

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Zoning Commission**



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

**AND**

**Z.C. ORDER NO. 04-33G**

**Z.C. Case No. 04-33G**

**(Text Amendment – Inclusionary Zoning – Amendments to Subtitle C, Chapter 10)**

**October 17, 2016**

The Zoning Commission for the District of Columbia (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 (2012 Rep1.), hereby gives notice of its adoption of amendments to Subtitles B, C, and I of Title 11 (Zoning Regulations of 2016) of the District of Columbia Municipal Regulations (DCMR). At the time it took final action to adopt these rules the Commission also authorized a notice of proposed rulemaking for a provision that had been advertised in the notice of public hearing for this case, but which was inadvertently omitted from the notice of proposed rulemaking. That notice is being published in this issue of the *D.C. Register*. Also being published in this issue is a notice of final rulemaking for Z.C. Case No. 04-33H, which adopts amendments to 11-C DCMR § 1001.6(a), including amendments originally proposed in this case.

The Inclusionary Zoning Regulations contained in Chapter 10 of Title 11-C require that inclusionary developments reserve a percentage of residential gross floor area for Inclusionary Units. The amendments provide that ownership of inclusionary units must be reserved for households earning equal to or less than eighty percent (80%) of the Median Family Income<sup>1</sup> (MFI) while rental inclusionary units must be reserved for households earning equal to or less than sixty percent (60%) of the MFI. A deeper level of affordability will continue to be required when the set-aside is attributable to penthouse habitable space. (See 11-C DCMR § 1003.7.) The amendments also allow for voluntary compliance; clarify how set-aside requirements are calculated; permit a twenty percent (20%) reduction of the set-aside applicable to an inclusionary development that is exclusively comprised of ownership units if the units are set aside to households earning sixty percent (60%) of the MFI, clarify development standards, allow owner/occupants of inclusionary units to request relief when certain circumstances are met; and adds definitions for “bedroom” and “inclusionary development.”

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<sup>1</sup> Median Family Income is defined by Title 11-B, § 100.2 as the “Median Family Income for a household in the Washington Metropolitan Statistical Area as set forth in the periodic calculation provided by the United States Department of Housing and Urban Development, adjusted for family size without regard to any adjustments made by the United States Department of Housing and Urban Development for the purposes of the programs it administers.”

A Notice of Proposed Rulemaking (Notice) was published in the *D.C. Register* on September 9, 2016, at 63 DCR 11434. The Notice indicated that the Commission, at the time it took proposed action, made a preliminary determination that the amendments should take effect six (6) months after the publication of a notice of final rulemaking. At the same time, the Commission requested that the Department of Housing and Community Development (DHCD) advise the Commission whether the agency would be able to begin administering the inclusionary zoning program, as the Commission proposes to revise it, on the preliminary effective date.

In response to the Notice, the Commission received comments from the Committee of 100 for the Federal City (Committee of 100) and from the Bernice J. Drazin Trust. The Office of Planning submitted a supplemental report that responded to the public comments, discussed potential amendments to address circumstances in which Inclusionary Units resulting from penthouse habitable space could be reserved for households earning sixty percent (60%) or less of the MFI, and noted an omission made in the Notice of Proposed Rulemaking. DHCD provided its response to the Commission's implementation questions on September 8<sup>th</sup>.

At its regularly scheduled public meeting on October 17, 2016, the Commission considered whether it should take final action to adopt the amendments. As a preliminary matter, the Commission's Secretary noted that the Commission had moved the proposed amendments to 11-C DCMR § 1001.6(a), pertaining to exempted projects, to Z.C. Case No. 04-33H.

During its deliberations, the Commission discussed the Committee of 100's recommendation to impose the higher set-aside requirements of 11-C DCMR § 1003.1 on all inclusionary developments that employ Type I construction, and not just to such developments located in zones with a by-right height limit of fifty feet (50 ft.) or less. The Commission considered this idea worthy of future study, but did not wish to delay adoption of the proposed rules for that analysis to be completed.

