

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18041 of Steuart Investment Company, pursuant to 11 DCMR §§ 3100 and 3101, from a decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, made October 20, 2009, determining that a proposed commercial development does not comply with the combined lot development (off-site residential) provisions under § 1706.7(b)(2) in the DD/C-2-C District at premises 442-444 New York Avenue, N.W. and K Street, N.W. (Square 483, Lot 9 and Square 515N, Lot 62).

HEARING DATE: April 6, 2010
DECISION DATE: May 4, 2010

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18041

EXHIBIT NO. 29

DECISION AND ORDER

This appeal was submitted on December 21, 2009 by Steuart Investment Company ("Appellant"), the owner of both of the properties that are the subject of the appeal. The appeal challenges a decision made by the Zoning Administrator ("ZA") on October 20, 2009 to the effect that a proposed combined lot development ("combined lot development" or "CLD") between Lot 9 in Square 483 and Lot 62 in Square 515N does not comply with the combined lot development provisions of the Zoning Regulations, specifically 11 DCMR § 1706.7(b)(2). The properties are located in the Downtown Development Overlay District and are zoned DD/C-2-C (Square 515N, Lot 62) and DD/C-3-C (Square 483, Lot 9). Following a public hearing on April 6, 2010, the Board of Zoning Adjustment ("Board") voted on May 4, 2010 to deny the appeal.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated January 10, 2010, the Office of Zoning ("OZ") provided notice of the appeal to the Office of Planning ("OP"); the ZA, at the Department of Consumer and Regulatory Affairs ("DCRA"); the Councilmember for Ward 6; Advisory Neighborhood Commission ("ANC") 6C, the ANC in which the subject property is located; and ANC Single Member District 6C02. Pursuant to 11 DCMR § 3112.14, on January 29, 2010, OZ mailed letters providing notice of the hearing to the Appellant, the ZA, and ANC 6C. Notice was also published in the *D.C. Register* on January 29, 2010 (57 DCR 1082).

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Board of Zoning Adjustment
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Party Status. The Appellant, DCRA, and ANC 6C were automatically parties in this proceeding. There were no additional requests for party status.

Appellant's Case. The Appellant provided evidence and testimony from Guy T. Steuart, senior vice president for Steuart Investment Company, the owner of the subject properties, and Ellen McCarthy, an expert in planning and zoning. The appeal challenged a decision made by the ZA to the effect that the Appellant's proposed combined lot development would not comply with the CLD provisions of the Zoning Regulations. According to the Appellant, the ZA erred in not giving effect to a provision in § 1708.1 so as to apply the Downtown Development ("DD") regulations to the sum of the two lots participating in the CLD rather than to the lots individually. The Appellant phrased the "primary question" of the appeal as "what is bonus density for purposes of utilizing density in a combined lot development process under chapter 17 of the Zoning Regulations?" and noted "a conflict between two provisions governing density when a combined lot development is used." (Hearing Transcript of April 6, 2010, ("T"), p. 14.)

DCRA. The DCRA provided evidence and testimony from Paul Goldstein, a development review specialist at OP who was qualified as an expert in planning and who advised the ZA in making his determination about the Appellant's proposed combined lot development. DCRA argued that the appeal should be denied because the Appellant failed to show that the ZA erred in finding that the proposed CLD did not comply with the Zoning Regulations.

ANC Report. By letter dated March 15, 2010, ANC 6C indicated that, at a properly noticed, regularly scheduled meeting on March 10, 2010 with a quorum present, the ANC voted unanimously to support the appeal. The letter stated that, at the meeting, the Appellant "described the appeal [as] hinging on the definition of bonus density and two parcels," where the Appellant "proposes placing all commercial development on Square 483 and all residential development on Square 515N. If allowed, this will result in 50 additional units on the new residential Square 515N."

FINDINGS OF FACT

1. This appeal concerns two parcels: Lot 9 in Square 483, and Lot 62 in Square 515N. Both lots are located within the Downtown Development ("DD") Overlay District and within Housing Priority Area A.
2. Lot 9 contains 56,339 square feet ("s.f.") of land area, which the Appellant planned to develop entirely for commercial use. The lot is zoned DD/C-3-C, and is located north of Massachusetts Avenue in the square bounded by 5th, 6th, and K Streets and New York Avenue, N.W.
3. Lot 62 contains 42,824 s.f. of land area, which the Appellant planned to develop entirely for residential use. The lot is zoned DD/C-2-C, and is located north of Massachusetts Avenue in the square bounded by L, 4th, and 5th Streets and New York Avenue, N.W. Lot 62 was

formed by the Appellant through the gradual acquisition of approximately 35 smaller lots on Square 515N and the closing of certain alleys, followed by a new subdivision that created two building lots, Lots 61 and 62.

