

Comments of Marilyn J. Simon on
Notice of Second Proposed Rulemaking
Zoning Commission Case No. 04-33I (Inclusionary Zoning)
Office of Planning – Text Amendment 11 DCMR
August 9, 2019

In this amendment to the first Notice of Proposed Rulemaking (NPRM), the Zoning Commission proposes new language to address the one of the issues that I raised in my September 20, 2018 testimony (page 2). These points were also raised in my May 10, 2019 Comments on the NPRM inasmuch as the language proposed in the NPRM did not fully address the issues that I raised in my testimony and cited herein.

As explained below, the proposed new language does not fully address the issues that I raised with respect to the IZ regulations in the MU-13 and MU-27 zones, and further, it includes contradictory language on the treatment of new habitable penthouse space in these zones.

The NPRM also adopts several substantial changes to the inclusionary zoning regulations that reduce the IZ set-aside requirements with no associated reduction in the bonus density. Throughout the discussion, these have been described as clarifications and technical corrections. It had also been stated that these changes recognize the way in which the regulations have been interpreted. That is correct, but only to the extent that some of the changes that this Commission adopted ZC 04-33G in 2017 had never been implemented by DCRA. DCRA's failure to fully implement ZC 04-33G and update its forms to reflect the Zoning Commission's 2017 text amendment should not be used to negate the Commission's 2017 decision.

The proposed changes would frequently reduce the set-aside requirement by allowing projects to be eligible for the reduced set-aside requirement of §1003.2, rather than the standard set-aside requirement of §1003.1, even when the project does not have the higher construction costs associated with having more than half of the residential units being concrete and steel. The current regulations are ambiguous on this point, but they could have as readily been clarified to reflect the language in the OP Report in ZC 04-33G: "This amendment would permit a reduction in the IZ requirement for the entire building only when steel and concrete construction is used to frame more than 50 percent of the dwelling units." The current proposed amendment would allow the reduced set-aside requirement whenever a project is in a zone, or requests a map amendment to a zone, that allows a matter-of-right height of more than 50 feet (a zone more intense than MU-4 (C-2-A)). My earlier comments include an example (based on a real project), where, with a PUD and a map amendment, the required IZ set-aside falls, even though there is nearly a 70% increase in density over an MOR IZ project without a map amendment. The proposed amendments on the conditions under which a project is eligible for the reduced set-aside requirement is a substantial change in the regulations and would result in a substantial reduction in the set-aside requirement for some projects.

The proposed changes also reduce the set-aside requirement for some projects by changing the formula for calculating the set-aside based on bonus density. In ZC 04-33G, the Commission reinstated the original definition of achievable bonus density, which had been changed in ZC 04-33B. With the original definition, and the definition adopted in 04-33G, the set-aside based on bonus density was calculated based on "the amount of bonus density that potentially may be utilized." In ZC 04-33B, it was reduced to be based on the bonus density utilized. This text amendment is a substantial change to reverse ZC 04-33G and reduce the set-aside requirement by only considering the bonus density utilized. While in 20017, the Zoning Commission adopted a text amendment (ZC 04-33G) to reverse ZC 04-33B,

that change was never implemented by DCRA. That failure to implement this text amendment is now being used as a justification to reverse the 2017 decision. The change in the definition of bonus density is a substantial change in the regulations adopted by this Commission and would result in a substantial reduction in the set-aside requirement for some projects.

IZ Requirement in the MU-13 and MU-27 Zones

In this section, I demonstrate how the proposed language in the Second NPRM does not fully address the issues with the treatment of the MU-13 and MU-27 zones in the original NPRM. I also highlight the ambiguity in the proposed language and propose different language that would address both concerns.

Subtitle G, §104.1: The initial NPRM did not include the current requirement that habitable penthouse space in MU-13 in the Georgetown Historic District or in the MU-27 zone near the Naval Observatory is subject to the inclusionary zoning requirement. That is partially addressed in the proposed changes to Subtitle G §104.1.

The proposed language in the second NPRM is:

“§104.1 The Inclusionary Zoning (IZ) requirements, and all available IZ modifications and bonus density, shall apply to all MU zones except for the portion of the MU-13 and MU-27 zones in the Georgetown Historic District, as specified in Subtitle C, Chapter 10, Inclusionary Zoning, and in the zone-specific development standards of this subtitle; provided that new penthouse habitable space as described in Subtitle C § 1500.11 in the portions of the MU-13 and MU-27 zones in the Georgetown Historic District shall be subject to the IZ requirements.” (highlighting added)

This language is problematic since the MU-27 zone is the Naval Observatory overlay zone. No portion of the MU-27 zone is in the Georgetown Historic District. With this construction, all of the MU-27 zone would be subject to IZ requirements and be allowed to use the IZ bonus density.

The language in Section 104.1 should be rewritten to make it clear that the relevant portion of MU-13 is limited to the Georgetown Historic District, and as in the current regulations, habitable penthouse space in the MU-13 zone and the MU-27 zone is subject to inclusionary zoning. I propose that the above be changed to:

“§104.1 The Inclusionary Zoning (IZ) requirements, and all available IZ modifications and bonus density, shall apply to all MU zones except for the portion of the MU-13 zone in the Georgetown Historic District and the MU-27 zone, as specified in Subtitle C, Chapter 10, Inclusionary Zoning, and in the zone-specific development standards of this subtitle; provided that new penthouse habitable space as described in Subtitle C § 1500.11 in the portions of the MU-13 zone in the Georgetown Historic District and the MU-27 zone shall be subject to the IZ requirements.” (highlighting added)

Subtitle G §504.3: The proposed language in Subtitle G, §504.3 in the Second NPRM introduces an ambiguity on whether there is an IZ requirement for penthouse space in MU-13 in the Georgetown Historic District.

In Subtitle G §504.3, the new proposed language correctly eliminates the option to qualify for IZ bonus density in MU-13 in the Georgetown Historic District by through voluntary IZ, but drops the requirement for IZ with new habitable penthouse space.

The proposed language in the Second NPRM is:

“504.3 The Inclusionary Zoning requirements and modifications of Subtitle C, Chapter 10 shall not apply

to the portion of the MU-13 zone in the Georgetown Historic District.”

Instead, this section should be revised to use the same language that is used for other zones, such as the Eighth Street Southeast Neighborhood Mixed Use Zone , §702.2, where the IZ regulations only apply to habitable penthouse space. I would suggest that the language for §504.3 be changed to add the current IZ requirement for habitable penthouse space:

“**504.3** Except for new penthouse habitable space as described in Subtitle C § 1500.11, the Inclusionary Zoning requirements and modifications of Subtitle C, Chapter 10 shall not apply to the portion of the MU-13 zone in the Georgetown Historic District.”

Subtitle G §804.2: Similarly, the proposed language in Subtitle G, §804.2 in the Second NPRM introduces an ambiguity on whether there is an IZ requirement for penthouse space in MU-27, the Naval Observatory Mixed Use Zone.

The proposed language in the Second NPRM is:

“**804.2** The Inclusionary Zoning requirements and modifications of Subtitle C, Chapter 10 shall not apply to the portion of the MU-27 zone in the Georgetown Historic District.”

In Subtitle G § 804.2, the proposed language drops the requirement for IZ for habitable penthouse space in MU-27 (Naval Observatory Mixed Use Zone) and adds a limitation to that portion of the Naval Observatory Mixed Use Zone that is in the Georgetown Historic District.

I propose that the language instead be changed to add the IZ requirement for the habitable penthouse space and drop the mention of the Georgetown Historic District:

“**804.2** Except for new penthouse habitable space as described in Subtitle C § 1500.11, the Inclusionary Zoning requirements and modifications of Subtitle C, Chapter 10 shall not apply to the MU-27 zone.”

This NPRM is not a clarification, but includes substantial changes that reduces IZ Set-Asides

The NPRM includes a substantial change in the conditions under which a project is eligible for a reduced set-aside requirement, where projects in a zone with a matter-of-right height of more than 50 feet or that request a map amendment to such a zone, even if the project does not employ the more expensive concrete and steel construction for more than half of the residential units. In its analysis of ZC 04-33G, the Office of Planning cited the use of concrete and steel construction for more than half the residential units as the only justification for a reduction in the IZ set-aside.

The NPRM also includes a substantial change in the formula for calculating the IZ set-aside based on bonus density. As discussed above, this is a substantial change from the formula that was adopted by this Commission in ZC 04-33G in 2017, and results in some instances in a large reduction in the amount of affordable housing that would be provided.

My September 20, 2018 testimony included proposed edits for C §1001.1, 1003.1 and 1003.2 that would address these issues. (The sections below differ slightly from the language in my September 2018 testimony, incorporating some of the differences between the June 2018 PHN and the 2019 NPRMs):¹

¹ The recommended changes from the language published in the NPRM are:

C §1001.1 Achievable bonus density is the amount of the permitted bonus density that potentially may be is utilized within a particular Inclusionary Development provided in Subtitle C § 1002.

C §1001.1 Achievable bonus density is the amount of the permitted bonus density that potentially may be utilized within a particular Inclusionary Development provided in Subtitle C § 1002.

C § 1003.1 An Inclusionary Development which does not employ Type I construction as classified in Chapter 6 of District of Columbia Building Code (Title 12-A DCMR) to construct a majority of dwelling units shall set aside for Inclusionary Units the sum of the following:

(a) The greater of ten percent (10%) of the gross floor area dedicated to residential use excluding penthouse habitable space, or seventy-five percent (75%) of the achievable bonus density; and

(b) An area equal to ten percent (10%) of the penthouse habitable space as described in Subtitle C § 1500.11.

This set-aside requirement shall be converted to net square footage pursuant to Subtitle C § 1003.4.

C § 1003.2 An Inclusionary Development which employs Type I construction as classified in Chapter 6 of District of Columbia Building Code (Title 12-A DCMR) to construct a majority of dwelling units shall set aside for Inclusionary Units the sum of the following:

(a) The greater of eight percent (8%) of the gross floor area dedicated to residential use excluding penthouse habitable space, or fifty percent (50%) of the achievable bonus density; and

(b) An area equal to ten percent (10%) of the penthouse habitable space as described in Subtitle C § 1500.11.

This set-aside requirement shall be converted to net square footage pursuant to Subtitle C § 1003.4.

C § 1003.1 An Inclusionary Development which does not employ Type I construction as classified in Chapter 6 of the District of Columbia Construction Codes (Title 12-A DCMR) to construct a majority of dwelling units ~~and which is located in a zone with a by right height limit, exclusive of any bonus height, of fifty feet (50 ft.) or less~~ shall set aside for Inclusionary Units the sum of the following:

(a) the greater of ten percent (10%) of the gross floor area dedicated to residential use excluding penthouse habitable space, or seventy-five percent (75%) of the achievable bonus density ~~utilized~~; and

(b) An area equal to ten percent (10%) of the penthouse habitable space as described in Subtitle C §1500.11.

This set-aside requirement shall be converted to net square footage pursuant to Subtitle C § 1003.4.

C § 1003.2 An Inclusionary Development which employs Type I construction as classified in Chapter 6 of the District of Columbia Construction Codes (Title 12-A DCMR) to construct the majority of dwelling units, ~~or which is located in a zone with a by right height limit, exclusive of any bonus height, that is greater than fifty feet (50 ft.)~~ shall set aside for Inclusionary Units the sum of the following:

(a) the greater of eight percent (8%) of the gross floor area dedicated to residential use excluding penthouse habitable space, or fifty percent (50%) of the achievable bonus density ~~utilized~~; and

(b) An area equal to ten percent (10%) of the penthouse habitable space as described in Subtitle C §1500.11

This set-aside requirement shall be converted to net square footage pursuant to Subtitle C § 1003.4.