The Commission then took final action to adopt the amendments it proposed in September, with the exception of the amendment to 11-C DCMR § 1001.6(a), which was moved to Z.C. Case No. 04-33H. The Commission also authorized the publication of a Notice of Proposed Rulemaking with respect to the provision inadvertently omitted from the September Notice. With respect to an effective date for the adopted rules, rather than make the rules effective six (6) months after publication of this final notice, the Commission decided that it would be preferable to specify the exact date when the rules would take effect. The Commission determined that the effective date should be the first Monday in June 2017.

Therefore, this final rulemaking shall become effective on June 5, 2017.

**Title 11 DCMR, ZONING REGULATIONS OF 2016, is amended as follows (new text shown in **bold** and underline and deleted text shown in ~~strikethrough~~):**

**Subtitle B, DEFINITIONS, RULES OF MEASUREMENT, AND USE CATEGORIES, Chapter 1, DEFINITIONS, is amended as follows:**

Section 100, DEFINITIONS, § 100.2, is amended by inserting the following new definitions in alphabetical order:

**Bedroom: A habitable room with immediate access to an exterior window and a closet that is designated as a “bedroom” or “sleeping room” on construction plans submitted in an application for a building permit.**

**Development, Inclusionary: A residential development subject to the provisions of Subtitle C, Chapter 10, Inclusionary Zoning.**

Subtitle C, GENERAL RULES, Chapter 10, INCLUSIONARY ZONING, is amended to read as follows:

## CHAPTER 10 INCLUSIONARY ZONING

1000	Introduction
1001	Applicability
1002	Bonuses and Adjustments to Incentivize Inclusionary Units
1003	Set-Aside Requirements
1004	Purchase and Tenancy Regulations
1005	Development Standards Regarding Inclusionary Units
1006	Off-Site Compliance with Inclusionary Zoning
1007	Relief from Inclusionary Zoning Requirements
1008	Applicability Date

### 1000 INTRODUCTION

1000.1 The purposes of the Inclusionary Zoning (IZ) Program are:

- (a) To further the Housing Element of the Comprehensive Plan by increasing the amount and expanding the geographic distribution of adequate, affordable housing available to current and future residents;
- (b) To utilize the skills and abilities of private developers to produce quality affordable housing;
- (c) To leverage private development, combined where appropriate with zoning density increases, to produce affordable housing throughout the District of Columbia;
- (d) To mitigate the impact of market-rate residential development on the availability and cost of housing available and affordable to low- and moderate-income households;

- (e) To increase the production of affordable housing units throughout the District to meet existing and anticipated housing and employment needs;
- (f) To provide for a full range of housing choices throughout the District for households of all incomes, sizes, and age ranges to preserve diversity and to ensure the benefits of economic integration for the residents of the District;
- (g) To stabilize the overall burden of housing costs on low- and moderate-income households;
- (h) To create a stock of housing that will be affordable to low- and moderate-income residents over a long term; and
- (i) To make homeownership opportunities available to low- and moderate-income residents.

1000.2 It is the intent of the Zoning Commission to promulgate only such regulations as are necessary to establish the minimum obligations of property owners applying for building permits or certificates of occupancy under an IZ Program. All other aspects of the program, including the setting of maximum purchase prices and rents, the minimum sizes of the units, the selection and obligations of eligible households, **administrative flexibility to ensure occupancy**, and the establishment of enforcement mechanisms such as covenants and certifications shall be governed by the following laws and regulations related to the IZ requirements:

- (a) The Inclusionary Zoning Implementation Amendment Act of 2006; and
- (b) Chapter 22 of the Housing Regulations (Title 14 DCMR).

## 1001 APPLICABILITY

1001.1 Achievable ~~inclusionary~~ bonus density is the amount of the permitted bonus density that potentially may be utilized within a particular inclusionary ~~residential~~ development **provided in Subtitle C § 1002**.