4. Each lot in a Housing Priority Area must provide on-site or account for off-site, by combined lot development, the amount of residential use required by § 1706 of the Zoning Regulations. (11 DCMR § 1706.3.)
5. Pursuant to § 1706.4, the following provisions apply to Lot 62 as a property zoned DD/C-2-C and located north of Massachusetts Avenue:
 - a. The maximum floor area ratio ("FAR") permitted as a matter of right is 8.0, which may be devoted entirely to residential use or to a combination of residential and non-residential uses in accordance with the requirements of the DD Overlay District; and
 - b. The lot must provide at least 4.5 FAR of residential use on site, or account for the same amount off-site in a combined lot development.
6. Because Lot 62 has an area of 42,824 s.f., its minimum residential use requirement is 192,708 s.f. of gross floor area (42,824 s.f. x 4.5 FAR).
7. In addition to its minimum residential use requirement, Lot 62 may be developed with up to 3.5 FAR of nonresidential use as a matter of right (8.0 maximum FAR less 4.5 minimum residential use requirement). The maximum permitted nonresidential gross floor area on Lot 62 is 149,884 s.f. (lot area of 42,824 s.f. x 3.5 FAR).
8. In accordance with § 1706.4, Lot 62 could be developed as a matter of right with a total of 342,592 s.f. (at 8.0 FAR), comprising at most 149,884 s.f. of nonresidential space (3.5 FAR), and at least 192,708 s.f. of residential space (4.5 FAR).
9. Pursuant to § 1706.5, the following provisions apply to Lot 9 as a property zoned DD/C-3-C and located north of Massachusetts Avenue:
 - a. The maximum FAR permitted as a matter of right is 9.5, which may be devoted entirely to residential use or to a combination of residential and non-residential uses in accordance with requirements of the DD Overlay District; and
 - b. The lot must provide at least 3.5 FAR of residential use on-site, or account for the same amount off-site in a combined lot development.
10. Because Lot 9 has a lot area of 56,339 s.f., its minimum residential use requirement is 197,187 s.f. of gross floor area (56,339 s.f. x 3.5 FAR).

11. In addition to its minimum residential use requirement, Lot 9 may be developed with up to 6.0 FAR of nonresidential use as a matter of right (9.5 maximum FAR less 3.5 minimum residential use requirement). The maximum permitted nonresidential gross floor area on Lot 9 is 338,034 s.f. (lot area of 56,339 s.f. x 6.0 FAR).
12. In accordance with § 1706.5, Lot 9 could be developed as a matter of right with a total of 535,221 s.f. (at 9.5 FAR), comprising at most 338,034 s.f. of nonresidential space (6.0 FAR) and at least 197,187 s.f. of residential space (3.5 FAR).
13. The total minimum residential use requirement of the two lots is 389,895 s.f. of gross floor area (*i.e.*, the sum of 192,708 s.f. attributable to Lot 62 and 197,187 s.f. attributable to Lot 9).
14. The total maximum nonresidential use permitted as a matter of right on the two lots is 487,918 s.f. of gross floor area, not considering any applicable bonus density or transferable development rights (the sum of 149,884 s.f. permitted on Lot 62 and 338,034 s.f. permitted on Lot 9).
15. Total development permitted on the two lots as a matter of right is 877,813 s.f. (the sum of 342,592 [42,824 s.f. lot area x 8.0 FAR] on Lot 62 and 535,221 s.f. [56,339 s.f. lot area x 9.5 FAR] on Lot 9).¹
16. Rather than requiring each lot to satisfy its residential use requirement individually, the DD Overlay District allows eligible lots to achieve their use requirements collectively by means of allocations between the participating lots in a “combined lot development.” The required residential use may be allocated from one lot (the “sending lot”) to another (the “receiving lot”), where the required gross floor area for residential use must be incorporated into the building design and occupied, in addition to the receiving lot’s own required residential use. *See*, 11 DCMR § 1708.1(e). In return, the gross floor area that could have been devoted to nonresidential use on the receiving lot (which will instead be developed as residential space as a result of the CLD) may be allocated to the sending lot, thereby allowing development of the sending lot with more nonresidential gross floor area than would otherwise have been permitted. Pursuant to § 1708.1(g), two lots (or more) may be combined for the purpose of achieving the required FAR equivalent for required residential use, where the maximum permitted gross floor area for all uses, the minimum gross floor area for the required residential use, and bonus density, if applicable, are calculated as if the combined lots were one lot. The total project must conform with the maximum and minimum gross floor area requirements.
17. The Appellant planned a CLD in which Lot 9 would allocate its minimum residential use requirement to Lot 62, which would be developed with a residential project intended to

¹ The maximum total development permitted as a matter of right may also be calculated as the sum of the minimum residential requirements and maximum permitted nonresidential requirements on each lot, or 192,708 s.f. and 149,884 s.f. respectively on Lot 62 and 197,187 s.f. and 338,034 s.f. respectively on Lot 9.

satisfy the minimum residential use requirements of both lots. In the same transaction, Lot 62 would allocate its permitted nonresidential gross floor area to Lot 9, thereby allowing development of an entirely commercial project on Lot 9.

18. The Appellant's CLD would allocate: (a) 149,884 s.f. of gross floor area (representing the maximum permitted 3.5 FAR of nonresidential density) from Lot 62 to Lot 9; and (b) 197,187 s.f. of gross floor area (representing the minimum 3.5 FAR residential requirement) from Lot 9 to Lot 62.
19. Because Lot 9 is larger than Lot 62, the gross floor area that constitutes 3.5 FAR on Lot 9 (*i.e.*, 197,187 s.f.) amounts to 4.6 FAR on Lot 62 (197,187 s.f. divided by 42,824 s.f. lot area).
20. The Appellant's proposed CLD would allocate the total residential use requirement of the two lots entirely to Lot 62. Thus, Lot 62 could be developed with a building containing 389,895 s.f. of residential use and no nonresidential use. The residential building's FAR would be 9.1.
21. The Appellant's proposed CLD would allocate the nonresidential development rights of Lot 62 to Lot 9. Thus, Lot 9 could be developed with a building containing 487,918 s.f. of nonresidential use (the sum of the maximum nonresidential use permitted on each lot as a matter of right: 149,884 s.f. on Lot 62 and 338,034 s.f. on Lot 9) and no residential use. The nonresidential building's FAR would be 8.66.
22. The Appellant asserts that its CLD satisfies § 1708.1 because, by means of the CLD, the two lots would provide the total minimum residential requirement generated on each lot individually, and would not exceed the maximum nonresidential development permitted as a matter of right on each lot, and therefore should have been approved by the ZA.
23. A CLD is eligible for density and area allowances permitted in the DD Overlay District, including those permitted in § 1706. (11 DCMR § 1708.1(b).)
24. The allowances offered by the DD regulations include offers of "density bonuses" intended to "assist in the development of residential and preferred uses."
 - a. Pursuant to § 1706.7(a), the maximum gross floor area permitted in the DD/C-2-C, DD/C-3, and DD/C-4 Zones may be increased by 0.5 FAR (for maximums of 8.5, 10.0, and 10.5 FAR, respectively), provided that the increase is achieved by receiving transferable development rights, creating affordable housing, or generating "retail bonus density" by devoting space to certain preferred retail uses. The increased gross floor area derived from transferable development rights may be devoted to any permitted use. (11 DCMR § 1706.7(a)(1).)

- b. Pursuant to § 1706.7(b), the maximum FAR limits applicable in the DD/C-2-C, DD/C-3, and DD/C-4 Zones do not apply to any lot² that devotes the increase in gross floor area entirely to residential use on-site, subject to two limitations:

- (1) The increase in gross floor area may not be used to meet the minimum residential requirement applicable in each zone; and
- (2) The maximum residential FAR that may be accepted through CLD is listed in the following table:

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

25. The limits on maximum residential FAR that may be accepted through combined lot development (*i.e.*, 3.5, 6.0, and 8.0 FAR in DD/C-2-C, DD/C-3-C, and DD/C-4, respectively) coincide with the maximum nonresidential densities permitted as a matter of right in each of those zones pursuant to §§ 1706.4-1706.6.
26. Without a limit on maximum FAR, as permitted by § 1706.7(b), Lot 62 could be developed to 11.2 FAR, derived by multiplying the lot's area by 80 % lot occupancy and the maximum permitted height of 130 feet (14 stories), and dividing the result (*i.e.*, 479,629) s.f. by the lot area.
27. Under the Appellant's CLD proposal, the 11.2 FAR on Lot 62 could be developed as 192,708 s.f. of required residential use (4.5 FAR), 197,187 s.f. of residential use allocated from Lot 9 in satisfaction of Lot 9's residential requirement (4.6 FAR), and 89,734 s.f. of bonus density (2.1 FAR) also developed as residential use pursuant to § 1706.7.
28. Under the Appellant's CLD proposal, Lot 9 could be developed as an entirely commercial building with a maximum FAR of 8.66, comprising 338,034 s.f. (6.0 FAR, the maximum nonresidential FAR permitted as a matter of right under § 1706.5) and 149,884 s.f. (2.66 FAR) of commercial space that could otherwise have been developed on Lot 62.³ The development on Lot 9 would have 47,303 s.f. of "unused density," representing the difference between the 9.5 maximum FAR permitted by § 1706.5 and the 8.66 FAR

² This provision does not apply to historic landmarks or properties listed in § 1707.4 in the Downtown Historic District, a limitation that does not apply to either of the subject properties.

³ Because Lot 62 is smaller than Lot 9, the gross floor area that constitutes 3.5 FAR on Lot 62 (*i.e.*, 149,884 s.f., the maximum nonresidential FAR permitted on Lot 62 pursuant to § 1706.4) amounts to 2.66 FAR on Lot 9 (149,884 s.f. divided by 56,339 s.f. lot area).

permitted by combined lot development with Lot 62. The “unused density” accounts for the density allocated in the Appellant’s CLD from Lot 9 to Lot 62 in order to transfer the entire residential requirement of Lot 9 (where 3.5 FAR equates to 197,187 s.f.) to the smaller Lot 62 (where 197,187 s.f. equates to 4.6 FAR).

29. By letter dated October 20, 2009, the ZA informed the Appellant of his determination that the proposed CLD does not comply with the requirements of chapter 17 of the Zoning Regulations. According to the ZA, the provision governing the proposed CLD transaction is 11 DCMR § 1706.7(b)(2), which provides that:

(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
DD/C-2-C	3.5 FAR
DD/C-3-C	6.0 FAR
DD/C-4	8.0 FAR

(Exhibit 3.)

30. The ZA’s letter stated further that the Residential Receiving Lot (Lot 62) is zoned DD/C-2-C, contains 42,824 s.f. of land area, and has a minimum residential requirement of 4.5 FAR, while the Non-Residential Sending Lot (Lot 9) is zoned DD/C-3-C, contains 56,339 s.f. of land area, and has a minimum residential requirement of 3.5 FAR. Citing § 1706.7(b)(2), the ZA concluded that “the Residential Receiving Lot may receive no more than 3.5 FAR, or 149,885 square feet, of residential uses through CLD. Since the proposed CLD provides for the Residential Receiving Lot to receive residential square feet in excess of 3.5 FAR, § 1706.7(b)(2) prohibits the CLD transaction” and cannot be approved by the ZA. (Exhibit 3.)

31. On December 21, 2009, the Appellant submitted a timely appeal to challenge the ZA’s determination.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized by the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2008 Repl.), to hear and decide appeals where it is alleged by the appellant that there is error in any decision made by any administrative officer in the administration of the Zoning Regulations. (11 DCMR §§ 3100.2, 3200.2.) In an appeal, the Board may reverse or affirm, in whole or in part, or modify the decision appealed from. (11 DCMR § 3100.4.)

Based on the findings of fact, the Board was not persuaded by the Appellant that an error occurred in the decision of the ZA that the proposed combined lot development between Lot 9 in Square 483 and Lot 62 in Square 515N would not comply with the Zoning Regulations, specifically the limit on maximum residential FAR that may be accepted through combined lot development as set forth in § 1706.7(b)(2). That provision plainly states that “[t]he maximum residential FAR that may be accepted through combined lot development is listed in the following table,” and the accompanying table indicates that the “maximum allowable combined lot transfer” amounts are 3.5 FAR in the DD/C-2-C Zone District, 6.0 FAR in the DD/C-3-C Zone District, and 8.0 FAR in the DD/C-4 Zone District. The sentence that precedes this restriction, in § 1706.7(b), states that the FAR limits generally applicable in the zone districts listed in the table do not apply to any lot that devotes the increase in gross floor area entirely to residential use on-site. This and the other increases in FAR authorized by § 1706.7 are referred to in its introductory language as “density bonuses.”

The Appellant claims that the additional density on Lot 62 (above the maximum stated in § 1706.4) will not be achieved through the density bonus available as a matter of right pursuant to § 1706.7(b)(2) by virtue of its construction of residential uses on that lot, but that the Appellant will use the combined lot development process authorized by § 1708 to accomplish the same thing. Section 1708 allows one or more lots in the same Housing Priority Area to combine for several different purposes, one of which is to have all zoning computations applied to the entire land area of the combined lots. If one lot owner agrees by covenant to permanently limit development to less than the matter-of-right FAR permitted, the other lots may utilize that unused FAR on their properties. Thus, even though a single building on one of the lots may technically exceed the matter-of-right FAR, when all of the land areas and proposed buildings are considered, the FAR for the entire lot would fall within matter-of-right limits. For the purposes of this appeal, this type of transaction will be referred to as a FAR swap.

In this case the Appellant owns both Lot 9 and Lot 62, and plans a commercial development on Lot 9 and a residential development on Lot 62. Although entirely unnecessary to do so, the Appellant is proposing to forgo a portion of matter-of-right density on Lot 9 in favor of Lot 62. Having found an alternative means of achieving additional density on Lot 62, the Appellant proposes to forswear the matter-of-right density available through § 1706.7(b)(2), and therefore claims to be free of its constraints. The Board was not persuaded that § 1706.7(b)(2) is inapplicable to the proposed combined lot development, and concludes instead that the Appellant’s CLD would violate the Zoning Regulations because the transaction would allocate

more than 3.5 FAR of residential use to a lot in the DD/C-2-C Zone, contrary to the express terms of that provision.

Consistent with decisions of the District of Columbia Court of Appeals, when interpreting a statute or regulation, the Board will first look to the language of the act, and when the language is unambiguous and does not produce an absurd result, the Board will not look beyond its plain meaning. *Citizens Ass'n of Georgetown v. District of Columbia Bd. of Zoning Adjustment*, 642 A.2d 125, 128 (D.C. 1994) (citations omitted); *see also, e.g., BSA 77 P Street LLC v. Hawkins*, 983 A.2d 988, 995 (D.C. 2009). Regulations, like statutes, are interpreted according to their plain language. *Walter Reed Mews Ltd. Ptnr. v. Wilkins*, 2006 WL 3043114, 5 (D.C. Super. 2006). The Board will not add language to a regulation, because “[t]o supply omissions transcends the judicial function.” *District of Columbia v. Brookstowne Community Development Co.*, 987 A.2d 442, 447 (D.C. 2010), quoting *Allman v. Snyder*, 888 A.2d 1161, 1169 (D.C. 2005).

“At bottom, this case is one of statutory interpretation, and ‘we begin with the statute’s plain language. If the statutory language is unambiguous, we may as well end there.’” *Tangoren v. Stephenson*, 977 A.2d 357, 360 (D.C. 2009), quoting *1836 S Street Tenants Ass’n v. Estate of B. Battle*, 965 A.2d 832, 838 (D.C. 2009). Lot 62 is zoned DD/C-2-C. Pursuant to § 1706.7(b)(2) and its appended chart, “[t]he maximum residential FAR that may be accepted through combined lot development” in a DD/C-2-C zone is 3.5. The Board finds no ambiguity in § 1706.7(b)(2), and concludes that, by its plain meaning, that provision applies to limit the maximum residential FAR that may be accepted through a combined lot development, and denies the appeal on that ground. Although not required to do so, the Board will discuss why this plain language should be given effect.

The Appellant’s contention that § 1706.7(b)(2) does not apply to an increase in FAR above that permitted as a matter of right when the increase is the result of a FAR swap made in a combined lot development is inconsistent with the express terms of § 1706.7(b)(2), which does not carve out any exceptions to its comprehensive statement that the “maximum residential FAR that may be accepted through combined lot development is listed in the following table.” The Board will not “transcend its judicial function” by adding any such exception to the regulation. As discussed below, the Board also concludes that the plain meaning of § 1706.7(b)(2) does not produce an absurd result, but is consistent with the intent of the Zoning Commission (“Z.C.” or the “Commission”) to eliminate the FAR cap on residential development so long as the bonus density thereby created is not used to satisfy the residential use requirement of any lot or to allow nonresidential development in excess of what was already permitted as a matter of right. The Appellant’s interpretation is inconsistent with the intent of § 1706.7(b)(2) in both regards, and thus would render that provision essentially meaningless. An interpretation that renders a regulation superfluous and meaningless is a result to be avoided whenever reasonably possible. *Tenants Council of Tiber Island-Carrollsborg Square v. D.C. Rental Accommodations Comm’n*, 426 A.2d 868, 874 (D.C. 1981).

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The Downtown Development Overlay District was created in 1991. (*See*, Z.C. Order No. 681, Case No. 89-25, effective January 18, 1991.) The Residential and Mixed Use Development provisions (§ 1706) of the overlay included § 1706.7, which authorized an increase of 0.5 FAR over the maximums permitted as a matter of right in the DD/C-2-C, DD/C-3-C, and DD/C-4 Zones under certain circumstances.⁴ A decade later, the Commission amended the DD Overlay by, *inter alia*, adopting a new § 1706.7(b). (*See* Z.C. Order No. 943, Z.C. Case No. 00-30TA, effective August 17, 2001.) The Commission described the change as follows:

[T]he amendments will relieve development projects in the DD/C-2-C, DD/C-3-C, and DD/C-4 Overlay Districts that are devoted entirely to residential use or a combination of residential and preferred retail and service and arts and arts-related uses of the applicable maximum FAR restrictions, provided the increased gross floor area is used only for housing on-site. Height and lot occupancy restrictions and yard requirements will remain applicable. Moreover, the increased FAR may not be used to meet minimum housing requirements, generate transferable development rights, or transfer residential density off-site through combined lot development.

(Z.C. Order No. 943 at 2.)

The amendment was adopted by the Commission upon the recommendation of OP as a means to increase the number of residential units available within the DD Overlay District by making “residential development more attractive” and “by increasing the number of units per building [so that] fixed operational costs per unit will decrease.”⁵ The amendment added a statement indicating the Commission’s intent – “to assist the development of residential and preferred uses” – in adopting the density bonuses permitted by § 1706.7, renumbered the original § 1706.7 as § 1706.7(a) (with minor changes), and added a new § 1706.7(b) in substantially the same form

⁴ As originally adopted in 1991, § 1706.7 read as follows:

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:

- (a) The increase in gross floor area may be achieved by receiving transferable development rights as provided in Section 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.

⁵ The Commission noted that “unlike height, lot occupancy, and building setback limitations that can be uniformly applied to any type of development, FAR limitations have different impacts depending on the proposed use. Height, lot occupancy, and building setbacks create a fixed zoning envelope, but the number of floors that can fit within that envelope varies depending on floor height.” Because residential development does not require floor heights as large as those provided for office development, “by lifting FAR restrictions for residential development, the number of dwelling units that can be built within the same zoning envelope could be increased.” (Z.C. Order No. 943 at 3.)

as the provision currently in effect.⁶

The Board finds no merit in the Appellant's argument that § 1706.7 does not apply to the proposed CLD. Nothing in § 1706.7 limits its applicability to developments not involving CLDs; on the contrary, § 1706.7(b) specifically addresses combined lot developments.⁷ Similarly, the Board was not persuaded by the Appellant's contention that the addition of § 1706.7(b)(2) to the DD regulations did not restrict a lot owner's ability to allocate density from a nonresidential lot to a residential lot in a CLD but only added the opportunity to construct additional "bonus density" that is not eligible for inclusion in a CLD. This argument is overly broad, is not supported by any provision in § 1708, and ignores the plain terms of § 1706.7. The FAR limits adopted in the table in § 1706.7(b)(2) correspond exactly to the FAR limits on nonresidential development permitted as a matter of right by §§ 1706.4 through § 1706.6. By imposing a limit on the amount of residential FAR that may be accepted in a combined lot development, the Commission was able to preserve the status quo in terms of maximum nonresidential development permitted as a matter of right on the lots participating in a CLD while also creating an incentive to generate additional housing units by lifting the FAR cap on residential development. Without a limit on residential FAR that could be accepted in a combined lot development, a residential project could use the "extra" space (*i.e.*, development in excess of the maximum FAR permitted as a matter of right) to satisfy the residential requirement of one or more nonresidential projects – thereby effectively allowing the nonresidential projects to exceed the matter-of-right limits on nonresidential development by substituting nonresidential development for the space that would otherwise have been required for on-site residential use – even though that "extra" space on the residential lot was intended solely as an incentive to generate more residential units than would otherwise be produced.

⁶ The current version of § 1706.7 was adopted later the same year in an order in which the Commission noted that "the focus of the new rule should be on the use of the increase in gross floor area for housing." The amendment to § 1706.7(b) deleted an introductory provision that had been included in the original subsection on an interim basis so that "residential projects that would meet the more restrictive requirements of § 1706.7(b) as originally proposed [could] proceed," and revised paragraph (b) to state the increase in gross floor area must be devoted entirely to residential use on-site, instead of stating that provision as a separate subparagraph. (*See* Z.C. Order No. 943-A, Case No. 00-30TA (Part I), effective December 21, 2001.)

