were unable to agree on an alternative that did not risk the loss of potential housing sites. Given the softness of the housing market at the time, the more stringent timing mechanism was used. While OP confesses to some of the same concerns about loss of housing sites, we feel that the current situation makes financing office and housing projects so complex that it creates an unnecessary obstacle.

What is significant about the current economic conditions is that more than one project has entered into negotiations to complete a combined lot transfer under the current regulations. When the Task Force first looked at this issue, this had not yet happened. This suggests the current regulations are not an absolute obstacle; however it appears that Combined Lot Transfer does require two well-funded entities or self-financing to successfully complete the transaction.

There are several tools, which the industry already utilizes to minimize risk, which could be useful, including performance bonds. The developers on the Downtown Housing Task Force rejected such tools as financially prohibitive and cumbersome, and strongly argued that relaxation of the timing constraints on combined lot transfers was the only feasible tool to permit combined lots to function as originally intended.

Combined lot does add complexity to real estate development and there are problems that do inhibit development. The first is timing. Development cycles and construction schedules are often different for office and residential. A more detailed discussion of this phenomenon is contained in endnote ii. However, the end result is simple—when both cycles are not strong simultaneously, neither one can proceed.ⁱⁱ

The second issue, the difficulty of coordinating multiple entities, is particularly relevant to Housing Priority Area C in the Penn Quarter. Due to the overall lack of developable space and since the housing requirement is only 2.0 FAR, a potential housing site may have to complete several Combined Lot Transactions before it is ready to move forward with 100% housing. If even 1 office site fails to go forward, the housing is stalled, which then halts the rest of the office projects.

The third is that, under the current system, the value of the compensation paid the housing project is not maximized because of its receipt at the completion of construction. Since the compensation is tied to receiving a C of O, the compensation would not be realized until the project is complete. If the money is available sooner, investors might be able to use it as equity, which would help reduce risk and construction interest. Therefore, there is value to the housing developer if the compensation can be received sooner.

Task Force Text Amendment

There are three components to the Task Force's recommendation for enabling both office and housing projects to move at full speed.

1. An office project in a Housing Priority Area would compensate another site to receive the housing use requirement.
2. The compensation paid would be deposited into an escrow account that could not be drawn on until permits had been filed and the housing project has reached 50% completion.
3. A covenant would be placed on the receiving site requiring the transferred housing requirement to stay with the land and the D.C. Government would serve as a beneficiary and enforcer.

Once this has taken place, the office site would be freed of its housing requirement and could receive a certificate of occupancy enabling the building to be used.

There are some concerns regarding the Task Force's proposed language. The primary concern is that there is no guarantee that housing will ever get built. There are three aspects to this concern:

1. There may be a housing requirement on the "receiving" site, but, if the market perceives that housing is not profitable, there is no way to force development of housing on the site.
2. The covenant on the receiving site may require housing on that site, but political pressure may be brought to bear on the Zoning Commission or the City Council to remove the requirement for housing on the site.
3. There is a possibility, for whatever reason, that there could be a less-than-arms-length transaction, which would result in the developer who "sends" his housing off-site, paying less than the appropriate difference in profitability between commercial and residential development. Or, especially in C-4 or C-3-C sites, where the housing requirement is relatively small in relation to the commercial component, it could be economically feasible to develop only the commercial portion of the site, leaving the remaining 20 - 35% of the site attractively landscaped as an office amenity.

The Task Force recognized these concerns, and examined various approaches to remedy them. In the end, most Task Force members have come to accept that the benefits to housing and commercial developers from "de-linking" the commercial and residential components of combined lot transfers outweigh the risks.

The Task Force also considered opening up transfers between the B & C Housing Priority Areas. There are very few remaining sites where housing can still be developed in Area C and land costs and the higher marginal value of land to office uses, would greatly reduce any possibility of further housing being provided in the Penn Quarter. For these reasons, the Office of Planning strongly recommends against allowing Combined Lot Transfers between B & C. Suggestions about combining the A and B Housing Priority Areas are not recommended by OP at this time for similar reasons.