1001.2 Except as provided in Subtitle C § 1001.5, the requirements and modifications of this chapter shall apply to developments meeting the following criteria:

- (a) Are mapped in the R-2, R-3, R-10, R-13, R-17, ~~or R-20~~, **RA-1 through RA-4, RA-6, RA-7, RA-8, or RA-9** zone; any RF, ~~RA~~, ARTS, CG, RC, USN, STE, **SEFC**, or HE zone; the NC-1 through NC-5 or ~~NC-9~~ **NC-7** through NC-13 zone; the MU-1 through MU-10 or MU-12 through ~~MU-29~~ **MU-26, MU-28, or MU-29** zone; or the D-2 or D-4 zone; ~~and~~

- (b) Is proposing new gross floor area that would result in ten (10) or more dwelling units;
- (c) Will have ten (10) or more new dwelling units ~~with only one (1) or two (2) dwelling units~~ constructed concurrently or in phases, on contiguous lots or lots divided by an alley if such lots were under common ownership, **control, or affiliation within one (1) year prior to the application for the first building permit at the time of construction; or**
- (d) Consists of a residential building, other than a single dwelling unit or flat, that has penthouse habitable space pursuant to Subtitle C § 1500.11-; **or**
- (e) **Any semi-detached, attached, flat, or multiple dwellings development not described in Subtitle C § 1001.2(b) through 1001.2(d) if the owner voluntarily agrees to the requirements of Subtitle C § 1003 and meets all other requirements of this chapter, provided:**
  - (1) **The square footage set aside achieves a minimum of one (1) Inclusionary Unit;**
  - (2) **Residential developments located in the areas identified by Subtitle C § 1001.5(a) may not use the modifications to height and lot occupancy, or minimum lot area or width; and**
  - (3) **Any use of the bonus density provided in Subtitle C § 1002 in the R-2, R-3, R-10, R-13, R-17, R-20, RF-1, RF-2, RF-3, RF-4, RF-5, or the RA-1 zones shall require special exception approval pursuant to Subtitle X, Chapter 9.**

1001.3 If more than one (1) building permit is issued for a development, the number of dwelling units and new gross floor area used to establish the applicability of the IZ requirements, and associated IZ modifications, shall be based on all the applications occurring within a three (3) year period, starting from the first building permit application.

1001.4 If the new gross floor area comprising ten (10) or more units would result in an increase of fifty percent (50%) or more in the floor area of an existing building, IZ requirements and modifications shall apply to both the existing and the increased gross floor area.

1001.5 Except for new penthouse habitable space as described in Subtitle C § 1001.2(d), IZ requirements of this chapter shall not apply to:

- (a) Properties located in any of the following areas:
  - (1) The R-1-A and R-1-B zones;

- (2) The MU-13 zone in the Georgetown Historic District;
- (3) The R-3 zone in the Anacostia Historic District;
- (4) The MU-27 zone;
- (5) The D-1-R, D-3, D-4-R, and D-5 zones;
- (6) The SEFC zones of Subtitle K, Chapter 2 **that are subject to a land disposition or other agreement with the District of Columbia that mandates the provision of affordable housing;**
- (7) The WR zones of Subtitle K, Chapter 9; **and**
- (8) The NC-6 zone;
- ~~(9) Hotels, motels, or inns;~~
- (b) Housing developed by or on behalf of a local college or university exclusively for its students, faculty, or staff; **and**
- (c) Housing that is owned or leased by foreign missions exclusively for diplomatic staff; **and**
- (d) **Hotels, motels, or inns.**

1001.6 IZ requirements of this chapter shall not apply to:

- (a) Any development subject to a mandatory affordable housing requirement that exceeds the requirements of this chapter as a result of District law or financial subsidies funded in whole or in part by the Federal or District Government and administered and/or monitored by the Department of Housing and Community Development (DHCD), the District of Columbia Housing Finance Agency (DCHFA), or the District of Columbia Housing Authority (DCHA); provided:
  - (1) The development shall set aside, for so long as the project exists, affordable dwelling units (“Exempt Affordable Units”) in accordance with the minimum income standards of Subtitle C § 1001.6(a)(2) and equal to at least the gross square footage that would have been otherwise required pursuant to the set-aside requirements in Subtitle C § 1003 for the zone in which the development is located;
  - (2) The Exempt Affordable Units shall be reserved as follows:

- (i) The square footage set aside for rental units shall be at or below sixty percent (60%) MFI; and
- (ii) The square footage set aside for or ownership units shall be at or below eighty percent (80%) MFI;
- (3) The requirements set forth in subparagraphs (1) and (2), of this paragraph, shall be stated as declarations within a covenant approved by the District of Columbia; and
- (4) The approved covenant shall be recorded in the land records of the District of Columbia prior to the date that the first application for a certificate of occupancy is filed for the project; except that for developments that include buildings with only one (1) dwelling unit, the covenant shall be recorded before the first purchase agreement or lease is executed; and
- (b) Boarding houses, community based institutional facilities; or single room occupancy projects within a single building.

