

MEMORANDUM

TO: Sara Bardin, Director, Office of Zoning

FROM: *JL for* Jennifer Steingasser, Deputy Director, Historic Preservation and Development Review

DATE: July 22, 2016

SUBJECT: Zoning Commission Cases 08-06 D and E

OP response to comments submitted in response to the 08-06 D and E
Technical Corrections to Zoning Commission Order No. 08-06A

At its November 16, 2015 public meeting, the Zoning Commission approved Case 08-06A, comprehensive update of the Zoning Regulations. The regulations were published in the DC Register in January 2016, and the Commission set an effective date of September 6, 2016.

Since then, the Office of Planning has been working with the Office of Zoning (OZ), the Office of the Attorney General (OAG), the Department of Consumer and Regulatory Affairs (DCRA) and many members of the public to identify corrections needed to the approved text¹. To this end, three reports were filed for consideration by the Commission, ZC Case 08-06D (ZC public meeting May 23, 2016) and Case 08-06E (ZC public meeting June 13, 2016). The Commission opened the record for public comment, based on the published Notices of Proposed Rulemaking.

Comments were received from the Committee of 100 (entered into the record for both cases, as 08-06D Exhibit 4, and 08-06E Exhibit 5), and from the Zoning Administrator, DCRA (08-06E Exhibit 6). No other public comments were received.

This report provides a response to issues raised in those two submissions.

¹ Some additional non-technical (potentially substantive) changes have also been identified, and will be brought forward for Zoning Commission consideration and public hearing in the fall.

1. Committee of 100 (C-100) Comments, 08-06D Exhibit 4, and 08-06E Exhibit 5

The following table provides a short summary of the issue and the C 100 comment – please refer to the C-100 submission for complete C 100 comments. Issues for which the C-100 did not raise concerns are not included on this table. The issues are listed in the order discussed in the C-100 submission, not in numerical order with the page number of the C-100 submission included in the first column.

Page and Section	OP Proposed Correction	OP Summary of C-100 Comment	OP Response
C-100 Page 2 X § 301.2	Minimum PUD Lot Area Requirement, Waiver - Correct a typo in the Zone Group column	Whether a typo or not, not a technical correction and a significant change from wording within the original Notice of Proposed Rulemaking for 08-06A. Requires re-notification and a public hearing to allow public comment.	OP considers a typo as the very definition of a technical correction. The corrected language reflects the direction provided as part of its deliberations, and simply corrects a reference in the table. The requested technical correction specifically highlighted this issue, and provided for public comment, as evidenced by the comments submitted by the C-100. Attachment A sets out the full sequence of action relative to the amendment and correction. OP continues to recommend adoption as noticed.
C-100 Page 5 B § 100.2	Clarification to definition of Emergency Shelter	While potentially desirable, the change represents a substantive change in use, so exceeds the scope of a technical correction	“Emergency Shelter” is both a defined term, and a use group as noted in Subtitle B, and permitted in Subtitle U. The change is simply to make the definition consistent with the use group description. As such, there is no expansion of the stated permitted uses within an emergency shelter, and this is an appropriate clarification. OP continues to recommend adoption as noticed.
C-100 Page 6 B	n/a	C-100 requests definitions for: • Abut • Building, Front • Eave, not an eave of a dormer • Nonconforming Lot • Place of Worship	OP has discussed the definitions sections with the ZA Office, and included their requests for definitions. Definitions were discussed at the ZC Public Hearing of November 5, 2013. The C-100 proposed definitions were not included in NPRM. Should the Commission wish to request additional definitions, OP would bring those forward as part of a proposal for additional changes to the regulations in the future. Subtitle B § Section 100.1 (g) clarifies that “Words not defined in this section shall have the meanings given in Webster's Unabridged Dictionary.” .

