

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of Zoning



MEMORANDUM

To: Office of Documents and Administrative Issuance

From: Sharon S. Schellin *SS*
Secretary to the Zoning Commission

Date: July 11, 2007

Re: Publication for the Office of Zoning

2007 JUL 12 AM 8:54

Office of
Documents and
Administrative
Issuances

Please publish the following in the *D C Register* on July 20, 2007.

- 1 Z C Notice of Final Rulemaking & Order No 04-33A (Case No 04-33A)

Attachment

ZONING COMMISSION
District of Columbia

CASE NO.

04-33A

EXHIBIT NO.

91

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ZONING COMMISSION

District of Columbia

CASE NO.04-33A

EXHIBIT NO.91

2007 JUL 12 AM 8: 54

RULEMAKING TRANSMITTAL FORM

TYPE OF RULEMAKING ACTION: ☐ EMERGENCY RULES
☒ FINAL RULES ☐ PROPOSED RULES ☐ COMBINED

DATE AND TIME RECEIVED

Office of Documents use only

AGENCY: OFFICE OF ZONING

AGENCY REPRESENTATIVE: MS SHARON SCHELLIN

ADDRESS 441 4th Street, N W , Suite 210 South

TELEPHONE (202) 727-0340

TITLE AND DESCRIPTION OF RULES ZC CASE NO 04-33A (Text Amendment – Inclusionary Zoning – Locations)

If this rulemaking action will amend or repeal existing rules, give a complete citation to the rules being amended or repealed Title 11, sections 1402, 1904, 1999, 2601 2602 and 2608

FINAL RULES ONLY Give the D C REGISTER citation and date of publication of the Notice of Proposed Rulemaking for these rules at 53 DCR 10337 DATE December 29, 2006

COMPLETE CITATION to the statute, regulation, or other legal authority which specifically authorizes the issuance of the substance of these rules Section 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat 797, 799 D C Official Code § 6-641 01)

LEGAL CERTIFICATION I certify that I have reviewed the attached rulemaking and, in my opinion, the substance of the text of the rules is legally sufficient

DATE FEBRUARY 13, 2007

SIGNED

Alan Byler

PHONE (202) 442-9777

☒ FINAL

☐ CONDITIONAL

NAME: LINDA SINGER

TITLE ACTING
ATTORNEY GENERAL

PROMULGATOR Name and title of the person legally authorized to adopt and promulgate these rules (or the name of the board or other body authorized to adopt rules by vote)

Zoning Commission For The District Of Columbia

Title

COMPLETE CITATION to the statute, regulation, order, or other legal authority that specifically authorizes this person or agency to adopt and promulgate these rules Section 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat 797, 799 D C Official Code § 6-641 01)

SIGNATURE OF THE PERSON AUTHORIZED TO ADOPT RULES OR ATTEST TO THE ADOPTION OF RULES

DATE OF
APPROVAL
OF VOTE

2-11-07

APPROVAL
OF ATTEST

Sharon V. Schellin
Secretary to the Zoning

TITLE

Commission

PHONE (202) 727-0340

Office of Documents
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THIS NOTICE
PUBLISHED AT

VOL

DCR

DATE

**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING**

and

Z.C. ORDER NO. 04-33A

Z.C. Case No. 04-33A

(Text Amendment – Inclusionary Zoning – Locations)

February 12, 2007

The Zoning Commission for the District of Columbia (the “Commission”), pursuant to its authority under § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat 797, as amended, D C Official Code § 6-641.01), having held a public hearing as required by § 3 of the Act, (D C Official Code § 6-641.03), and having referred the proposed amendments to the National Capital Planning Commission (“NCPC”) for a 30-day period of review pursuant to § 492 of the District of Columbia Charter, hereby gives notice of its adoption of amendments to §§ 1402.1, 1904.2, 1999.2, 2601.1, 2602.1, 2602.3, and 2608.1 of the Zoning Regulations (Title 11 DCMR) to specify the locations where the requirements and incentives of Chapter 26, Inclusionary Zoning (“IZ”), will apply. A Notice of Proposed Rulemaking was published in the December 29, 2006 edition of the *D C Register* at 53 DCR 10337.