Office of Planning's Text Amendment

The Office of Planning's set down report provided an alternative text amendment that adds two additional components to the Task Force's sample. In addition to the covenant and the escrow agreement, OP added:

1. A deadline to the compensation in the escrow. If the housing site does not receive the C of O in 5 years then the compensation paid into the escrow can be

deposited into the District's Housing Production Trust Fund for financing housing elsewhere within the DDD boundaries. A three-year extension is possible upon review by the Zoning Commission for good cause. The covenant would still remain on the land.

2. The District should be a beneficiary of the covenant to maintain the Zoning Commission's regulatory authority over land use decisions

The addition of the deadline attempts to ensure the housing is built within a similar time frame as the office development. It makes the District be a third party beneficiary of the escrow agreement and upon a deadline the receiving site would potentially lose use of the funds. In theory, a housing developer would not risk accepting the transfer if he or she weren't able to complete the project within the deadline. The central goal of OP's alternative was to amend the mechanism to allow both projects to move forward upon a transfer, but to create an enforcement mechanism that in the event housing did not occur on the site, the escrow could help build housing elsewhere in the Downtown.

On January 18, 2001 the OP held a roundtable discussion with participants of the Task Force and housing developers to discuss an alternative approach which would require the documentation from the housing site developer often required by the private sector such as:

- 1) completion guarantee bonds from the major contractors, and
- 2) the proviso that all necessary permits have been secured, and
- 3) financial commitments made,

before the covenant could be recorded.

While stringent requirements such as these would increase the likelihood that the "receiving" site is indeed a legitimate housing development, an important point to bear in mind is the effect of the alternative on the value of combined lot transfers. Alternatives that are stricter on the status of the housing site mean a housing developer would need greater compensation before accepting the housing requirement, which may discourage housing development

Participants at the roundtable discussions believed that OP original proposal was sufficient to protect legitimate housing developers from competition for combined lot transfers with non-legitimate sites. One addition that was discussed included a requirement to demonstrate with conceptual architectural drawings that the receiving site was at least developable as housing.

Residential Density

Current Regulations

The goal of any amendment to residential density must be two fold. From an economic standpoint it must help residential housing be financially attractive to potential housing developers. From a public policy standpoint, it must help the Downtown reach its goal of 5,400 units of housing and strive for a high quality urban environment.

One of the common tools in zoning for controlling density is the floor area ratio (FAR). However, unlike height, lot coverage, and building setbacks that can be uniformly applied to any type of development, the effect of FAR limitations has different impacts depending on the proposed use. Height, lot coverage and building setbacks create a fixed building envelope, but the number of floors that can be fit into that envelope is variable depending on the floor height. Office development needs a larger floor height than residential development, thus by lifting FAR restrictions for residential developments, the number of units that can be built, within the same building envelope, could be increased.

Because of the floor height differences between office and residential uses and the Building Code¹ requirements for light and air and the Zoning requirements for recreational open space and restricted lot coverage in residential development, residential development will always have less bulk than comparably restricted commercial development. Some effort to relieve this disparity was built into the DD District by allowing a 0.5 FAR bonus for housing development. According to the Downtown Housing Task Force, however, this bonus has not effectively compensated for the financial disparity between office and residential profitability. Depending on the shape of the lot and building design, the lifting of FAR restrictions on residential development will provide many additional housing units. This not only makes development of housing more attractive, but also, by increasing the number of units in a building, fixed operational cost per unit will decrease. Increasing the number of units per building site will also help the city to reach its housing targets.

Task Force Text Amendment

The Task Force recommended that in the DD maximum density restrictions could be removed for housing use only. The Task Force notes for instance that on sites in the C-2-C that permit 130' buildings, FAR under optimal conditions could be increased from 8.5 to 13.0. As an example, this recommendation would enable a developer of a 20,000

¹ BOCA Building Code, Section 1206 Natural Light, Section 1208 Natural Ventilation, and Section 1212 Courts and Yards, See Attachment 7

square foot lot to go from a 170,000 square foot building to 260,000 square feet. This would add roughly 90 units of housing to the project.

This seems to be a simple way to give a density bonus; however, several things should be considered in evaluating the impacts of this rule change. FAR not only controls the density of development, but also the bulk of buildings. Additional building bulk may have a negative impact on light and air available to adjacent buildings. Reduced ceiling height may result in lower quality units, and could reduce marketability and long-term value. This would affect the quality of housing units both on the subject property and on those adjacent to the proposed development. Finally, if the FAR bonus proposed were given credit in a combined lot development no net increase in housing units would be achieved.