Page and Section	OP Proposed Correction	OP Summary of C-100 Comment	OP Response
C-100 Page 9 G § 609	Correct numbering for Dupont Circle MU Zones	An additional correction to referenced zones is also needed: Change MU-13 through MU-22 to MU-15 through MU-22.	OP agrees that this is a technical correction, and should be added at this time, or OP will bring it forward separately in the future. OP recommends adoption of the C-100 proposed correction, as a purely technical correction to what was noticed.
C-100 Page 10 I § 205.1	Rear yards	Technical, correct cross references	The reference in subtitle I § 205.1 reads “Subtitle B §§ 318 and 319.6” but should read Subtitle B §§ 317 and 318.6”. OP agrees that this is a technical correction, and should be added at this time, or OP will bring it forward separately in the future. OP recommends adoption of the C-100 proposed correction as a purely technical correction to what was noticed.
C-100 Page 11 X § 303.7	PUD Heights for Fort Totten Mixed Use Zones	NPRM describes the table of minimum number of bicycle parking spaces instead of PUD height	This was an error in the NPRM title, not the proposed text. No additional action needed. OP continues to recommend adoption as noticed.
C-100 Page 11 A § 102.4	Clarification of vesting rights of projects approved under ZR-58, particularly Zoning Administrator flexibility	Suggest that the change alters the intent of the provision so is beyond the scope of a technical correction; suggested alternative wording.	This correction was submitted by the Office of Zoning as a result of requests from the public for clarification of the section, and is intended to provide clearer direction for both owners/developers and staff in proceeding forward with review of vested projects under the former regulations. OP continues to recommend adoption as noticed.
C-100 Page 12 B § 100.2	Alley Lot definition	Presume wording included in the NPRM is the intended wording	Correct. No additional action needed. OP continues to recommend adoption as noticed.
C-100 Page 12 B § 311 and 312	Removal of the term “structure” from lot occupancy calculations.	Substantive impact to eliminate “structures” from these calculations, so not a technical correction.	As noted in the OP report dated June 3, 2016, structures historically have not been included in lot occupancy, but “and structures” was inadvertently including the ZR-16 general regulations for lot occupancy calculation. So the change is to be consistent with the current regulations. OP continues to recommend adoption as noticed.

Page and Section	OP Proposed Correction	OP Summary of C-100 Comment	OP Response
C-100 Page 14 C § 709	Clarification of the method for calculating parking requirements for non-residential uses.	Does not capture all uses for which the current regulations would include cellar area in calculating required parking; should include the following use groups: • Entertainment, assembly, and performing arts; • Education • Institutional • Government • Sexually oriented business Does not take into account uses for which parking requirement is not calculated on a GFA basis.	The OP proposal reflects current parking regulations. For uses for which parking is not calculated on a GFA basis in the new regulations (such as residential, or a school), the regulations do not exempt eligible uses from the parking requirement just because the use is in the cellar – a cellar residential unit, or classroom seats located in the cellar would contribute to the parking required. Including these other uses could be viewed as an expansion of parking requirements. If the Commission wished to include them, OP would bring this forward as part of a future ZR-16 amendment. OP continues to recommend adoption as noticed.
C-100 Page 15 G § 201	Clarify conversion of a pre-existing non-residential building to residential in MU zones	For clarity, remove “even if in excess of otherwise permitted FAR”	The proposed wording is fully consistent with ZR-58 Section 771.3, reworded for clarity. OP does not recommend excluding this clause. OP continues to recommend adoption as noticed.
C-100 Page 16 G § 702.1	Correct reference to maximum permitted non-residential FAR in the MU-26 zone	Correction is in error – corrected FAR (2.5) is in excess of the zone permitted FAR (1.8).	MU-25 is equivalent to CHC/C-2-A, and MU-26 is equivalent to CAP/CHC/C-2-A zone. In the current ZR-58 zoning, CHC/C-2-A is permitted an FAR of 3.0 for all uses (§ 1572.3); while CAP/CHC/C-2-A is permitted an FAR of 2.5 for all uses (§ 1572.4). This is not reflected in the ZR-16 table, including in the table published in the NPRM. The Commission did not discuss or approve changes to existing permissions. As such, the table is incorrect – a corrected table is provided below, which carries forward the existing limits to both the MU-25 and MU-26 zones. OP recommends adoption of the corrections as noted below:

Page and Section	OP Proposed Correction	OP Summary of C-100 Comment	OP Response																					
Subtitle G § 702.1 is amended as follows:																								
TABLE G § <u>702.1</u> : MAXIMUM PERMITTED FLOOR AREA RATIO																								
<table><tr><th rowspan="2">Zone</th><th colspan="2">Maximum FAR</th></tr><tr><th>Total Permitted</th><th>Maximum Non-Residential Use</th></tr><tr><td rowspan="2">MU-23</td><td>1.8</td><td rowspan="2">N/A</td></tr><tr><td>2.16 (IZ)</td></tr><tr><td rowspan="2">MU-24</td><td>1.8</td><td rowspan="2">1.5</td></tr><tr><td>2.16 (IZ)</td></tr><tr><td rowspan="2">MU-25</td><td>2.5 3.0</td><td rowspan="2">2.5 3.0</td></tr><tr><td>3.0 (IZ)</td></tr><tr><td rowspan="2">MU-26</td><td>1.8 2.5</td><td rowspan="2">1.5 <u>2.5</u></td></tr><tr><td>2.16 2.5 (IZ)</td></tr></table>				Zone	Maximum FAR		Total Permitted	Maximum Non-Residential Use	MU-23	1.8	N/A	2.16 (IZ)	MU-24	1.8	1.5	2.16 (IZ)	MU-25	2.5 3.0	2.5 3.0	3.0 (IZ)	MU-26	1.8 2.5	1.5 <u>2.5</u>	2.16 2.5 (IZ)
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C-100 Page 17 H §1101.3	Wording correction proposed in response to public comment, that wording be consistent with long standing DCRA interpretation and enforcement.	Suggests this change is substantive	Existing wording for the formula to calculate eating and drinking establishments was carried forward from the existing regulations. However, it was made clear from the public and DCRA that this wording is unclear and should be clarified to be consistent with other text wording and long standing Zoning Administrator interpretation of the provision. OP continues to recommend adoption as noticed. However, if the Commission feels this rises to the level of a substantive change, then OP would recommend that the Commission not adopt this change, and instead OP would bring this forward as part of a future proposal for such changes to the new text.																					
C-100 Page 18 I § 210.1	Technical correction to delete a hyphen in the word “set-back”. Note – the NPRM references § 210.1 (d), but intended to reference § 210.1 (c).	Remove hyphen from “set-back” in § 210.1 (c), should be two words.	OP agrees with C-100 comment that “setback” (one word) is a noun that indicates a “thing”, while “set back” (two words) indicates an “action”. Typically, the context of the provision adequately provides direction for how to read and understand the word and the provision. Even so, OP agrees with C-100 recommendation that the hyphen in “set-back” be replaced with a space, rather than deleted. OP notes that throughout the ZR-58 and the ZR-16 regulations, some inconsistency remains in the use of “setback”, “set-back” and “set back”; OP will evaluate this as part of a future proposal for corrections to the regulations.																					

2. DCRA Zoning Administrator Comment

The Zoning Administrator (ZA) filed comments (08-06E Exhibit 6) requesting revisions to Subtitle A, § 304, Deviations and Modifications Permitted by Zoning Administrator's Ruling, which includes new language that establishes limits with respect to ZA flexibility to grant deviations and modifications to Board of Zoning Adjustment (BZA) or ZC approved plans. The ZA believes that the adopted limits to ZA flexibility would have counterproductive results, with potentially serious implications to both the permit review and Board of Zoning Adjustment processes for projects vested under the old regulations pursuant to a BZA approval. The ZA recommends deleting the reference to the BZA in Subtitle A § 304.5 and suggests a new § 304.8 that would allow more defined flexibility for the ZA to consider modifications to BZA approved building plans if the modification is unrelated to the relief granted. The ZA comments also note potential inconsistencies between the provisions in Subtitle A § 304 and Subtitle X § 311.

OP, OAG, ZA, and OZ discussed the proposed revisions prior to the ZA's filing, and generally agreed that amendments in line with those proposed by the ZA are warranted. However, OP did not include the proposed amendment text in the technical corrections submissions² because it was felt that they would result in a substantive change to the regulations, so were outside the scope of being considered technical corrections.

Should the Commission desire to pursue the ZA's proposed revisions, OP could bring forward modifications to Subtitle A § 304 and Subtitle X § 311, along with other substantive changes, for Zoning Commission consideration and public hearing in the fall.

OP would not be opposed to the Commission setting down the ZA proposed text amendment for a public hearing at this time. If the Commission does so, OP asks for flexibility to work with the ZA and OAG to refine the language of the proposal prior to the publication of the public hearing notice.

² ZC Case 08-06D, Exhibit 1 and ZC Case 08-06E, Exhibits 1 and 2.

ATTACHMENT A

Issues regarding the process by which §§X-301.1 and .2 became a part of the ZRR Notice of Final Rulemaking text.

The review revealed that the issue is related to a renumbering within the Table X-3-1.1 and an inadvertent edit of the final text and not whether there was notice regarding the Zoning Commission's intent to include "Any Other Zone" within those zones eligible for a waiver of minimum Planned Unit Development (PUD) land area. Going back through the reports, submittals and exhibits it is clear that the submitted draft included "Any Other Zone" as an eligible waiver category, and in fact, there was notice of the Zoning Commission's intent to include the category of "Any Other Zone".

JULY 2013

On July 29, 2013 OP submitted the initial draft text of the zoning revisions to the Zoning Commission³. Subtitle X includes the Planned Unit Development provisions.

- Section X-301 includes the PUD Minimum Land Area and
- Section X-301.2 establishes the Zoning Commission's authority to waive the minimum land area for PUDs.
- The table in Subtitle X § 301.1 (page X-16) skipped a number so the NC group had no number in its row and the following row, "All Other Zones" had the number "5" (see below).