1001.7 No exemption may be granted pursuant to Subtitle C § 1001.6(a) unless the Zoning Administrator receives a written certification from the DHCD Director that the development meets the requirements of Subtitle C §§ 1001.6(a)(1) and (4).

1001.8 ~~**[DELETED]**A development not otherwise subject to the requirements of this chapter may opt in to the IZ program and, except as limited in Subtitle C § 1001.9, may utilize the IZ zoning modifications provided for in Subtitle C § 1002.~~

1001.9 ~~**[DELETED]**A development in the following zones not otherwise subject to the requirements of this chapter may opt in to the IZ program but shall not utilize the IZ zoning modifications provided for in Subtitle C § 1002:~~

- ~~(a) — D-1 R; D-3, D-4, D-5, and D-8;~~
- ~~(b) — MU-13 and MU-27;~~
- ~~(c) — NC-6;~~
- ~~(d) — R-3;~~
- ~~(e) — RA-6; and~~
- ~~(f) — SEFC.~~

1001.10 The requirements of this chapter shall automatically terminate if title to the mortgaged property is transferred following foreclosure by, or deed-in-lieu of foreclosure to, a mortgagee in the first position, or a mortgage in the first position is assigned to the Secretary of the U.S. Department of Housing and Urban Development (HUD).

**1002 BONUSES AND ADJUSTMENTS TO INCENTIVIZE INCLUSIONARY UNITS**

1002.1 The types of density bonuses and/or dimensional adjustments in this section are available to developments subject to the Inclusionary Zoning (IZ) provisions of this chapter.

1002.2 Inclusionary ~~residential~~ developments in the zones identified in the following table may use the minimum lot dimensions identified in the table in lieu of the otherwise required lot dimension required by Subtitles D and E:

**TABLE C § 1002.2: IZ DIMENSIONAL MODIFICATIONS FOR LOWER DENSITY ZONES**

Base Zone	IZ Dimensional Modifications for Lower Density Zones		
	Minimum Lot Area	Minimum Lot Width	Minimum Lot Width with Special Exception
R-2, R-10 Detached	3,200 sq. ft.	40	32
R-2, R-10 Semi-Detached	2,600 sq. ft.	30	25
R-3, R-13, R-17, R-20	1,600 sq. ft.	20	16
RF-1, RF-2, RF-3, RF-4, RF-5	1,500 sq. ft.	18	16

1002.3 Inclusionary developments, except those located in the SEFC, StE, and HE zones, may construct up to twenty percent (20%) more gross floor area than permitted as a matter of right (bonus density), subject to all other zoning requirements (as may be modified by the zone) and the limitations established by the Height Act. ~~residential developments in the following zones governed by Subtitles F, G, H, I, or K may construct bonus density of up to an additional twenty percent (20%) gross floor area (bonus density) than permitted as a matter of right subject to all other zoning requirements of their zone:~~

- (1) ~~All RA zones;~~
- (2) ~~MU 3, MU 4, MU 12, MU 13, MU 17, MU 18, MU 19, MU 24 through MU 29, and RC 2 zones;~~
- (3) ~~NC 1, NC 2, NC 3, NC 5, NC 10, NC 12, NC 14, and NC 16 zones;~~
- (4) ~~D-2 and D-4 zones;~~
- (5) ~~USN and CG zones; and~~



(6) ~~HE zones, subject to the development standards in Subtitle K § 402.1.~~

1002.4 Inclusionary residential developments in the zones below may use the following modifications to height and lot occupancy in order to achieve the bonus density:

**TABLE C § 1002.4: MODIFICATIONS TO HEIGHT AND LOT OCCUPANCY FOR BONUS DENSITY**

Base Zone	Matter-of-Right Zoning Constraints			IZ Zoning Modifications	
	Lot Occupancy	Zoning Height	Zoning FAR	Lot Occupancy	Height (feet)
RA-5, RA-11, D-1	75%	90 ft.	6.00	90%	90
MU-10, MU-22, MU-29, ARTS-4	75%	90 ft.	6.00	80%	100
MU-4, MU-17, MU-24, MU-25, MU-26 through MU-29, MU-33, NC-2, NC-3, NC-4, NC-7, NC-9, NC-14, NC-16 ARTS-1, RC-2	60%	50 ft.	2.50	75%	50
MU-5, MU-18, ARTS-2, RC-3, NC-5, NC-10, NC-17	80%	65 ft.	3.50	80%	70
MU-6, MU-19, NC-11	80%	90 ft.	6.00	<del>90%</del> <b>80%</b>	<del>90</del> <b>100</b>
MU-7, MU-28, ARTS-3, NC-8, NC-12, NC-15	75%	65 ft.	4.00	80%	65
MU-12	80%	40 ft.	2.50	80%	50
MU-13	75%	60 ft.	4.00	75%	80
MU-13	75%	90 ft.	6.00	80%	100
MU-1, MU-15	80%	65 ft.	4.00	80%	70
MU-2, MU-16, MU-23, D-2	80%	90 ft.	6.00	90%	90
<b><u>MU-9, MU-21</u></b>	<b><u>100%</u></b>	<b><u>90 ft.</u></b>	<b><u>6.50</u></b>	<b><u>100%</u></b>	<b><u>100</u></b>
CG-1	75%	90 ft.	6.00	90%	90

1002.5 An inclusionary residential development that has met its IZ set-aside requirements and used all the bonus density permitted by IZ may be eligible for other bonus density permitted by other chapters of this title, provided the development’s total density does not exceed the FAR-maximum associated with the zone permitting that additional bonus density.

**1003 SET-ASIDE REQUIREMENTS**

1003.1 An inclusionary residential development for which the primary method of construction does not employ **Type I construction as defined by Chapter 6 of the International Building Code as incorporated into District of Columbia Construction Codes (Title 12 DCMR)** ~~steel or steel and concrete frame structure~~ **to construct a majority of dwelling units** and which is located in a zone with a by-right height limit of fifty feet (50 ft.) or less shall set aside the greater of ten percent (10%) of the gross floor area dedicated to residential use including

penthouse habitable space as described in Subtitle C § 1001.2(d), or seventy-five percent (75%) of its achievable bonus density to inclusionary units plus an area equal to ten percent (10%) of the penthouse habitable space as described in Subtitle C § ~~2602.1~~ 1001.2(d).

1003.2 An inclusionary residential development which employs Type I construction as defined by Chapter 6 of the International Building Code as incorporated into the District of Columbia Construction Codes (Title 12 DCMR) of steel or steel and concrete frame construction to construct the majority of dwelling units shall set aside the greater of eight percent (8%) of the gross floor area dedicated to residential use including penthouse habitable space as described in Subtitle C § 1001.2(d), or fifty percent (50%) of its achievable bonus density to inclusionary units plus an area equal to eight percent (8%) of the penthouse habitable space as described in Subtitle C § ~~2602.1~~ 1001.2(d).

1003.3 Except as provided in Subtitle C §§ 1003.5 through 1003.6, inclusionary units resulting from the set asides required by §§ 1003.1 and 1003.2 shall be reserved for households earning equal to or less than: ~~1003.7, inclusionary residential developments in the R, RF, RA zones, or in the MU or NC zones where the by right height limit is fifty feet (50 ft.) or less, shall set aside fifty percent (50%) of inclusionary units for eligible low income households and fifty percent (50%) of inclusionary units for eligible moderate income households. The first inclusionary unit and each additional odd number unit shall be set aside for low income households~~

(a) Sixty percent (60%) of the MFI for rental units; and

(b) Eighty percent (80%) of the MFI for ownership units.

1003.4 ~~[DELETED] Except as provided in Subtitle C § 1003.7, inclusionary residential developments in the D zones, or in the MU or NC zones where matter of right height limits exceed fifty feet (50 ft.), shall set aside one hundred percent (100%) of inclusionary units for eligible moderate income households.~~

1003.5 An inclusionary development that results from a conversion of a single dwelling unit or flat to a multiple dwelling unit development in an RF zone for four (4) or more dwelling units approved by the Board of Zoning Adjustment shall set aside every even numbered dwelling unit beginning at the fourth (4<sup>th</sup>) unit as an inclusionary unit.

1003.6 An inclusionary development that results from a conversion of a single dwelling unit or flat to a multiple dwelling unit development in an RF zone for four (4) or more dwelling units approved by the Board of Zoning Adjustment shall set aside one hundred percent (100%) of inclusionary units for eligible moderate income households earning equal to or less than eighty percent (80%) of the MFI.

- 1003.7 Notwithstanding Subtitle C §§ 1003.3 and 1003.4, one hundred percent (100%) of inclusionary units resulting from the set-aside required for penthouse habitable space shall be set aside for eligible ~~low-income~~ households **earning equal to or less than fifty percent (50%) of the MFI.**
- 1003.8 **An inclusionary development in an StE zone shall devote no less than ten percent (10%) of the gross floor area being devoted to residential use for inclusionary units.**
- 1003.9 **An inclusionary development's entire residential floor area including dwelling units located in cellar space or enclosed building projections that extend into public space, shall be included for purposes of calculating the minimum set-aside requirements of Subtitle C §§ 1003.1 and 1003.2**
- 1003.10 **The square footage set aside applicable to an inclusionary development that is exclusively comprised of ownership units may be reduced by twenty percent (20%) provided all the units are set aside to households earning equal to or less than sixty percent (60%) of the MFI.**
- 1003.11 **Increases in FAR as a result of variances granted by the Board of Zoning Adjustment shall be included within gross floor area for the purposes of calculating the maximum IZ requirement.**

## **1004 PURCHASE AND TENANCY REGULATIONS**

- 1004.1 Except as provided for in Subtitle C § 1004.2, all inclusionary units created pursuant to this chapter shall be leased or sold only to eligible households for so long as the inclusionary ~~residential~~ development exists.
- 1004.2 An owner/occupant of an inclusionary unit may not sell the unit at a price greater than that established by the Mayor pursuant to D.C. Official Code § 6-1041.03 of the IZ Act unless the price is offered by the Mayor or a Housing Trust authorized by the Mayor:
- (a) No eligible household shall be offered an inclusionary unit for rental or sale at an amount greater than that established by the Mayor pursuant to D.C. Official Code § 6-1041.03 of the IZ Act;
  - (b) The Mayor or DCHA shall have the right to purchase the greater of one (1) IZ unit or twenty-five percent (25%) of inclusionary units in a for-sale inclusionary development, or any number agreed to by the owner of the development, in accordance with procedures set forth in the IZ Act.
- 1004.3 Notwithstanding Subtitle C § 1004.2, nothing shall prohibit the Mayor or DCHA from acquiring title to inclusionary units in a for-sale inclusionary development if any of the following circumstances exist:

- (a) There is a risk that title to the units will be transferred by foreclosure or deed-in-lieu of foreclosure, or that the units' mortgages will be assigned to the Secretary of the U.S. Department of Housing and Urban Development (HUD); or
- (b) Title to the units has been transferred by the foreclosure or deed-in-lieu of foreclosure, or the units' mortgages have been assigned to HUD.

## **1005 DEVELOPMENT STANDARDS REGARDING INCLUSIONARY UNITS**

- 1005.1 The proportion of studio and one-bedroom inclusionary units shall not exceed the proportion of the comparable market rate units for each unit type.
- 1005.2 All inclusionary units shall be comparable in exterior design, materials, and finishes to the market-rate units.
- 1005.3 The interior amenities of inclusionary units, such as finishes and appliances, shall be comparable to the market-rate units but may consist of less expensive materials and equipment, provided the interior amenities are durable, of good quality, and consistent with contemporary standards for new housing.
- 1005.4 All inclusionary units in an inclusionary development shall be constructed prior to or concurrently with the construction of market-rate units, except that in a phased development, the inclusionary units shall be constructed at a pace that is proportional to the construction of the market-rate units.
- 1005.5 Inclusionary units shall not be overly concentrated **by tenure, dwelling type, including single dwelling units, flats, or multiple-dwellings, or** on any floor of a project.