In response to the comments received, the Commission decided to retain the bonus height provision in the Reed Cooke Overlay, but to make its availability automatic, rather than through special exception approval as is now the case, once the Inclusionary Zoning program becomes effective. In addition, the final text clarifies that only those properties included within the five transferable development rights receiving zones on February 12, 2007 (the date the Commission adopted this Order) are exempt from the IZ requirements. Finally, as indicated in the Notice of Proposed Rulemaking, the existing text of 11 DCMR § 2608.1, which provides for a delayed effective date of the IZ regulations, is amended to eliminate a reference to this Order, since it is being published prior to the District issuance of the first purchase/rental schedule. The issuance of that schedule is the only pre-condition left to the effectiveness of this program (although that schedule cannot be issued until the IZ legislation becomes effective and applicable). None of these changes are substantial enough to warrant republication of the proposed notice.

The text amendments adopted herein will, subject to the exemptions noted below, apply IZ to all Residence Districts zoned R-3 through R-5-D, all Commercial Districts zoned C-1 through C-3-C, all Waterfront Districts zoned W-1 through W-3, all Mixed Use (CR) and Special Purpose (SP) districts, and all overlay districts except the Downtown Development (“DD”) and Southeast Federal Center Overlay Districts and the C-2-A portion of the Naval Observatory Precinct Overlay District. Also exempted from IZ are all properties presently included within the five Transferable Development Rights Receiving Zones, all properties now or in the future mapped in

the W-2 zoned portions of the Georgetown Historic District, and the R-3 portion of the Anacostia Historic District

The amendments also bring the voluntary affordability requirements of the Reed-Cooke and the Uptown Arts Overlay Districts into conformity with the mandatory set aside requirements of IZ provisions. These amendments, like all other existing and new substantive provisions of Chapter 26, will not take effect until the District issues the first schedule that establishes the maximum amount that the owner of a property that is subject to IZ may receive from low- and moderate-income households for the rental or purchase of units set aside pursuant to the IZ program.

Existing Zoning

Through its publication of Order No. 04-33 in the August 18, 2006 edition of the *D C Register*, the Zoning Commission established a mandatory Inclusionary Zoning program. Essentially, the program applies to new residential developments with ten or more units and certain additions to existing residential developments. Such developments and additions must devote a portion of their gross floor area to be sold or rented to low- or moderate-income households at less than market-rate amounts. Bonus density of up to 20% additional gross floor area is made available to properties subject to these requirements. The Order indicated that subject properties would be mapped within an overlay district, but left the selection of those areas to this proceeding.

The Commission did not adopt regulations governing the administration and enforcement of the program, believing that the Council of the District of Columbia was the proper forum to enact such measures or to delegate some or all of that responsibility to the Mayor. In December of 2006, the Council enacted and the Mayor signed the Inclusionary Zoning Implementation Act Of 2006 (D C Act 16-632). That act is now undergoing Congressional review and is projected to become effective on March 12, 2007. Among other things, the act authorized the Mayor to adopt a series of administrative provisions by regulation and, because none of the fiscal impacts of the program were included within the District's FY 07 budget, provides that the act "shall apply subject to the inclusion of its fiscal effect in an approved budget and financial plan."

Set Down Proceedings and Public Hearings

As noted, this proceeding is the second phase of Case No. 04-33, which was initiated by the Campaign for Mandatory Inclusionary Zoning in November 2004. Prior to the Commission's decision to consider separately the IZ program and the areas where IZ would apply, the Office of Planning ("OP"), in a report dated June 30, 2006, offered recommendations concerning the geographic application of IZ. That report utilized an "additive" approach toward target areas where IZ should be required. A map illustrating the resulting overlay depicted a large number of small, non-contiguous areas scattered throughout the District. Subsequently, OP concluded that the administration and enforcement of an IZ program based upon such an approach would be, at best, cumbersome and inefficient.

Testimony from the first phase of hearings and OP's research over the past two years resulted in a different approach presented in OP's set down report for this proceeding, dated June 30, 2006. Concepts of equity among property owners and neighborhoods and the goals of achieving both simplicity of administration and maximum effectiveness led OP to start its analysis by assuming that IZ should be applied District-wide, and then consideration given to exempting zone districts or areas from IZ requirements where specific circumstances made IZ incompatible with a zone district, area, or neighborhood.

This "subtractive" approach led OP toward applying IZ to zone districts where changes to the permitted building envelope to accommodate a 20% bonus density were compatible with light and air and other design considerations, such as consistency with neighborhood character. An architectural design analysis was conducted to identify impacts on neighborhood scale.

OP then undertook impact assessments on infrastructure, such as transportation/transit and sewage, and public services, such as schools. The impact assessments used the extensive studies commissioned for the 2006 revision of the District's Comprehensive Plan. IZ was a major policy initiative supported in the new Housing Element of the Comprehensive Plan, therefore, the population and job growth forecasts created for the Comprehensive Plan already included the projected impacts of IZ.

