

Zoning Commission Case No. 16-23
 Valor Development, LLC – Design Review @ Square 1499
 Testimony of Marilyn J. Simon
 Thursday, January 24, 2019

As with my testimony last year, I limit my discussion to the inclusionary zoning (IZ) proposal for this project. As discussed below, the proposal does not satisfy the required inclusionary zoning set-aside for a project of this size, even when calculated assuming adoption of the proposed text amendment in ZC 04-33I.¹

Based on the revised tabulations provided by the Applicant, the amount of inclusionary zoning proposed for this project still falls far short of the amount required for a building of this size. Valor proposes providing 27,440 square feet of space for inclusionary units. Based on Valor’s zoning tabulations, the set-aside requirement for a project of this size is 45,416 SF. The inclusionary zoning set-aside falls 18,006 square feet short of the requirement, even if the bonus density calculation is based on utilized bonus density, rather than on achievable bonus density as currently required.

Evaluation of the Proposed IZ Set-Aside if the Proposed Text Amendment (ZC 04-33I) Is Adopted

If ZC 04-33I, a text amendment that changes the definition of bonus density for the purposes of this calculation, reducing the IZ set-aside requirement, is adopted as proposed and if the Applicants resubmit this proposal to be evaluated under those regulations, the proposed IZ set-aside still falls far short of the affordable housing requirement.

The Zoning Regulations clearly state that residential cellar space and projections are included in the calculations of the IZ requirement in §§1003.1 and 1003.2:

Subtitle C, Section 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.”

There are two calculations in §§1003.1 and 1003.2: the residential floor area and the utilized bonus density. So, with the proposed text amendment, the bonus density utilized would include the residential cellar space and the projections, which are not in GFA. The following table gives the calculation for the IZ set-aside using the proposed regulations:

Calculation based on Bonus Density		75% Bonus Density 10% Penthouse Space	Set-Aside
Density Utilized (total of GFA, residential cellar space and projections)	458,622 SF		
GFA	430,853 SF		
Cellar Space (per § 1003.9)	26,050 SF		
Projections (per § 1003.9)	1,719 SF		
MOR GFA	401,970 SF		
Bonus Density Utilized (per § 1003.9)	56,652 SF	42,489 SF	
Penthouse (per § 1003.1)	29,572 SF	2,957.2 SF	
Total Based on Bonus Density (75% of bonus density plus 10% penthouse space)			45,446.2 SF
Total Based on Residential Floor Area (Applicant’s Page G05 of Revised Plans)			27,440 SF
IZ Set-Aside Requirement (greater of the two results)			45,446.2 SF
Proposed Set-Aside			27,440 SF
Shortfall			18,006.2 SF

¹ The Commission took proposed action ZC 04-33I on November 19, 2018. ZC 04-33I reduces the IZ requirement for some projects, including this one. In ZC 04-33 and ZC 04-33G, the IZ requirement bonus density was 50% or 75% of the achievable bonus density, while ZC 04-33B and 04-33I reduced the requirement to be 50% or 75% of the bonus density utilized. In the hearing on 04-33I, OP testified that it had not enforced the requirement to provide the higher IZ requirement based on achievable bonus density as specified in the ZC 04-33, ZRR and ZC 04-33G.

Response to Applicant's discussion of gross floor area and cellar space: In the December 18, 2018 letter, the Applicant asserts that it is inappropriate to include the residential space in the cellar and the enclosed building projections in the calculation of bonus density, that space is not "considered gross floor area." The definition of gross floor area is not relevant here, since Subtitle C, §1003.9 explicitly states these areas are to be included in the calculation, even though they are not included in the calculation of gross floor area. Currently, they are included in the calculation of 10% of the residential floor area, and if 04-33i is adopted, they would be included in the calculation of the utilized bonus density.

Response to Applicant's statement on DCRA interpretation of the set-aside requirement: At the January 7, 2019 hearing, Shane Dettman of Holland & Knight² cited the Office of Planning's Supplemental Report for 04-33I³ for its conclusion that Subtitle C, §1003.9, requiring the inclusion of cellar space and projections in the calculations in §§1003.1 and 1003.2, applies only to one of the two calculations in those sections, i.e., that it applies only to the calculation of residential floor area and does not also apply to the calculation of the bonus density utilized. In the November 9 filing, the Office of Planning relied on DCRA's forms and instructions for filing its CIZC. Yet DCRA's instructions include the following caveat: "This guide is **not** a substitute or replacement for District laws and regulations, and those legal sources should be consulted for the specific legal requirements."

This guide is **not** a substitute or replacement for District laws and regulations, and those legal sources should be consulted for the specific legal requirements applicable to the construction process. Many of these laws and regulations cross over multiple District agencies sharing in their development and enforcement. This guide is intended to provide a central informational source to assist in complying with these inclusionary laws and regulations.

This caveat is well justified. The posted DCRA document is dated June 18, 2018. Yet, it was not revised to incorporate the 2016 change in the definition of bonus density that this Commission adopted in ZC 04-33G.⁴ As stated in the DCRA document, the Applicant cannot rely on that document for the interpretation of this Commission's intent in adopting the current set-aside requirement. As noted above, there is no language in §1003.9 limiting the inclusion of the residential cellar area and projections to only one of the two calculations in §1003.1 and §1003.2.