Office of Planning's Text Amendment

It should be made clear in any text proposed that the Historic Preservation FAR requirements in Section 1707.4 be maintained. The ability to transfer bonus densities from a historic lot shall be maintained as permitted in 1707.5, which will allow for some incentive to build housing within the district. The Historic Preservation Review Board or the Commission on Fine Arts can evaluate the impacts of the density bonus on other historic districts and on landmark sites on a case-by-case basis.

There are a number of questions regarding the housing projects, which could result from these bonuses:

- 1) Does the building provide adequate light and air for its tenants?
- 2) Will the development adversely impact the light, air or privacy of adjacent buildings?
- 3) Can architecture provide sufficient variety to mitigate the impacts of increase building bulk?

However, the Office of Planning agrees with the arguments of several Task Force members that market forces will take care of these quality of housing concerns and has recommended that the density bonus be available as a matter of right, with no zoning review. The perceived impediment of having to get a special exception, though an improvement over the variance requirements, would not further our goal of actively encouraging additional downtown housing.

To further visualize the impacts of the increased building bulk permitted; a case study is provided in Attachment 8. The building shown represents the visual impact of the additional FAR that was provided in this case. As illustrated by the diagrams, the building gains an entire floor of residential units. Because the additional bulk could be

added in several ways, three different scenarios are shown. The study shows that the additional bulk permitted by the proposed regulations would not substantially impact the neighboring buildings.

Because of the lower land values, predominance of C-2-C zoning and larger availability of sites in Housing Priority Area A, a density bonus incentive may not be as critical, though the strength of the market here has not yet been demonstrated. It has been suggested by some reviewers of the draft regulations that the Zoning Commission consider examples set by other jurisdictions. Across the country, many governmental entities (i.e. Montgomery County, New Jersey, Massachusetts, California) require that, in exchange for added density, residential housing projects must make 10% or more of the units affordable to moderate-income families. Shaw is currently experiencing gentrification and displacement of long-term residents. An affordability requirement, such those successful programs found in many other cities, could provide needed units of affordable housing in the area; however, little is known about the market economics of such a move, and the strength of the market north of Massachusetts Avenue.

Since the goal of this zoning change is to encourage the development of additional housing downtown, the bonus residential FAR should not be permitted to relieve other commercial sites of their housing requirement through combined lot development. Residential FAR eligible for transfer should be limited to the amount of non-residential FAR permitted on the residential lot under the current regulations. The same concept applies to transferable development rights.

Therefore, while the Office of Planning endorses providing relief from density restrictions for housing in the Downtown Development District commercial zones (DD/C-2-C, DD/C-3-C, and DD/C-4), the ability to complete combined lot transfers should be limited to the original target DD density. Many present at the round table discussion agreed that this would potentially increase the total number of units eventually developed in the DD.

A related question is whether such density bonuses should be extended to the pockets of high-rise residential zoning within the DD. Sites with existing residential were generally zoned DD/R-5-E in order to conserve these uses; however, some owners of this property have requested that they be permitted to benefit from the increased density as well. Relieving housing of density requirements in commercial zones is meant to help them compete with office developments. Since sites in the R-5-E zone do not compete with office, density bonus could be permitted in exchange for other public benefits such as a small percent of affordable units. At this point, OP has no objection, and we have encouraged these owners to testify at the public hearing.

Recreation Space

In addition to the Task Force recommendations, the Office of Planning in our set down report suggested the Zoning Commission consider changes to the residential recreation space requirements in commercial districts of the DD. The table below breaks down the requirement zone by zone.

DISTRICT	PERCENTAGE OF GROSS FLOOR AREA
C-1, C-2-A	20%
C-2-B, C-2-C, C-3-A	15%
C-3-B, C-3-C	10%
C-4, C-5 (PAD)	5%

Figure 4

There were several reasons OP felt these changes should be considered.