## **1006 OFF-SITE COMPLIANCE WITH INCLUSIONARY ZONING**

- 1006.1 The Board of Zoning Adjustment is authorized to permit some or all of the set-aside requirements of Subtitle C § 1003 to be met by off-site construction upon proof, based upon a specific economic analysis, that compliance on-site would impose an economic hardship.
- 1006.2 Among the factors that may be considered by the Board of Zoning Adjustment in determining the existence of economic hardship are:
  - (a) Exceptionally high fees in condominium developments that cannot be reduced to levels affordable to eligible households;
  - (b) The inclusion of expensive and specialized social or health services in a retirement housing development or a development that principally

provides housing for the disabled, if such services are not severable from the provision of housing and render units in the development unaffordable to eligible households; or

- (c) Proof that continuation of the existing rental inclusionary development is no longer economically feasible, when the owner wishes to change the property's use to a non-residential use or to one (1) meeting the exemption requirements of Subtitle C § 1001.5.

1006.3 An applicant who has demonstrated the existence of economic hardship shall further demonstrate that the off-site development:

- (a) Is located within the same census tract as the inclusionary residential development;
- (b) Consists of new construction for which no certificate of occupancy has been issued;
- (c) Is at a location suitable for residential development;
- (d) Has complied with or will comply with all on-site requirements of this chapter as are applicable to it;
- (e) Has not received any development subsidies from Federal or District Government programs established to provide affordable housing;
- (f) Will provide inclusionary units with gross floor areas for each unit type of not less than ninety-five percent (95%) of the gross floor area of the off-site market-rate unit types, and of a number no fewer than the number of units that would otherwise have been required on-site; and
- (g) Will not have more than thirty percent (30%) of its gross floor area occupied by inclusionary units.

1006.4 The requirement of Subtitle C § 1006.3(a) may be waived upon a showing that the off-site development is owned by the applicant, is located in the District of Columbia, and meets all the other requirements of Subtitle C § 1006.3.

1006.5 Inclusionary units permitted to be constructed pursuant to this section shall not be counted toward any set-aside requirement separately applicable to the off-site development or to any other inclusionary residential development.

1006.6 No order granting off-site compliance shall become effective until a covenant, found legally sufficient by the Office of the Attorney General, has been recorded in the land records of the District of Columbia between the owner of the off-site

development and the Mayor. A draft covenant, executed by the owner of the off-site property, shall be attached to an application for relief under this section.

1006.7 The covenant shall bind the owner and all future owners of the off-site development to:

- (a) Construct and reserve the number of inclusionary units allowed to be accounted for off-site, in accordance with the plans approved by the Board of Zoning Adjustment and the conditions of the Board's order;
- (b) Sell or rent, as applicable, such units in accordance with the provisions of this chapter and the IZ Act for so long as the off-site development remains in existence;
- (c) Neither apply for nor accept any development subsidies from Federal or District Government programs established to provide affordable housing;
- (d) Acknowledge that the owners are legally responsible for the set-aside requirement accepted as if the requirement had been imposed directly on the off-site development; and
- (e) Not request special exception or variance relief with respect to the obligations accepted or its own obligations under this chapter.

1006.8 Upon the recordation of the covenant, the set-aside requirements permitted to be accounted off-site shall be deemed to be the legal obligation of the current and future owners of the off-site development. All dwelling units as are required to be reserved in the off-site development in accordance with the Board of Zoning Adjustment's order shall be deemed inclusionary units for the purposes of this chapter and the IZ Act.

1006.9 No application for a certificate of occupancy for a market-rate unit on the inclusionary development shall be granted unless construction of the off-site inclusionary units is progressing at a rate roughly proportional to the construction of the on-site market-rate units.

1006.10 Inclusionary units resulting from the set-aside required for penthouse habitable space as described in Subtitle C § 1001.2(d) shall be provided within the building, except that the affordable housing requirement may be achieved by providing a contribution to a housing trust fund, consistent with the provisions of Subtitle C §§ 1505.13 through 1505.16 when:

- (a) The new penthouse habitable space is being provided as an addition to an existing building which is not otherwise undergoing renovations or additions that would result in a new or expanded Inclusionary Zoning requirement within the building;

- (b) The penthouse habitable space is being provided on an existing or new building not otherwise subject to Inclusionary Zoning requirements; or
- (c) The building is not otherwise required to provide inclusionary units for low income households and the amount of penthouse habitable space would result in a gross floor area set-aside less than the gross floor area of the smallest dwelling unit within the building.

## 1007 RELIEF FROM INCLUSIONARY ZONING REQUIREMENTS

1007.1 The Board of Zoning Adjustment is authorized to grant partial or complete relief from the requirements of Subtitle C § 1003 upon a showing that compliance, whether on-site, off-site, or a combination thereof, would deny ~~the applicant~~ **an inclusionary development owner** economically viable use of its land.

1007.2 An application **from an inclusionary development owner** for a variance from the requirements of Subtitle C § 1003 shall not be granted unless the Board of Zoning Adjustment has determined that the applicant cannot comply with the provisions of Subtitle C § 1006 based on evidence provided by the applicant, and has voted to deny an application for relief pursuant to this section or Subtitle C § 1006.

1007.3 **The Zoning Commission may grant relief from the requirements of this chapter to an owner/occupant of an inclusionary unit on the consent calendar authorized by Subtitle Z § 703 provided:**

- (a) **Condominium or homeowner association fees have increased to make the unit unaffordable to other Eligible IZ Households as defined by Title 14, Chapter 22; and**
- (b) **The application for relief includes written confirmation of Subtitle C § 1007.3(a) from the Director of DHCD; and**
  - (1) **The IZ covenant remains and the unit is sold at the Maximum Resale Price (MRP) as determined by 14 DCMR § 2218 if the income of the Eligible IZ Household purchasing the unit does not exceed eighty percent (80%) of the MFI; or**
  - (2) **If the IZ covenant is terminated and the unit is sold above the Maximum Resale Price, a fee equal to any net proceeds from the sale that are above and beyond the MRP are deposited into the District's Housing Trust Fund.**

## 1008 APPLICABILITY DATE

1008.1 With the exception of penthouse habitable space approved by the Zoning Commission pursuant to Subtitle C § 1504.3, the provisions of this chapter shall not apply to any building approved by the Zoning Commission pursuant to a planned unit development if the approved application was set down for hearing prior to March 14, 2008.

**Subtitle I, DOWNTOWN (D) ZONES, Chapter 8, GENERATION AND CERTIFICATION OF CREDITS, is amended as follows:**

**Section 802, GENERATION OF CREDITS BY RESIDENTIAL DEVELOPMENT, § 802.2, is amended by repealing paragraph (a) and amending paragraph (b) as follows:**

- 802.2 One (1) credit shall be generated for each square foot of eligible residential gross floor area (GFA) constructed, except that two (2) credits shall be generated in the following circumstances:
- (a) ~~**[DELETED]** For projects subject to Subtitle C, Chapter 10, Inclusionary Zoning, two (2) credits shall be developed for each square foot of eligible GFA reserved for low-income households;~~
  - (b) For projects not subject to Subtitle C, Chapter 10, Inclusionary Zoning, two (2) credits shall be generated for each square foot of eligible GFA reserved for moderate-income households **that meet the income requirements of Subtitle C § 1003;**

...

On July 20, 2016, upon motion of Chairman Hood, as seconded by Commissioner Miller, the Zoning Commission took **PROPOSED ACTION** to **APPROVE** the petition at its public meeting by a vote of **5-0-0** (Anthony J. Hood, Marcie I. Cohen, Robert E. Miller, and Peter G. May to approve; Michael G. Turnbull to approve by absentee ballot).

On October 17, 2016, upon motion of Vice Chairman Miller, as seconded by Commissioner May, the Zoning Commission took **FINAL ACTION** to **APPROVE** the petition at its public meeting by a vote of **4-0-1** (Anthony J. Hood, Robert E. Miller, and Peter G. May to approve; Michael G. Turnbull to approve by absentee ballot; Third Mayoral Appointee position vacant, not voting).



In accordance with the provisions of 11-Z DCMR § 604.9, this Order shall become effective upon publication in the *D.C. Register*; that is on December 16, 2016.



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**ANTHONY J. HOOD**  
**CHAIRMAN**  
**ZONING COMMISSION**



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**SARA A. BARDIN**  
**DIRECTOR**  
**OFFICE OF ZONING**

**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA  
NOTICE OF FINAL RULEMAKING  
AND  
Z.C. ORDER NO. 04-33G  
Z.C. Case No. 04-33G  
(Text Amendment – Inclusionary Zoning – Amendments to Subtitle C, Chapter 10)  
October 17, 2016**

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