Response to Office of Planning's position that it is not necessary to determine the sufficiency of the affordable housing set-aside prior to design review approval: At the January 7, 2019 hearing, the Office of Planning maintained that, since the Commission cannot vary FAR or IZ as part of the design review process, it is not necessary to evaluate IZ compliance in this proceeding. Confirmation of compliance with the inclusionary zoning regulations would be done when the Applicant pulls a building permit, and the project could not proceed if the proposed set-aside is inadequate.⁵

This might be appropriate if only a small change in the IZ set-aside might be required, presumably related largely to design flexibility in the project. However, in this instance, the Applicant's proposal might be 18,000 to 35,800 square feet short of the set-aside requirement. It is unreasonable to approve a project where the Applicant might be required to make major changes in the project, to revise its plans to include an additional 18,000 to 35,800 square feet of affordable housing. Delaying a decision about the affordable housing set-aside is an unnecessary burden to the Applicant, the community and affordable housing advocates.

Inclusionary Zoning Text Amendments and the definition of bonus density

In the December 18, 2018 letter, the Applicant describes ZC 04-33I as a "recently adopted amendment." This is false. On November 19, 2018, the Commission took proposed action on the text amendment. As of January 18, 2019, the Notice of Proposed Rulemaking (NPRM) had not yet been published in the DC Register. The Commission can only

² Video, ZC 16-23, Zoning Commission Hearing, January 7, 2019, time-stamp 53:50.

³ Office of Planning Memorandum from Jennifer Steingasser to the Zoning Commission, "ZC 04-33I Supplemental Inclusionary Zoning ZR16 Corrections and Reorganization," November 9, 2018, ZC 04-33I.

⁴ Zoning Commission for the District of Columbia, Notice of Final Rulemaking and ZC Order 04-33G, Text Amendment – Inclusionary Zoning – Amendments to Subtitle C, Chapter 10, October 17, 2016.

⁵ The Office of Planning also stated that the Applicant would be subject to the regulations in effect at the time that they apply for the building permit, and not the regulations in effect when they filed the request for design review.

vote to adopt the proposed text amendment after publication in the DC Register and the required comment period expired.

The current regulations are clear. The bonus density calculation is based on the achievable bonus density, the amount which potentially may be utilized. Absent unusual site conditions, that is 20% of the MOR FAR. However, in its testimony and its November 9, 2018 Supplemental Report, the Office of Planning stated that the recent “administrative practice” has been to evaluate the IZ requirement based on utilized bonus density, in spite of the clear language adopted by this Commission stating that the IZ requirement is based on the defined “achievable bonus density.”

There have been several text amendments affecting this calculation. The original requirement (ZC 04-33, Notice of Final Rulemaking, 2006) stated that the bonus density requirement was based on “achievable bonus density” which was the amount of bonus density that “potentially may be utilized.” In 2008, the Office of Planning proposed a text amendment (ZC 04-33B) to change the definition to be the bonus density utilized. In that proceeding, the change to the set-aside requirement was adopted, but was not discussed or deliberated on by the ZC. In October 2016, the Commission adopted a text amendment (ZC 04-33G) restoring the original requirement. That is the requirement currently in effect, although according to OP’s testimony, neither OP nor the ZA had implemented the requirement adopted by this Commission in 2016. This means that some projects that did not provide the required affordable housing, as specified in ZC 04-33G, might have been approved by the ZA. Even if the “administrative practice” had been to approve projects that do not provide the required affordable housing, that would not justify the approval of additional projects that do not meet the affordable housing requirements in place when the applications were filed.

Evaluation of the Proposed IZ Set-Aside based on Regulations Currently in Effect (ZC 04-33G)

Based on the regulations currently in effect, and in effect at the time of the Application (ZC 04-33G), the required IZ set-aside is 63,252.7 SF, substantially more than the 27,440 GSF proposed.

Calculation based on bonus density (as defined on ZC 04-33G, 2016 as well as ZC 04-33, 2006)			
	Bonus Density	75% of Bonus Density	Set-Aside
Building ⁶	80,394 SF	60,295.5 SF	
	GFA, habitable, non-communal	10% habitable GFA	
Penthouse	29,572	2,957.2 SF	
Total based on Bonus Density			63,252.7 SF
Total based on Residential GFA (per Applicant’s Revised Plans, Page G05)			27,440 SF
IZ Set Aside Requirement (greater of the two results)			63,252.7 SF
Proposed Set-Aside			27,440 SF
Shortfall			35,812.7 SF

Conclusion

The Applicant interprets the regulations to allow an 18,000 SF reduction in the affordable housing set-aside by sinking the building a few feet into the ground, thereby eliminating a large amount of space from its bonus density calculation. Fortunately, the regulations adopted by this Commission address the use of cellar space, and sinking the building a few feet into the ground doesn’t reduce the requirement that dramatically. Subtitle C, Section 1003.9 clearly states that residential cellar space and projections are included in the calculations of the IZ requirement in §§1003.1 and 1003.2, so the Applicant cannot reduce the calculation of utilized bonus density by sinking the building a few feet into the ground, but must include the residential cellar space and projections in that calculation.

⁶ Revised Architectural Drawings, pp. G05, G07 and G09. The IZ bonus density is the difference between the permitted GFA as a MOR and the permitted GFA with IZ. The permitted GFA listed in the Applicant’s zoning tabulations are: MOR: 401,970 SF (241,182 SF nonresidential); IZ: 482,364 SF (241,182 SF nonresidential). Based on these calculations, the IZ bonus density for the calculating the set-aside requirement is 80,394 SF. The proposed habitable penthouse space is 29,572 SF.