1. The bonus density provided by the DD incentives for categories such as C-2-C was equivalent to or exceeded the base density of the C-4 zoning, however the recreation requirements were three times as high. Figure 5. illustrates that the density of the DD/C-2-C (8.5) is equivalent to the base C-4 (also 8.5), however in Figure 4 above, the required recreation space of the C-2-C (15%) is much greater than the C-4 (5%).

DISTRICT	BASE DENSITY	DEVELOPMENT DISTRICT BONUS	MINIMUM RESIDENTIAL REQUIREMENT	RESIDENTIAL BONUSES	MAXIMUM DENSITY
C-2-C	6.0	2.0	4.5	0.5	8.5
C-3-C	6.5	3.0	3.5	0.5	10.0
C-4	8.5	1.5	2.0	0.5	10.5

Figure 5.

2. Numerous public recreational activities are already available downtown, especially south of Massachusetts Avenue. There are outdoor spaces such as the Mall, Judiciary Square, and John Marshall Park. There are also restaurants, retail, museums, etc.
3. The "eyes on the street" concept of pedestrians and vibrant activity is weakened if residents primarily use private recreation space provided on the inside of buildings or on top floor observation decks.
4. In the DD, with lot coverage requirements reducing potential floor area, the required recreation space, even with the use of available roof top space, will add up to greater than one entire floor, as demonstrated by Figure 6. This means a substantial reduction in the number of units that would otherwise be able to be built on the site.

DISTRICT	LAND AREA	MAXIMUM FAR	TOTAL SQ FT	RECREATION REQUIREMENT	REQUIRED REC SPACE
C-2-C	20,000	6.0	120,000	15%	18,000
DD/C-2-C	20,000	8.5	170,000	15%	25,500
C-4	20,000	8.5	200,000	5%	8,500

Figure 6.

5. Provision of ground floor open space is prohibitively expensive where land costs are high. In addition, it could reduce the ability to provide ground level retail, which is important for street vitality and to provide necessary retail services.

Upon further review, all these conditions exist south of Massachusetts. However, very few of these conditions exist north of Massachusetts. The Mt Vernon Triangle area is in fact substantially different from the rest of the DD. It has large unimproved lots, much lower land prices, very few opportunities for recreation space, and few public streetscape amenities. There is a planned housing project on New York Avenue in the C-2-C zone that is, as currently proposed, providing 15% of the FAR as recreation space. This demonstrates that providing the required recreation space can be achievable in the NoMa area, but there are aspects of that project, which make it unique.

Related to this discussion should be the NoMa Investment Strategy, a planning effort that looks at revitalizing the Mt Vernon Triangle (bounded by Massachusetts, New Jersey and New York Avenue) and the North Capitol Corridor. Central to the strategy is the development of a new neighborhood with all the quality of life features needed for such a neighborhood to succeed. The ability for residents to have sufficient recreation space will be important. Therefore, reductions in recreation requirements for Housing Priority Area A should be limited. Options for the Zoning Commission to consider include a buy out option, or allowing a special exception reduction to 5% for north of Massachusetts.

Some present at the roundtable felt that the requirement should be removed entirely and left to the market. However, what the market requires changes as conditions change and without minimum standards the quality of housing can decline. OP feels that a minimum 5% recreation space set aside should continue to be required. If further incentives are needed to build housing, it should not be at the sacrifice of a minimum standard of quality.

As a final note on recreation space, the Zoning Commission should consider that recreation space is a typical variance request. While the variance review process empowers the Board of Zoning Adjustments to maintain some direct control over the quality of development in the District, at the same time allowing flexibility for development sites that have unique problems, such relief is substantially discounted by the development community because of the uncertainty and additional time it introduces.

Reducing the recreation space requirement will be one step toward speeding projects to delivery, but at the cost of relinquishing the ability to review each situation individually.

III. FINDINGS

Combined Lot

- A limited number of housing projects are currently moving forward under the existing DD combined lot provisions. However, the current Combined Lot regulations do require two very well funded entities or those who can self-finance (REITS) to complete the transaction.
- Increasing the flexibility with regard to timing of combined lot transfers could make this a more feasible option for less well-financed entities or those relying on debt financing.
- The concept that housing construction must be in approximately the same time frame as any linked commercial development is an important concept. Assuring continued availability of sites is key.
- Legitimate housing projects should be protected from competing for combined lot transfers with sites that have no intention of constructing housing.
- Escrow agreements and covenants giving the appropriate District entity review power are useful for minimal guarantee of housing delivery.
- A combination of escrow and covenant agreements would eliminate non-legitimate, or highly speculative housing projects from tying up valuable combined lot FAR.