The OP report of April 26, 2005 recommended applying the IZ requirements to essentially the same areas described at the outset of this Order. The Commission voted to set down these recommendations for a public hearing and indicated that building permit applications filed while the Commission was hearing and deciding this case could be processed without regard to the IZ requirements.

The Commission also decided to hold two nights of public hearings, the first to cover IZ outside of historic districts, and the second to cover the application of IZ within historic districts. The Commission also asked OP to pay particular attention to informing and soliciting input from the residents of the District. OP responded by holding three open meetings in different parts of the District and specifically inviting Advisory Neighborhood Commissioners to attend.

The Zoning Commission held hearings on the application of IZ outside of historic districts on October 5, 2006 and on the application of IZ in historic districts on October 19, 2006.

At the October 5, 2006 hearing, witnesses in favor of applying IZ as proposed in the public hearing notice testified that applying IZ to as many areas and zone categories of the District as possible would maximize the potential to generate affordable units, increase opportunities for social, cultural, and economic integration, promote civic engagement, create opportunities for capital accumulation by a wider range of households, reduce displacement or the need to move out of the District as household size grows, increase opportunities for District public servants to

live within the city they serve, enhance environmental objectives by increasing walk-to-work opportunities, and simplify the program for the public and the development community

Witnesses in opposition to a broad geographic implementation stressed the rapid rise in construction costs and the decline in the housing market since OP completed its analysis. The witnesses believed that these changes were significant and made it much less likely that the bonus density offered by the program will adequately compensate developers for the additional costs of the complying with the IZ requirements. As an alternative, it was suggested that the IZ program should be mapped in only limited areas so its impact can be carefully assessed before broader application, or that its application should be delayed by approximately three years. Further, there was objection voiced to OP's relying on the Comprehensive Plan's studies of infrastructure capacity for determining IZ's likely physical impact, rather than studying each area of the District in more detail.

There was also disagreement about whether IZ should be applied to the DD, with some individuals testifying it should be included after a three-year delay. Other witnesses suggested all of Wards 7 and 8 be exempted because of the high percentage of lower-income housing already contained in those Wards and that the Reed-Cooke neighborhood be exempted because of its existing, protected, supply of low-income housing and existing affordable housing incentives. There was testimony in favor and against applying IZ to the Wisconsin Avenue corridor between Tenleytown and Friendship Heights.

On October 19, 2006, the Zoning Commission heard testimony concerning the extent to which IZ should be applied within historic districts. Those favoring broad applicability contended that such an approach would promote a more equitable distribution of IZ and be more economically inclusive of neighborhoods throughout the District than would the exclusion of some or all of the historic districts. Witnesses expressed their belief that varied and greater heights and density can be achieved while respecting a historic district's character through the use of upper floor setbacks and other design techniques. It was also suggested that the right amount of greater height can promote better exterior design by enabling higher ceilings, which could lead to better unit design.

Witnesses opposing the application of IZ to historic districts indicated that it would be a mistake for the Commission to assume that IZ is compatible with all such districts. Instead, the Commission was urged to study separately the land use characteristics within each historic district and tailor the IZ requirements based on the findings. Moreover, it was felt that applying IZ to historic districts would not produce enough affordable units to make the extra review and administrative process worth the effort while, at the same time, reducing the uniqueness of individual historic districts. Specific exclusions were sought for the Takoma Park, Woodley Park, Cleveland Park, Kalorama Triangle, and the Capitol Hill Historic Districts.

Proposed Action

The Zoning Commission deliberated whether to take proposed action on the advertised proposals at its December 12, 2006 public meeting. The Commission divided its deliberations into the non-historic area and the historic areas. Topics of discussion regarding non-historic areas included

- Areas that were not capable of bearing the additional bonus density,
- Areas that are struggling to attract market rate housing,
- The possibility of out-of-scale buildings causing significant visual impacts, and
- The impact of any possible traffic congestion

The Commission agreed with OP that

- The Downtown Development District and the transferable development rights (TDR) receiving zones could not accommodate more density. The Commission also stated that the Commission should review the exemption every time new TDR receiving zones are considered for mapping,
- Many neighborhoods where there is a need to attract market rate housing to facilitate diverse neighborhoods are some of the most rapidly appreciating areas of the District, and IZ would help retain some long-term affordability in those neighborhoods,
- There would not be any significant visual impacts in terms of scale or loss of green space by changes made to the building envelopes in order to accommodate the bonus density, and
- The greater dependency on public transportation of the lower income households would keep impacts on traffic congestion to a minimum

The Commission asked OP to explore the expansion of IZ to the R-2 Zone District in another case.