Minimum Area	Applicable Zone	Zone Group
Two (2) Acres	Any R zone (R-1, R-2, R-3) Any RF zone (R-4)	1
One (1) acre	A-1 (R-5-A) A-3 (R-5-B) M-11 (W-0)	2
One (1) acre	A-4, A-9, A-11 (R-5-B,D,E/DC) M-16, M-17 (SP/DC) M-23 (CR/DC)	3
One-half (½) acre	M-18 (C-2-A/DC) M-19 (C-2-B/DC) M-20 (C-2-C/DC) M-21 (C-3-B/DC) M-22 (C-3-C/DC)	4
Ten thousand square feet (10,000 sq. ft.)	N-7 (C-2-A/GA) N-8 (C-3-A/GA) N-9 (C-2-A/HS-H) N-10 (C-2-B/HS-H) N-11 (C-2-C/HS-H) N-12 (C-3-A/HS-H) N-13 (C-3-B/HS-H) N-14 (C-2-A/HS-A) N-15(C-3-A/HS-A) N-16 (C-2-A/HS-R) N-17 (C-2-B/HS-R)	
Fifteen thousand square feet (15,000 sq. ft.)	Any Other Zone	5

301.2 The Commission may waive up to fifty percent (50%) of the minimum area requirement of this section for applications in zone groups 1, 2 and 5, or up to

³ ZC Case 08-06A Exhibit No. 1X

five percent (5%) for applications in zone groups 3 and 4, provided that the Commission shall find one of the following:

SEPTEMBER 2013

On September 9, 2013 the ZC set the draft text down and the table was renumbered such that the empty box relative to the N-7 through N-17 zones (ultimately adopted as NC-7 through NC-17 zones) was filled in with number “5” and “Any Other Zone” was changed to number “6”⁴ but the text of § 301.2 was not updated to reflect the correction:

Minimum Area	Applicable Zone	Zone Group
Two (2) Acres	Any R zone (R-1, R-2, R-3) Any RF zone (R-4)	1
One (1) acre	A-1 (R-5-A) A-3 (R-5-B) M-11 (W-0)	2
One (1) acre	A-4, A-9, A-11 (R-5-B,D,E/DC) M-16, M-17 (SP/DC) M-23 (CR/DC)	3
One-half (½) acre	M-18 (C-2-A/DC) M-19 (C-2-B/DC) M-20 (C-2-C/DC) M-21 (C-3-B/DC) M-22 (C-3-C/DC)	4
Ten thousand square feet (10,000 sq. ft.)	N-7 (C-2-A/GA) N-8 (C-3-A/GA) N-9 (C-2-A/HS-H) N-10 (C-2-B/HS-H) N-11 (C-2-C/HS-H) N-12 (C-3-A/HS-H) N-13 (C-3-B/HS-H) N-14 (C-2-A/HS-A) N-15(C-3-A/HS-A) N-16 (C-2-A/HS-R) N-17 (C-2-B/HS-R)	5
Fifteen thousand square feet (15,000 sq. ft.)	Any Other Zone	6

OCTOBER 21013

In the OP hearing report dated October 25, 2013⁵ for the Public Hearing on Subtitle X (held Nov 3, 2013) Section 301.2 was corrected to reflect the guidance given by the Zoning Commission:

“ERRATA: The advertised text does not reflect the Commission guidance to remove the 50% limitation on waivers; OP recommends that the draft text be modified to reflect the Commission’s guidance; possible text:

301.2 The Commission may waive ~~up to fifty percent (50%) of~~ the minimum area requirement of this section for applications in zone groups 1,2 and 5, or up to five percent (5%) for applications in zone groups 3 and 4, provided that the Commission shall find one of the following: ...

⁴ Case 08-06A Exhibit No. 7X, page X-18

⁵ Case 08-06A Exhibit No. 92, page 14

But the correction was not made to the identified zone groups within § 301.2 to reflect the renumbered Table X-301.1.

Neighborhood Commercial Zones

The reason a Zone Group number was not assigned to the NC-7 through NC-17 zones in Table X-301.1 of the July 29, 2013 draft reflects the repeated commitment to maintain the provisions of the neighborhood commercial overlays of the 1958 text as they are rolled into the new Neighborhood Commercial zones of ZR2016 text.

In the 1958 overlay text there is a minimum land area requirement for the H Street overlay and the Georgia Avenue overlay of 10,000 square feet (11 DCMR §§ 1326.3 and 1331.1 (b)). This minimum land area is reflected in the Zone Group 5 and the zone group that includes NC-7 through NC-17 was always intended to be excluded from the zones eligible for a waiver.

Therefore, Subtitle X § 301.2 should be corrected to exclude Zone Group 5 from Subtitle X § 301.1 as follows:

301.2 The Zoning Commission may waive the minimum area requirement of Subtitle X § 301.1 for applications in Zone Groups 1, 2, ~~5~~, and 6, provided that the Zoning Commission shall find after the public hearing that the development is of exceptional merit and is in the best interests of the District of Columbia or the country and one (1) of the following: