

Testimony of Marilyn J. Simon on
Zoning Commission Case No. 04-33I
Office of Planning – Text Amendment to Subtitle C, Chapter 10, Inclusionary Zoning (IZ),
and Corresponding Text Amendments to Subtitles D, E, F, G, H, and K

The Office of Planning has described many of the proposed amendments as “simple corrections, clarification, and reorganization and consistency efforts to improve the administrative process,” and maintained that the “do not reflect changes in policy or substantive changes.”¹ However, on closer review, several of these proposed amendments do involve substantive changes and would result in reductions in the required IZ set-aside for some projects.

I will discuss: (1) Amendment 1, a definition change which generally reduces the required IZ set-aside, especially in matter-of-right and design review projects; (2) Amendments 2 and 4 which change the applicability of IZ in the MU-13 zone; and (3) Amendment 8 which affects when a project is eligible for the reduced set-aside requirement of Section 1003.2.

Amendment 1:² Amendment 1 is described by the Office of Planning as a clarification of the amount of bonus density that is used to calculate the IZ set-aside requirement. The proposed amendment is not a clarification, since the current regulations have a clear definition of the achievable bonus density that is used in the calculation of the required IZ set-aside. Instead, it is a substantial change in the requirement, generally reducing the required set aside.

The current regulations have a clear definition of the achievable bonus density that is used in the calculation of the required IZ set-aside:

Current §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.

This would generally be 20% of the gross floor area permitted as a matter of right.

The proposal would be a substantial change in the formula for calculating the IZ set-aside, as it would change the definition of achievable bonus density:

Proposed §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.

The proposed amendment would reduce the requirement if the project does not utilize the entire 20% bonus density. Since the IZ set-aside requirement for matter-of-right or design review projects would be based on the achievable bonus density, it could reduce the IZ requirement for those projects which do not use the entire IZ bonus.

¹ See ZC 04-33I, Memorandum from Jennifer Steingasser to the Zoning Commission, November 3, 2017, p. 15.

² This is labeled Amendment 1 in OP’s November 2017 Memorandum and listed as unchanged in Section C (page 26) of OP’s September 2018 Public Hearing Report

If the Commission supports this proposed reduction in the IZ set-aside requirement, it might require an additional hearing with adequate notice that a substantial reduction in the set-aside requirement is being proposed. Otherwise, the current, clear definition should be retained.

Amendment 2 and Amendment 4:³ With the reorganization of the IZ regulations, the applicability of IZ in MU-13 (formerly W-2) has changed.

In the current regulations, MU-13 in the Georgetown Historic District is exempt from the IZ requirements, except for the requirements that apply to new penthouse space.

In the proposed amendment, MU-13 is exempt from all IZ requirements. This means that new habitable penthouse space in MU-13 in the Georgetown Historic District will no longer be required to meet the IZ set-aside requirement. In addition, if other properties obtain a map amendment to MU-13, they will not be subject to the IZ regulations.

In an earlier filing, the Office of Planning was concerned about map amendments into zones that are exempt from IZ requirements.⁴ The proposed amendments, which would exempt properties zoned MU-13 from IZ, whether or not the property is in the Georgetown Historic District, introduces the same risk.

Amendment 8:⁵ Amendment 8 is described as clarifying that buildings located in zones that permit heights greater than 50 feet can use the reduced set-aside requirement of §1003.2, even if they use stick frame construction for more than 50% of the residential units.

While the current language might be ambiguous, this is a substantial change to the current language of §1003.2 which currently allows the reduced set-aside of that section only if the project uses Type 1 construction for more than half the residential units.

The proposed amendment does the opposite of what the Office of Planning's stated goal was in modifying this section in ZC 04-33G. In OP's Setdown Report for ZC 04-33G, OP gave the goal of the text amendment as permitting a reduction of the IZ requirement for the entire building only when steel and

³ This is labeled Amendments 5 and 8 in OP's November 2017 Memorandum and Amendments 2 and 4 OP's September 2018 Public Hearing Report.

⁴ Memorandum from Eric Shaw, Director, Office of Planning to the Zoning Commission, ZC 04-33G, July 3, 2015, pp 8-9, requesting clarifying language to define the boundaries of the areas where IZ would not apply, since "a map amendment to change a zone district within one of the historic districts could result in a property that was intended to be subject to IZ inadvertently being exempted from IZ."

⁵ This is labeled Amendment 10 in OP's November 2017 Memorandum and Amendment 8 in OP's September 2018 Public Hearing Report.

concrete construction is used to frame more than 50% of the dwelling units.⁶ This was also discussed in the ZC's deliberations on ZC 04-33G.⁷

The proposed amendment would change that section to allow the reduced set-aside requirement if the project is in certain zones or if the developer requested a map amendment to one of those zones, even if the project would largely use the less costly construction methods. In some instances, the required set-aside for the larger PUD could be lower than the required set-aside for a MOR building on that site.⁸

I recommend that the following changes (from the current proposal) be adopted to remove the current ambiguity and to reflect the original intention of the OP and ZC to allow the reduction in the set-aside requirement only when required due to the higher costs associated with steel and concrete construction.

1003.1 An inclusionary development which 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) 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 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 the **achievable** bonus density **utilized** to inclusionary units plus an area equal to ten percent (10%) of the penthouse habitable space as described in Subtitle C § 1001.2(d).

⁶ ZC Case 04-33G Exhibit 8, Office of Planning Setdown Report, July 2015: "§ 2603.1 & 2603.2 was requested by the ZA to address the growing number of projects that mix construction techniques between steel and concrete and wood frame "stick" construction. The goal is to clearly define when a project has an 8 percent requirement versus a 10 percent requirement. OP will be continuing to work the ZA and developers to refine this language for the final report. This amendment would permit a reduction of 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."

⁷ See ZC Notice of Final Rulemaking and ZC Order 04-33G, October 17, 2016, at page 2:

⁸ For example, if a PUD on a 10,000 SF lot included a request for a map amendment from MU-4 to MU-5, the set-aside requirement would be the reduced requirement of §1003.2 rather than the normal requirement of §1003.1.

In this example, for a 10,000 SF lot, the set-aside requirement for a MOR building in MU-4 would be 3,750 SF. 75% of the IZ bonus density of 5,000 SF.

If there is a PUD with a map amendment to MU-5 on that site, the allowable FAR increases from 3.0 (MOR with IZ in MU-4) to 5.04 (PUD with IZ in MU-5). The IZ bonus density in MU-5 would be 7,000 SF. If more than half the residential units are stick-built and §1003.1 applies, the required set-aside would be at least 5,250 SF.

On the other hand, with the proposed amendment, the reduced set-aside requirement (§1003.2) would apply, even if more than half the residential units are stick built, and the required set-aside would be 3,500 SF – 4,032 SF, depending on the amount of non-residential space in the project.

In other words, with this amendment, the IZ set-aside for a PUD with a map amendment that would allow a building 68% larger than a MOR building on that site could be less than the required IZ set-aside for the MOR building.

1003.2 An inclusionary 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) 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 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 the achievable bonus density ~~utilized~~ to inclusionary units plus an area equal to eight percent (8%) of the penthouse habitable space as described in Subtitle C § 1001.2(d).