Residential Density

- Because floor height requirements are different between commercial and residential uses, lifting FAR restrictions for residential developments would increase the number of units built in substantially similar building envelopes.
- Based on the massing study shown in Attachment 8, the proposed increases in bulk would not substantially impact the Downtown District.
- The character of the Historic District should be maintained by excluding its lots from the density bonus.
- The density bonus should not be transferable in a combined lot situation or for generating transferable development, as that would defeat the goal of the bonus to provide additional housing units.

Recreation Space

- In the dense urban environment south of Massachusetts Avenue there are numerous public recreation opportunities. Their use should be encouraged.
- The DD density incentives provide C-2-C and C-3-C zones FAR density functionally equivalent to, or greater than the C-4 zone, but maintains the recreation space requirements of their base zones.
- Sites north of Massachusetts have few quality public recreation opportunities and different development economics and should not have their recreation space reduced as much as Housing Priority B & C.
- For sites north of Massachusetts, developers should be able to buyout of their recreation requirement through contributions to improve public recreation space.
- Upon District commitment of funds toward improving public space recreational opportunities, the Zoning Commission could revisit the additional recreation space requirement north of Massachusetts Avenue.

IV. RECOMMENDATIONS

Combined Lot Transfers

Based on the discussion of the round table on downtown housing, the Office of Planning recommends that the Zoning Commission modify the regulations and no longer require the housing site to receive its C of O before the linked non-housing site can receive its C of O, as long as the following occur:

1. A covenant running with the land of the receiving site shall be executed by all of the owners of the properties and the District government prior to the issuance of any building permits for the non-residential site. The covenant shall be for the purpose of insuring that the transferred housing requirement is developed on site. Amendments to the covenant can only happen with approval of the Zoning Commission.
2. Compensation paid for receiving the housing requirement shall be deposited into an escrow account and be released only upon certification by an independent architect or the D.C.R.A. building inspector that the project has reached 50% completion.
3. A deadline shall exist on the funds in escrow. If a Certificate of Occupancy has not been received within five years after the placement of the covenant, the city shall have the right to deposit the money in the Housing Production Trust Fund

for the development of housing elsewhere in the DD. The owner may request a three-year extension by a showing of good cause before the Zoning Commission.

Sample text is provided in Attachment 3.

Residential Density

The Office of Planning recommends that the Zoning Commission modify the regulations to allow a density bonus for residential development by lifting FAR restrictions. For north of Massachusetts the Zoning Commission could consider an affordability requirement in exchange for this relief of density restrictions. The Office of Planning will provide a proforma analysis of the impacts of such a requirement at the public hearing.

The bonus should not apply to properties identified in Section 1707.4 or properties designated as historic landmarks. The bonus density gained through this provision should not be used to accept additional combined lot transfers beyond the amount, which would normally be permitted in that zone. This is outlined in the following table. This bonus would provide economic incentive to developers to increase housing supply in the Downtown District.

Housing Receiving Property Zone	Allowable Combined-Lot Transfer
DD/C-2-C	3.5 FAR
DD/C-3-C	6.0 FAR
DD/C-4	8.0 FAR

Figure 4.

Sample language is provided in Attachment 3.

Recreation Space

The Office of Planning recommends that the recreation space requirements for housing projects in Housing Priority Areas B & C be set at 5% of the total residential FAR achieved by the project. Housing projects in Housing Priority A should also have their recreation requirement reduced to 5%. However, given the very limited open space recreational opportunities, the Zoning Commission should consider this option only if the developer buys out of this requirement through a contribution to an open space trust fund. At this time, the Office of Planning has not researched an appropriate buyout price. The level of contribution, and further definition of the fund, could be detailed at a later period. We ask the record be left open on this issue.

Sample text is provided in Attachment 3.