⁷ The Board notes that the OP report, dated January 25, 2001 and submitted to the Commission in Z.C. Case No. 00-30T in support of a text amendment that would remove maximum density restrictions for residential use ("OP Report"), specifically addressed combined lot development. The OP report emphasized that:

[S]ince 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 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 [T]his would potentially increase the total number of units eventually developed in the DD.

(OP Report at 11.)

Applying § 1706.7 to the proposed combined lot development, the Board concludes that the Appellant's proposal would violate § 1706.7(b)(2) because the amount of residential density allocated in the transaction – 3.5 FAR on Lot 9 but 4.6 FAR on Lot 62 – would exceed the 3.5-FAR limit on maximum residential FAR that may be accepted through the combined lot development, as set forth in the table in § 1706.7(b)(2). The FAR limit is properly measured using the lot area of Lot 62, because the provision refers to the maximum residential FAR that “may be *accepted*” on any given lot (emphasis added), rather than the amount that may be allocated or transferred (*i.e.*, sent) from one lot to another.

The Appellant's proposed CLD would also violate the prohibition set forth in § 1706.7(b)(1) against using the increase in gross floor area permitted under § 1706.7 to meet the residential requirements of §§ 1706.4, 1706.5, or 1706.6. In this case, Lot 9 has a residential requirement of 3.5 FAR by operation of § 1706.5(b). Allocation of Lot 9's entire residential requirement to Lot 62 in a combined lot development would require 4.6 FAR of “extra” residential development on Lot 62 in addition to its own residential requirement, for a total of 9.1 FAR. However, irrespective of a combined lot development, Lot 62 could be developed with up to 11.2 FAR of residential space by virtue of the bonus density permitted pursuant to § 1706.7(b), comprising 4.5 FAR of its own residential requirement and up to 6.7 FAR (in the absence of any CLD) in bonus density. In a CLD consistent with the 3.5-FAR limit, Lot 62 could also be developed with a maximum of 11.2 FAR, representing 4.5 FAR of its own residential requirement, 3.5 FAR of residential space allocated from Lot 9, and 3.2 FAR of bonus density constructed as residential space pursuant to § 1706.7(b). Meanwhile, Lot 9 would retain the portion of its residential use requirement that could not be allocated to Lot 62 (47,303 s.f.; the difference between 197,187 s.f., the minimum residential requirement on Lot 62, and 149,884 s.f., representing 3.5 FAR on Lot 9). In accordance with the requirements of the DD Overlay, this portion could be developed on-site as residential use on Lot 9 (along with additional residential space developed as bonus density permitted by § 1706.7(b), if desired), or allocated to another eligible lot in a separate combined lot development. Thus, the Board concludes that the Appellant's proposed CLD would improperly use the increase in gross floor area permitted under § 1706.7 to meet the residential requirements of § 1706.5, since that transaction would allow Lot 62 to accept the “extra” 47,303 s.f. of Lot 9's residential requirement, thereby allowing Lot 62 to employ its bonus density, above the matter-of-right limit, to satisfy the residential requirement of Lot 9 under § 1706.5.

The Board was not persuaded by the Appellant's contention that the interpretation of the ZA would decrease the number of dwelling units potentially created by development of the two lots.⁸

⁸ The Appellant's contention was apparently based on an assumption that the maximum FAR on Lot 62 absent the combined lot development would be 8.0, so that approximately 47,000 s.f. of residential use (the difference between 9.1 and 8.0 FAR) would be “lost.” The Board finds no merit in this contention because, consistent with the ZA's interpretation, (a) § 1706.7(b) would allow development of residential space on Lot 62 without regard to the 8.0 FAR maximum otherwise in effect in the DD/C-2-C Zone, and (b) the 47,303 s.f. – *i.e.*, the portion of the residential requirement of Lot 9 that could not be satisfied on Lot 62 by operation of the 3.5-FAR limit in § 1706.7(b)(2) – would remain on Lot 9 or could be allocated to a third lot in a subsequent CLD, so that the residential use that could

On the contrary, the Board finds that the Appellant's CLD would operate to reduce the total number of dwelling units potentially created on the participating lots by using a portion of bonus density constructed on Lot 62 – which could be built as a matter of right, with or without a CLD – to satisfy a portion of the residential requirement of Lot 9 (47,303 s.f.) in excess of the 3.5 FAR limit. This result would be counter to the purposes of § 1706.7 – “to provide an incentive for increased Downtown housing”⁹ – as well as the DD Overlay generally¹⁰ and especially the Residential and Mixed Use provisions set forth in § 1706.¹¹

The Appellant advances this argument not to make a theoretical point but to avoid having to enter into a second combined lot development, with another property owner who will promise to construct additional housing to satisfy the portion of Lot 9's residential requirement that could not be met on Lot 62. If the Appellant prevailed, only this additional amount of housing would be on Lot 62. But as a result of this ruling, the Appellant will both construct the residential development on Lot 62 and will also assist in the creation of additional residential development on another lot.

The Board finds no merit in the Appellant's argument that its combined lot development would not employ any bonus density and therefore was not subject to limitations on the use of bonus density set forth in § 1706.7(b). According to the Appellant, the proposed 9.1 FAR that would occur on Lot 62 would result from operation of the combined lot development mechanism, and the prohibition in § 1706.7(b)(2) against accepting residential density in excess of 3.5 FAR was irrelevant to the proposed CLD because “the chart ... was aimed at controlling the bonus density in 1706.7(b), which is not a factor here.” (Exhibit 21, p. 15.) For the reasons discussed above, the Board does not agree with this contention, and concludes that any residential construction on Lot 62 beyond the 8.0 FAR permitted as a matter of right constitutes bonus density permitted by § 1706.7(b), and is subject to the limitations set forth in § 1706.7(b)(2).

The Board does not agree that the purpose of the table was to prevent overdevelopment of nonresidential density. The table limits the amount of residential FAR that may be accepted in a combined lot development to the same amount of nonresidential FAR that may be developed on a lot as a matter of right, thus ensuring that the bonus density, which must be developed as

not be accommodated on Lot 62 would not be “lost” but would be developed elsewhere in satisfaction of the residential requirement generated by Lot 9.

⁹ (See Z.C. Order No. 943 at 5.)

¹⁰ The purpose of the DD Overlay District is to help accomplish the land use and development policies of the Comprehensive Plan relating to the affected Downtown sectors. (11 DCMR § 1700.2.) As stated in § 1700.3, the “most important general purposes” include to create a balanced mixture of uses by means of incentives and requirements for critically important land uses identified in the Comprehensive Plan, including residential.

¹¹ As stated in § 1706.1, the policies and objectives for residential use and development in and near Downtown, as specified in the Comprehensive Plan, include: (a) to encourage construction of new housing...so that a sizeable residential component is created that will help accomplish the balanced mixture of uses essential to a “Living Downtown”; and (b) to create the greatest concentration of housing in the Mount Vernon Square area, which includes the area defined by Housing Priority Area A.

residential space, will in fact serve as “extra” residential that would not have been developed but for the offer of bonus density. This bonus was offered to promote the production of residential gross floor area, not specifically to limit nonresidential development. Its use to satisfy the residential requirement of another lot, as the Appellant proposed, would counter the intent of the Commission in eliminating the FAR cap on residential development by allowing matter-of-right residential development – which could occur as an incentive, without the CLD – to satisfy a portion of required residential use.

The Appellant testified that the proposed CLD would not increase nonresidential development over the amount permitted as a matter of right on the participating lots, because, as planned, the nonresidential building on Lot 9 would be developed to a maximum FAR of 8.66 (rather than the 9.5 generally permitted) to reflect a transfer of density to the residential project on Lot 62 (which would be built to 9.1 FAR, larger than the 8.0 FAR permitted as a matter of right). However, the Board concludes that the Appellant’s proposal would effectively create 47,303 s.f. of “extra” nonresidential space on Lot 9 since its entire residential requirement would pass to Lot 62. This result would also be counter to the intent of the DD regulations, because bonus density on Lot 62 (*i.e.*, density beyond the 8.0 permitted as a matter of right) would be used to satisfy a minimum residential requirement, even though that same density could be built as a matter of right as an incentive intended to encourage residential density beyond the minimum requirements. The Board does not agree with the Appellant that an offset in the nonresidential density proposed for Lot 9 warrants a result inconsistent with the purposes of the DD Overlay District, particularly its emphasis on maximizing residential development.

For the reasons discussed above, the Board was not persuaded by the Appellant’s argument that § 1706.7(b)(2) does not apply to the proposed combined lot development. Similarly, the Board finds no merit in the Appellant’s contention that the proposed CLD should have been approved as consistent with the provisions of § 1708.

The combined lot development provisions, set forth as § 1708 of the Zoning Regulations, were adopted as part of the text amendment that created the Downtown Development Overlay District.¹² The combined lot development mechanism allows participating properties to

¹² The regulations adopted in Z.C. Order No. 681 included § 1708.1(k), which stated that: “The instrument of transfer [required pursuant to § 1708.1(h) to effect a transfer of bonus density in a CLD] shall increase the development rights under this zoning ordinance otherwise available to the receiving lot, to the extent of the rights transferred.” This provision was subsequently repealed by the Commission as redundant with § 1709.10. (*See* Z.C. Order No. 931, Z.C. Case No. 00-04, adopted November 27, 2000.) The Appellant contends that the original § 1708.1(k) specifically recognized that a CLD could “increase the development rights ... otherwise available to the receiving lot, to the extent of the rights transferred.” However, as the Appellant notes, that provision was not included in subsequent versions of the DD regulations. In any event, the original § 1708.1(k) referred to an instrument of transfer needed to effect a transfer of bonus density in a CLD, not the sort of density transfer contemplated by the Appellant’s proposed combined lot development, which would allocate matter-of-right density from one participating lot to another. The CLD provisions were further amended in 2002, when the Commission, *inter alia*, eliminated “all references in § 1708 to the transfer of bonus density,” which were found unnecessary because the procedures for transferring bonus density were addressed in § 1709. (Z.C. Order No. 943-B, Z.C. Case No. 00-30TA (Part II-Combined Lot), effective February 1, 2002, at page 3.)

collectively provide “the required FAR equivalent for preferred uses,” in this case the required residential space generated by the two subject properties, so that the preferred uses will be provided within a defined geographic area without expecting each building to provide a mix of residential and nonresidential uses.

The Board concurs with the Appellant that the CLD regulations were intended to provide flexibility, a means for a given lot to avoid complying with its residential use requirement individually so long as the required residential space is provided in conjunction with the development of another eligible lot. However, the Board was not persuaded that § 1708.1(g) should be applied in a manner that would effectively exempt a lot participating in a combined lot development from other important zoning requirements. Nothing in § 1708 indicates that lots in a combined lot development are not also subject to all other DD requirements; rather, § 1708 anticipates that the CLD provisions will be applied in conjunction with other DD requirements and incentives, such as bonus density. The Appellant’s assertion that § 1708.1(g) exempts the lots that participate in a CLD from other DD requirements, including maximum overall FAR and density bonuses offered to assist residential development, is overly broad, particularly in light of the specific requirements of § 1706.7(b)(2). The crux of § 1708.1(g) – that “the total project shall conform with the maximum and minimum gross floor area requirements” – is a requirement that the lots participating in a combined lot development must collectively provide residential space (or other required use) in an amount not less than the sum of the minimum residential requirements of each participating lot, and may not provide more than the maximum permitted nonresidential gross floor area.¹³

In sum, the Board concludes that the Appellant’s arguments place undue influence on a single provision, § 1708.1(g), which is simply a general rule of computation that does not specifically permit the sort of FAR allocation the Appellant urges, much less expressly exempt a combined lot development from any other provision of the DD Overlay District or the Zoning Regulations generally. The Appellant urges the Board to ignore the specific requirement of another provision, § 1706.7(b), that not only does not exempt combined lot developments but expressly indicates how the provision should be applied in the case of a lot that is participating in a CLD.

¹³ The Board was not persuaded by the Appellant’s contention that a provision in § 1708.1(e), which precludes the transfer in a CLD of any required ground-level retail uses away from a lot where those uses are mandated, necessarily means that § 1708 does not limit the FAR on individual lots, so that one lot could exceed the otherwise applicable matter-of-right limit as long as the combined lot development did not exceed the sum of the maximum permitted gross floor areas on the participating lots. While that provision does reflect that the Commission “thought about the concept of dealing with the requirements on each individual lot,” (T. at 36) as the Appellant noted, the Board concludes that the prohibition against transferring required ground-level retail uses reflects the intent of the Commission to require ground-level retail space in certain locations (and not in others) and to prevent the use of the CLD mechanism to thwart that intent. The prohibition on transferring ground-level retail uses cannot be expanded to justify an exemption from matter-of-right FAR limits, notwithstanding the Appellant’s assertion that “the Zoning Commission didn’t find a need to specify maximums on each individual lot” because a “natural governing process” (T. at 51) and the Height Act would provide a rough equilibrium that negated the need to specify a maximum FAR for any building participating in a combined lot development. Instead, the Board concludes that the prohibition on allocations of required ground-floor retail uses illustrates that the CLD provisions should be applied in conjunction with, and not as an exemption from, other requirements of the DD Overlay District.

Nothing in § 1706.7 excludes combined lot developments or creates an exception from the FAR limit necessary to accommodate the Appellant's proposed CLD. The Appellant's view would alter the plain meaning of that section by requiring the Board to interpret the phrase "maximum residential FAR that may be accepted through combined lot development" to mean "maximum residential FAR that may be accepted through combined lot development, not including any FAR allocated in the combined lot development itself." The Board may not interpret the Zoning Regulations in a way that effectively amends the regulations adopted by the Zoning Commission. *See Taylor v. District of Columbia Bd. of Zoning Adjustment*, 308 A.2d 230, 234 (D.C. 1973) (Board is without power to amend the Zoning Regulations directly or indirectly). The Board must give effect to the entirety of the DD regulations and cannot disregard the express requirement of § 1706.7(b)(2) that a lot located in the DD/C-2-C Zone may not accept more than 3.5 residential FAR in a combined lot development.

The Board is required to give "great weight" to the issues and concerns raised by the affected ANC. Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2001)). In this case, ANC 6C voted to support the appeal, but did not state any specific issues or concerns. The ANC heard a presentation from the Appellant, and apparently had no objection to the Appellant's project, which the ANC understood would place "all commercial development on Square 483 and all residential development on Square 515N. If allowed, this will result in 50 additional units on the new residential Square 515N." The Board fully credited the unique vantage point that ANC 6C holds with respect to the impact of the proposed development on the ANC's constituents. However, the Board concludes that the ANC has not offered persuasive advice that would cause the Board to find that the Appellant's proposed combined lot development is consistent with the requirements of chapter 17 of the Zoning Regulations.

Based on the findings of fact and conclusion of law, the Board concludes that the Appellant has not satisfied the burden of proof with respect to the claim of error in the administrative decision, made October 20, 2009 by the Zoning Administrator, Department of Consumer and Regulatory Affairs, that a proposed combined lot development between two properties located in the Downtown Development Overlay District, zoned DD/C-2-C (Square 515N, Lot 62) and DD/C-3-C (Square 483, Lot 9) did not comply with the combined lot development provisions of the Zoning Regulations, specifically § 1706.7(b)(2). Accordingly, it is therefore **ORDERED** that the appeal is **DENIED**.

VOTE: **4-0-1** (Meridith H. Moldenhauer, Shane L. Dettman, Nicole C. Sorg, and Peter G. May to Deny the appeal; No other Board members (vacant) participating)

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BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of Board members approved the issuance of this order.

ATTESTED BY: 
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: DEC 21 2010

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT
UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.