Topics of discussion on historic areas included

- The compatibility of the bonus density with the character of a historic district,
- The burden placed on a developer to go to the Historic Preservation Review Board ("HPRB") and then, potentially, to the Board of Zoning Adjustment ("BZA") to seek relief if the IZ bonus was not compatible with an HPRB decision,
- The overall benefit of applying IZ to historic districts given the reduced development potential and number of affordable units created, and
- The issue of equity among neighborhoods if certain neighborhoods are exempted simply because of their historic status

A majority of the Commission agreed with OP that

- In general, the bonus density can be compatible with and, therefore, achievable within most historic districts, with the exceptions of the W-2 portions of the Georgetown Historic District and the R-3 portions of the Anacostia Historic District and
- Exempting historic areas as a whole created an equity issue across neighborhoods

The Commission voted to apply IZ to the areas recommended by OP and agreed with the Office of Attorney General (“OAG”) that the broad application of IZ within entire zone districts eliminated the need for an overlay. The Commission, therefore, authorized the issuance of a notice of proposed rulemaking that consisted of only text amendments and the referral of the text to the National Capital Planning Commission for review and comment.

Written Public Comment

Only two written comments were received by the end of the 30-day comment period on January 29, 2006. These were from Advisory Neighborhood Commission (“ANC”) 1C and OP. ANC 1C expressed concern over the language deleted from the Reed-Cooke (RC) Overlay. There were two concerns: 1) the lack of specific standards for density in the Reed-Cooke Overlay raised questions of how bonus would be calculated and 2) the intent of the Reed-Cooke Overlay would be enhanced by retaining the existing language.

OP also addressed the Reed-Cooke (RC) Overlay and concluded it was premature to delete so much of the section. OP provided alternative language that kept a majority of the existing Reed-Cooke Overlay provisions, including the requirement that 50% of additional space developed above the RC Overlay’s 40-foot height limit be set aside for target households. The OP alternative would bring the Overlay into conformance with the IZ chapter by deleting the requirement to go before the BZA for a special exception to receive the Overlay’s ten-foot height bonus.

The specific language suggested by OP is as follows (with new language shown in bold and underlined text and deleted language shown in strikethrough):

- 1402 1 The maximum height permitted in the RC Overlay District shall not exceed forty feet (40 ft.) plus roof structure as defined in this title, provided, that in the RC/C-2-B Overlay District, ~~the Board of Zoning Adjustment may approve a maximum height of fifty feet (50 ft.) with appropriate setbacks from the street, plus roof structures, subject to determination by the Board that the project will~~ **shall be permitted to provide for the on-site construction or substantial rehabilitation of low and moderate income household units, as those households are defined by the Inclusionary Zoning regulations of Chapter 26** ~~the D.C. Department of Housing and Community Development, for a total gross floor area equal to fifty~~

percent (50%) of the additional gross floor area made possible by the height bonus, ~~by this exception~~

National Capital Planning Commission

NCPC reviewed the Commission's preliminary order pursuant to federal requirements and, at its meeting of January 4, 2006, determined that the IZ text amendments applying the previously adopted IZ program would not be inconsistent with the Federal Elements of the Comprehensive Plan for the National Capital and would promote several federal policies relating to workplaces and communities

Final Action

The Commission took final action after deliberating on the public testimony and written comments. The Commission agreed with OP and ANC 1A that the Commission should revisit the proposed amendment to Reed-Cooke Overlay and agreed with OP that the modified test it suggested properly balances the needs of that Overlay with the goals of the IZ program.

OAG has determined that this rulemaking meets its standards of legal sufficiency.

Based on the above, the Commission finds that the proposed amendment to the Zoning Regulations is in the best interests of the District of Columbia, consistent with the purpose of the Zoning Regulations and Zoning Act, and not inconsistent with the Comprehensive Plan for the National Capital.

In consideration of the reasons set forth herein, the Zoning Commission hereby APPROVES the following amendments to Title 11 DCMR, ZONING:

Title 11 of the DCMR, ZONING, is amended as follows (new language shown in **bold and underlined**, deleted language in strikethrough)

A Chapter 14, REED-COOKE OVERLAY DISTRICT, § 1402 1, is amended to read as follows:

- 1402 1 The maximum height permitted in the RC Overlay District shall not exceed forty feet (40 ft) plus roof structure as defined in this title, provided, that in the RC/C-2-B Overlay District, ~~the Board of Zoning Adjustment may approve a maximum height of fifty feet (50 ft) with appropriate setbacks from the street, plus roof structures, subject to determination by the Board that the project will~~**shall be permitted** to provide for the on-site construction or substantial rehabilitation of low and moderate income household units, as those households are defined by the Inclusionary Zoning regulations of Chapter 26 ~~the D.C. Department of~~

~~Housing and Community Development~~, offer a total gross floor area equal to fifty percent (50%) of the additional gross floor area made possible by the height bonus. ~~by this exception~~

B Chapter 19, UPTOWN ARTS-MIXED USE (ARTS) OVERLAY DISTRICT, is amended as follows.

- 1 By amending the table following § 1904 2 to remove the reference to “Below-market housing “as follows

	<u>Gross floor area devoted to the bonus use</u>	<u>Proportionate number of square feet of additional gross floor area earned for on-site or off-site Development</u>
~~(a) Below market housing,~~	~~1~~	~~to 3~~

- 2 By striking the definition “Below-market housing” from § 1999 2

C Chapter 26, INCLUSIONARY ZONING, is amended as follows

1. Section 2601, DEFINITIONS, § 2601 1, is amended by deleting the definition “Inclusionary Zoning Overlay ”

- 2 Section 2602, APPLICABILITY, is amended as follows

(a) By amending § 2602 1(a) to read as follows

2602 1 Except as provided in § 2602 3, the requirements and incentives of this Chapter shall apply to developments that

- (a) ~~Are mapped within the Inclusionary Zoning Overlay, and the R-3 through R-5-D, C-1 through C-3-C, CR, SP, and W-1 through W-3 Zone Districts, unless exempted pursuant to § 2602.3;~~

(b) By amending § 2602 3 to read as follows

2602 3 This Chapter shall not apply to

- (a) Hotels, motels, inns, or dormitories,

- (b) Housing developed by or on behalf of a local college or university exclusively for its students, faculty, or staff,
- (c) Housing that is owned or leased by foreign missions exclusively for diplomatic staff,
- (d) Rooming houses, boarding houses, community-based residential facilities, single room occupancy developments, or ~~developments in R-1, R-2 and C-4 Districts~~

(e) Properties located in any of the following areas:

- (1) The Downtown Development or Southeast Federal Center Overlay Districts;**
- (2) The Downtown East, New Downtown, North Capitol, Southwest, or Capitol South Receiving Zones on February 12, 2007;**
- (3) The W-2 zoned portions of the Georgetown Historic District;**
- (4) The R-3 zoned portions of the Anacostia Historic District; and**
- (5) The C-2-A zoned portion of the Naval Observatory Precinct District.**

(c) Subsection 2608.1 is amended to read as follows

2608.1 The provisions of **sections 2600 through 2607 of this Chapter as adopted by Zoning Commission Orders No. 04-33 and 04-33A and all amendments made by Order No. 04-33A to 11 DCMR §§ 1402.1, 1904.2, and 1999.2** shall become effective upon the publication of the first purchase/rental schedule ~~or in the D C Register~~ **Zoning Commission _____, establishing the Inclusionary Zoning Overlay, whichever is the last to occur**

At its public meeting of December 12, 2006, the Zoning Commission **APPROVED** the proposed rulemaking for non-historic districts by a vote of 4-0-1 (Carol J. Mitten, Michael G. Turnbull, Anthony J. Hood, Gregory N. Jeffries, and John G. Parsons to approve)

At its public meeting of December 12, 2006, the Zoning Commission **APPROVED** the proposed rulemaking for historic districts by a vote of 4-1-0 (Carol J Mitten, Anthony J. Hood, Gregory N Jeffries, and Michael G Turnbull to approve, John G Parsons opposed)

This Order was **ADOPTED** by the Zoning Commission at its public meeting on February 12, 2007, by a vote of 4-1-0 (Carol J Mitten, Michael G Turnbull, Anthony J Hood, and Gregory N Jeffries to approve, John G Parsons opposed)

In accordance with the provisions of 11 DCMR §3028 9, this Order shall become effective upon publication in the *D C Register*, that is on _____

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
and
Z.C. ORDER NO. 04-33A
Z.C. Case No. Case No. 04-33A
(Text and Map Amendments – 11 DCMR)

The full text of this Zoning Commission order is published in the “Final Rulemaking” section of this edition of the *D C Register*