V. ATTACHMENTS:

1. Downtown Development District - Housing Priority Area Map
2. Office of Planning Setdown Report for 00-30TA
3. Office of Planning Sample Text
4. Downtown Housing Task Force Report
5. Downtown Housing Task Force Sample Text
6. Downtown Housing Project Pipeline
7. Building Code Chapter 12
8. Office of Planning's Massing Analysis

ⁱ Combined lot transfer principles are discussed below.

- 1) "Housing construction must be in same time frame as any linked commercial development (p.27)." This is reflected in §1706.13. The matrix below outlines potential scenarios and outcomes.

	Strong Housing Market	Weak Housing Market
Strong Office Market	Combined Lot transactions are negotiated; both uses built.	Office projects potentially held up depending on strength of office.
Weak Office Market	Housing becomes competitive for land that is marginal for office; Combined lot use is "banked" for future sale.	Nothing built.

Figure 3.

- 2) "The form of ownership, transfer payments, appraisals, etc., are left to the private sector in the interest of efficiency and consideration of specific location and value factors as these change over time (p.28)." The regulations are therefore purposely silent as to how the private sector insures both parties are protected as long as District officials approve the instrument documenting the transfer (§1708.1 (j)).
- 3) "All Property owners in locations designated in the Plan for mixed-use should carry some of the burden, on- or off-site (p.29)." Detailed in §1706.4; §1706.5; §1706.6 that created the three distinct priority areas. The FAR requirements chosen for each area were based on the neighborhood envisioned, the relative land prices for the area, and the goal of reaching 5,400 units of housing for Downtown.

ⁱⁱ Figure 3 above very simply outlines four potential scenarios based the strength and weakness of the market types. In a strong office market and a weak housing market, office development would be delayed. 1995 to 1998 would be an example. Data collected by CoStar Group, Inc. and published in the Washington Post on Monday, January 15, 2001 documented that office deliveries posted a recovery at the same time when housing was non-existent. Office sites in the Housing Priority Areas were therefore probably passed over during this time because the housing market had not yet demonstrated its strength. Office and housing also have different construction periods, which could potentially result in the office site standing vacant while it waits for the housing to be completed.

Sample Zoning Text Amendments and Statutory Revisions to Implement
Housing Task Force Recommendations
Downtown Housing Zoning Text Amendments
Draft Text

- 1706.3 Each lot in the Housing Priority Area shall provide on-site or account for off-site by combined lot development residential use and development as provided in this section. Provided further, that a building or a combined lot development that provides new residential uses on-site shall earn bonus density or transferable development rights as follows:
- (a) Residential development north of Massachusetts Avenue shall earn one square foot of bonus density or transferable development rights for each square foot of residential use developed;
 - (b) Residential development south of Massachusetts Avenue shall earn two square feet of bonus density or transferable development rights for each square foot of residential use developed; and
 - (c) Residential development that qualifies as affordable dwelling units as defined in Subsection 1799.1 of this chapter shall earn two square feet of bonus density or transferable development rights for each square foot of affordable housing developed.
 - (d) The increase in gross floor area provided by subsection 1706.7(d) may not be used to generate additional transferable development rights. The maximum transferable development rights a residential site may generate is equal to the residential density achieved by the project, but in no case greater than the FAR listed in table below:

Zoning District	Transferable Development Rights
DD/C-2-C	8.0 FAR
DD/C-3-C	9.5 FAR
DD/C-4	10.0 FAR

- 1706.4 In the DD/C-2-C zone the following residential and mixed use provisions shall apply:
- (a) The maximum FAR shall be 8.0 as a matter-of-right, which FAR may be devoted to all residential use or may include commercial or nonresidential uses as provided in this subsection;
 - (b) Each lot shall provide on-site or account for off-site in a combined development no less than 4.5 FAR of residential use;
 - (c) On a lot that is south of Massachusetts Avenue, up to 1.8 FAR this residential requirement may be met by constructing or by financially assisting affordable housing as defined in this chapter and as governed further by the provisions of this section;
 - (d) On a lot that is north of Massachusetts Avenue, up to 1.35 FAR of this residential requirement may be met by constructing or by financially assisting

affordable housing as defined in this chapter and as governed further by the provisions of this section; and

- (e) If such affordable housing is provided off-site, commercial or nonresidential FAR may be substituted on-site or in a combined lot development by the same amount of gross floor area as the affordable housing up to the maximum limit of 1.8 FAR south of Massachusetts Avenue or 1.35 FAR north of Massachusetts Avenue.
- (f) **For projects south of Massachusetts Avenue, the area of residential recreation space required by §773 may be reduced to 5% of the gross floor area devoted to residential use, provided the bonus granted by this provision is used solely for residential purposes**
- (g) **For projects north of Massachusetts Avenue, the area of residential recreation space required by §773 may be reduced to 5% of the gross floor area devoted to residential use, provided the bonus granted by this provision is used solely for residential purposes.**

1706.5 In the DD/C-3-C zone the following residential and mixed use provisions shall apply:

- (a) The maximum FAR shall be 9.5 as a matter-of-right, which FAR may be devoted to all residential use or may include commercial or nonresidential uses as provided in this subsection;
- (b) Each lot shall provide on-site or account for off-site in a combined lot development no less than 3.5 FAR of residential use;
- (c) On a lot that is south of Massachusetts Avenue, up to 1.4 FAR of the residential requirement may be met by constructing or financially assisting affordable housing as defined in this chapter and as governed further by the provisions of this section;
- (d) On a lot that is north of Massachusetts Avenue, up to 1.05 FAR of the residential requirement may be met by constructing or financially assisting affordable housing as defined in this chapter and as governed further by the provisions of this section; and
- (e) If such affordable housing is provided off-site pursuant to paragraph (c) or (d) of this subsection, commercial or nonresidential FAR may be substituted on-site, or in a combined lot development, by the same amount of gross floor area as the affordable housing, up to the maximum limit of 1.4 FAR south of Massachusetts Avenue or 1.05 north of Massachusetts Avenue.
- (f) **The area of residential recreation space required by §773 may be reduced to 5% of the gross floor area devoted to residential use provided the bonus space granted by this provision is used solely for residential purposes.**

1706.7 The maximum permitted gross floor area may be increased by 0.5 FAR up to a maximum of 8.5 FAR in the DD/C-2-C District, 10.0 FAR in the DD/C-3-C District, and 10.5 FAR in the DD/C-4 District, Provided, that the following occurs:

- (a) The increase in gross floor area may be achieved by receiving transferable development rights as provided in § 1709, which floor area may be devoted to any permitted use on the receiving site;
- (b) The increased gross floor area may be entirely devoted to residential use; and
- (c) The increase may be earned by constructing or assisting affordable housing as defined in this chapter and as further governed by the provisions of this section, or by earning retail bonus density as provided in paragraph 1706.16.
- (d) Notwithstanding Sections 1706.4, 1706.5, or 1706.6, no maximum FAR shall be applicable to any building that is devoted solely to residential uses or to a combinations of residential uses and retail, service, arts and entertainment uses listed in Sections 1710.1 and 1711.1; Provided, that any such building shall comply with the maximum permitted building height requirements of Sections 1701.7 and 1703.15 and the yard and lot occupancy requirements of the applicable zone. This subsection shall be specifically inapplicable to any building that contains any uses specified in Section 1712.1 and any individually designated landmarks or lots in the Historic District as identified in 1707.4.

- (e) The increase in gross floor area provided by subsection 1706.7(d) may not be used to accomplish the transfer of residential use through a combined lot development, nor to meet the minimum residential requirement on the site. The maximum Combined Lot a residential site may accept is equal to the residential density achieved by the project minus the minimum housing requirement, but in no case greater than the FAR listed in table below:

Zone of Property Receiving Housing	Allowable Combined-Lot Transfer
DD/C-2-C	3.5 FAR
DD/C-3-C	6.0 FAR
DD/C-4	8.0 FAR

1708 COMBINED LOT DEVELOPMENT

1708.1 Two or more lots may be combined for the purpose of achieving the required FAR equivalent for preferred uses or to transfer bonus density from one lot to one or more other lots; Provided, that the following occurs:

- (a) A combined lot development shall be eligible for the density and area allowances permitted in §§1703, 1704, 1705 and 1706;
- (b) When combined lot development involves only linkage, i.e., the allocation of gross floor area required by this chapter to be devoted to preferred uses (hereinafter "linkage project"), such combined lot developments shall be limited to lots located within the same subarea as defined in §§1703, 1704, 1705, and 1706, except as provided in §1708.1(d);
- (c) Notwithstanding the requirements of paragraph (c) of this subsection and of §1706.9 of this chapter, a historic property that is identified and governed by §1707.4 of this chapter, is eligible to serve as the location of required

residential uses within a combined lot development, even if the historic properties are located outside the Housing Priority Area as established in §1706.2.

- (d) In a linkage project, the required floor area to be devoted to preferred uses may be transferred from the sending lot to a receiving lot, on which the required space for preferred uses shall be incorporated into the building design and occupied: Provided, that any applicable ground level uses required on any affected lot shall not be transferred, but shall be provided on each sending lot and receiving lot;
- (e) In a linkage project, the certificate of occupancy for the development sending FAR for preferred uses to another development may be revoked, if no building permit for the receiving site has been issued to the developer within three (3) years after the issuance of the certificate of occupancy for the sending site, or if no certificate of occupancy for the receiving site has been issued within five (5) years after the issuance of the certificate of occupancy for the sending site;
- (f) If a development project includes both required residential uses and nonresidential uses in a combined lot development between squares or non-contiguous lots in the same square, no building permit for the development of the nonresidential uses shall be issued until the following requirements are met:
 - (i) A declaration of covenants running with the land in form satisfactory to the Zoning Administrator shall be recorded against the property of the receiving lot that requires the receiving lot to be developed only in accordance with the residential use requirements of this chapter;
 - (ii) The declaration of covenants shall name the District of Columbia as a beneficiary. The declaration of covenants shall require that the instrument shall not be amended or terminated without the consent of the Zoning Commission and on substantial change in circumstances. The covenant shall require the declarant to pay such fees as are reasonably necessary to pay the expenses of the beneficiaries;
 - (iii) The owner of the sending site shall deliver to the Zoning Administrator a certification prepared by a generally recognized title company that all monetary consideration paid or to be paid to the owner of the receiving site has been placed in an escrow account and will be available to the owner of the receiving site only upon (i) the issuance of a building permit for the construction of a building containing the residential uses and (ii) 50% completion of the residential project (as certified to the Zoning Administrator by a third party architect.;
 - (iv) If a certificate of occupancy for residential project has not been issued within 5 years of the date of occupancy for the sending site, the escrow and any accrued interest shall be released to the District of Columbia Housing Production Trust Fund for the

financing of housing in the Downtown Development District. At the request of the owner of the receiving site, a 3-year extension may be granted if the Zoning Commission determines that the receiver has acted in good faith and best effort.

- (g) If a development project includes both required residential uses and nonresidential uses in a combined lot transfer between different portions of the same lot or immediately adjacent lots in the same square, no Certificate of Occupancy shall be issued for the nonresidential space until a Certificate of Occupancy has been issued for the residential space.
- (h) When combined lot development involves a transfer of bonus density to another lot or lots, by itself or in addition to a linkage project, such density transfer may occur to any lot or lots within the DD District or in a receiving zone as provided in §1709 of this chapter, except as excluded by other provisions of this chapter and title;
- (i) The maximum permitted floor area for all uses, the minimum required floor area for preferred uses, and bonus density, if applicable, shall each be calculated as if the combined lots were one lot, and the total project shall conform with the maximum and minimum floor area requirements;
- (j) A building that has been constructed or that is under construction as of January 18, 1991 is not eligible to utilize the combined lot development provisions, nor to earn bonus density or transferable development rights pursuant to §1709;
- (k) No transfer of required gross floor area for preferred uses shall be effective under this section unless an instrument, approved by the Corporation Counsel to be legally sufficient to effect such a transfer and approved in content by the Director, Office of Planning and the Zoning Administrator, has been entered into among all of the parties concerned, including the District of Columbia;
- (l) A certified copy of the instrument of transfer shall be filed with the Zoning Administrator, Department of Consumer and Regulatory Affairs, prior to approval by said Department of any building permit application affected by such transfer;
- (m) The document shall be recorded in the office of the Recorder of Deeds, serving as a notice both to the receiving lot and to the sending lot by virtue of this arrangement for transfer of required floor area or bonus area; and
- (n) The notice of restrictions and transfer shall run with the title and deed to each affected lot.