

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

Z.C. Case No. 21-05

Office of Planning

**(Text Amendment – Subtitle C, IZ-XL Phase #2, Applying Inclusionary Zoning to
Conversions of Non-Residential Buildings to
Residential Use)**

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 (2018 Repl.), and pursuant to § 6 of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1206; D.C. Official Code § 2-505(c) (2016 Repl.)), hereby gives notice of its intent to amend Subtitle C of the Zoning Regulations (Title 11 of the District of Columbia Municipal Regulations, Zoning Regulations of 2016, to which all references are made unless otherwise specified), with the proposed text at the end of this notice.

SETDOWN

On March 1, 2021, the Office of Planning (OP) filed a petition (Petition) to the Commission proposing a text amendment to apply the existing Inclusionary Zoning (IZ) program to buildings that are converted from non-residential use to residential use. The text amendment is the second of three phases of OP’s proposed IZ updates – Phase I is the subject of Z.C. Case No. 21-02, and Phase 3 will follow this case. This phase would apply the IZ requirements, in zones where IZ already applies, to non-residential use conversions to residential use, regardless of whether the existing building envelope is enlarged or retained. A conversion must be in a zone where IZ already applies and propose ten (10) or more dwelling units at the time of the building permit. The ten or more dwelling unit threshold can be a combination of existing floor area converted to residential use and new floor area built for residential use. All other requirements of the IZ program would apply to a conversion, including the existing set-aside requirements and the use of bonus density.

The following table summarizes the existing regulations and the change in how IZ would be applied to a conversion from non-residential to residential use under the proposed text amendment.

Non-Residential Building Converts to Residential Use	Uses IZ-Related Bonus Density	IZ Applies?	Proposed Text Amendment Application
Less than 10 units	Not available	No	No
10 units or more; no addition	No	No	Whole building
10 or more units that result from addition of less than 50% of existing GFA	No	New GFA only	Whole building
	Yes	Whole building	Whole building
10 or more units that result from addition of 50% or more of existing GFA	No	Whole building	Whole building
	Yes	Whole building	Whole building

At its March 11, 2021 public meeting, the Commission voted to grant OP's request to set down the Petition for a public hearing.

PUBLIC HEARING

On June 17, 2021, OP submitted its Analysis of Assessments of Commercial to Residential Conversions in the District of Columbia Q2, 2020 along with a report (OP Hearing Report), stating that no substantive changes to the proposed amendments had been made since set down, but that the amendments were revised to:

- Reorganize Subtitle C § 1001 to streamline the existing program applicability requirements and to better integrate the new applicability requirements for conversions;
- Refine what establishes a conversion by referencing the residential use category of Subtitle B § 200.2; and
- Clarify that a conversion is subject to an IZ requirement when ten (10) or more dwelling units are proposed by either:
 - Converting existing non-residential floor area to residential floor area; or
 - A combination of converting existing non-residential gross floor area to residential floor area and adding new residential floor area that did not previously exist; and
- Revise Subtitle C § 1001.4 to clarify when existing residential floor area in a mixed-use building is subject to the IZ set aside requirements where the non-residential portion of the building converts to residential use.

Prior to the public hearing, no comments or testimony were submitted to the record.

At the June 28, 2021 public hearing, OP presented the Petition and responded to questions of the Commission. In addition, organizations and members of the public testified:

- In opposition to the Petition, concerned it will act as a disincentive to non-residential to residential conversion projects and make such projects less likely to be underwritten;
- In opposition to the Petition, concerned that applying IZ to conversions without any offsetting benefit will further challenge conversion projects, and concerned about including a vesting provision to allow projects currently underway to continue; and
- In support of the Petition, noting that non-residential buildings such as hotel, institutional and office uses may be obsolete and/or located in high-cost areas with potential to be converted to affordable housing.

At the conclusion of the hearing, the Commission decided to continue the hearing to allow time for the following:

- City wide input from ANC's;
- Submission of all the hearing testimony in writing to the record; and
- Submission of an OP supplemental report to the record addressing all opposition to the proposed amendments.

Prior to the continued hearing on October 7, 2021, OP submitted an October 4, 2021 (OP Supplemental Hearing Report). OP's report noted that it had addressed the Commission's requests by:

- Contacting all ANCs by email on August 18, 2021, to serve as a reminder that this case was heard at a public hearing on June 28, 2021, and that the Commission was providing an additional opportunity for their comment on the case. No ANC comments were submitted to the record; and
- Responding to all opposition testimony and comments submitted to the case record in four categories: financing and housing production comments; density comments; vesting comments; and set-aside comments, as follows:
 - Financing and Housing Production Comments

OP explained that: (i) the proposed amendments should be clear, but the language must be flexible to cover a diversity of potential scenarios making clarity more challenging; (ii) the proposed amendments will not have an impact on the supply or demand of office uses due to the limits on office floor-area-ratio (“FAR”) in mixed-use (MU) zones, other than Downtown zones (“D zones”), there is usually additional residential FAR available for redevelopment; (iii) the proposed amendments application of IZ to existing structures will result in a net gain in IZ units compared to the hypothetical loss of conversion projects that choose to stay non-residential.

- Density Comments

OP explained that: (i) some conversions are already built to their maximum zoning envelope and do not have the ability to achieve additional bonus density to offset the cost of providing affordable units; (ii) the proposed amendments should only apply IZ to conversions when that building is in a zone where bonus height and density are available; the IZ requirement should only be attached to the additional density gained.

- Vesting Comments

OP reiterated that the proposed amendments will only apply to IZ conversions located in zones where IZ already applies; given that set down occurred on March 11, 2021, OP does not see a need for a vesting provision.

- Set-Aside Comments

OP explained that it recommends keeping the set-aside for conversions consistent with existing IZ requirements rather than lowering it, which also keeps the regulations clear and simple.

At the October 7, 2021 continued public hearing, the Commission acknowledged OP for its outreach efforts and its detailed supplemental report addressing all issues raised at the initial hearing. The Commission also expressed disappointment that there was no ANC input submitted to the record. OP reiterated the statements in its supplemental report regarding how the expansion of IZ to non-residential to residential conversions would likely not reduce affordable housing because the amendments will impact MU zones the most, and in those zones residential FAR is more available because of limits on non-residential FAR.

“Great Weight” to the Recommendations of OP

The Commission must give “great weight” to the recommendations of the Office of Planning (OP) pursuant to § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990. ((D.C. Law 8-163; D.C. Official Code § 6-623.04 (2018 Repl.) and Subtitle Z § 405.8; *Metropole Condo. Ass’n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1087 (D.C. 2016).)

The Commission finds persuasive, and concurs with, OP’s recommendations that the Commission adopt the Petition, particularly:

OP's conclusion that the decision to pursue a conversion is a business decision where a property owner considers how to maximize land value given potential costs, revenues, and profit requirements. Further, when an existing non-residential use is no longer viable, a property owner has several options to ensure the best use of the land, including retaining existing non-residential uses or converting to residential uses.

“Great Weight” to the Written Report of the ANC

The Commission must give great weight to the issues and concerns raised in the written report of an affected ANC that was approved by the full ANC at a properly noticed public meeting pursuant to § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2012 Repl.) and Subtitle Z § 406.2). To satisfy the great weight requirement, the Commission must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. (*Metropole Condo. Ass'n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1087 (D.C. 2016).) The District of Columbia Court of Appeals has interpreted the phrase “issues and concerns” to “encompass only legally relevant issues and concerns.” (*Wheeler v. District of Columbia Board of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (1978) (citation omitted).)

Since no ANC filed a response to the Petition as advertised in the public hearing notice, there is nothing to which the Commission can give great weight.

PROPOSED ACTION

At the conclusion of the October 7, 2021 continued public hearing, the Zoning Commission voted to take **PROPOSED ACTION** to:

- Adopt the Petition; and
- Authorize the publication of a Notice of Proposed Rulemaking (NOPR).

VOTE (October 7, 2021): 4-0-1 (Peter A. Shapiro, Anthony J. Hood, Robert E. Miller, and Peter G. May to **APPROVE**; Architect of the Capitol Representative, not present, not voting)

Final rulemaking action shall be taken not less than thirty (30) days from the date of publication of this notice of proposed rulemaking in the *D.C. Register*.

All persons desiring to comment on the subject matter of this proposed rulemaking action should file comments in writing no later than thirty (30) days after the date of publication of this notice in the *D.C. Register*. Comments should be filed with Sharon Schellin, Secretary to the Zoning Commission, Office of Zoning, through the Interactive Zoning Information System (IZIS) at <https://app.dcoz.dc.gov/Login.aspx>; however, written statements may also be submitted by mail to 441 4th Street, N.W., Suite 200-S, Washington, D.C. 20001; by e-mail to zcsubmissions@dc.gov; or by fax to (202) 727-6072. Ms. Schellin may be contacted by telephone at (202) 727-6311 or by email at Sharon.Schellin@dc.gov. Copies of this proposed rulemaking action may be obtained at cost by writing to the above address.

The complete record in the case can be viewed online at the Office of Zoning's Interactive Zoning Information System (IZIS) at <https://app.dcoz.dc.gov/Content/Search/Search.aspx>.

PROPOSED TEXT AMENDMENT

The proposed amendments to the text of the Zoning Regulations are as follows) text to be deleted is marked in ~~bold and strikethrough~~ text; new text is shown in **bold and underline** text).

Subsections 1001.2, 1001.3, 1001.4, and 1001.6 of § 1001, APPLICABILITY, of Chapter 10, INCLUSIONARY ZONING, of Subtitle C, GENERAL RULES, are proposed to be amended, to read as follows:

1001.2 Except as provided in Subtitle C § 1001.5, the requirements of this chapter shall apply to, and the modifications to certain development standards and bonus density of this chapter shall be available to, developments in zones in which this chapter is identified as applicable as specified in the individual subtitles of this title; provided the development falls into one of the following categories:

(a) A “Mandatory Inclusionary Development” – a development that ~~meets one or more of the following criteria:~~

(1) **Proposes to create ten (10) or more new dwelling units, including dwelling units located in a cellar or penthouse, by:**

(i) **Adding Is proposing** new gross floor area beyond that existing at the time of the building permit application ~~that would result in ten (10) or more new dwelling units, including dwelling units located in a cellar or penthouse;~~

(2) ~~Will have ten (10) or more new dwelling units constructed concurrently or in phases, on a lot, on contiguous lots, or on 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;~~

(ii) **Changing the use of existing gross floor area to the “Residential” use category of Subtitle B § 200.2; or**

(iii) **A combination of (i) and (ii);**

~~(3)~~ (2) Consists of a residential building that has penthouse habitable space pursuant to Subtitle C § 1500.11; or

~~(4)~~ (3) An “IZ Plus Inclusionary Development” – a development located on property that was the subject of a map amendment that increased the allowable FAR pursuant to Subtitle X § 502 and as indicated with an “IZ+” on the Zoning Map and that meets one of the categories of subparagraphs (1) through ~~(3)~~ (2) of this paragraph 1001.2(a); or

(b) A “Voluntary Inclusionary Development” – any single household ...¹

1001.3 ~~If more than one (1) building permit is issued for a development, the~~ **The** number of dwelling units and ~~new~~ **the** gross floor area used **pursuant to Subtitle C § 1001.2(a)** to establish the applicability of the IZ requirements, and associated IZ modifications, shall be based on:

(a) **The new dwelling units and the gross floor area constructed or converted to the “Residential” use category of Subtitle B § 200.2 concurrently or in phases, on a single lot, on contiguous lots, or on lots divided by an alley, that were under common ownership, control, or affiliation within one (1) year prior to the application for the first building permit; and**

(b) ~~All~~ **all** the building permits issued for the development within a three (3)-year period, starting from the issuance of the first building permit for the development.

1001.4 For existing buildings that become subject to the requirements of this chapter pursuant to Subtitle C § 1001.2, the requirements of Subtitle C §§ 1003.1 through 1003.4 and the available modifications to applicable development standards shall apply **as follows**:

(a) **For any development described by Subtitle C §§ 1001.2(a), to** ~~To~~ both the existing and new gross floor area if ~~the new gross floor area~~ **the development**:

- (1) Utilizes the bonus density provided by Subtitle C § 1002; or
- (2) Results in an increase of fifty percent (50%) or more in the building’s existing gross floor area; **and**

(b) **For developments described by Subtitle C §§ 1001.2(a)(1)(i) or (a)(3),** ~~to~~ **only the new gross floor area if** ~~it~~ **the development**:

- (1) Does not utilize the bonus density provided by Subtitle C § 1002; **and**
- (2) Does not result in an increase of fifty percent (50%) or more in the building’s existing gross floor area; **;**

¹ The uses of this and other ellipses indicate that other provisions exist in the subsection being amended and that the amendment of the provisions does not signify an intent to repeal.

(c) For developments described by Subtitle C § 1001.2(a)(1)(ii), to only the existing gross floor area for which the use is changed to the “Residential” use category of Subtitle B § 200.2 if the development:

(1) Does not utilize the bonus density provided by Subtitle C § 1002; and

(2) Does not result in an increase of fifty percent (50%) or more in the building’s existing gross floor area; and

(d) For developments described by Subtitle C §§ 1001.2(a)(1)(iii), to the portion of the existing gross floor area for which the use is changed to the “Residential” use category of Subtitle B § 200.2 as well as to the new gross floor area if the development:

(1) Does not utilize the bonus density provided by Subtitle C § 1002; and

(2) Does not result in an increase of fifty percent (50%) or more in the building’s existing gross floor area.

...

1001.6 The 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 of law or financial subsidies ... ; provided:

(1) The development shall set aside, for so long as the project exists, affordable dwelling units (**Temporarily Exempt Affordable Inclusionary** 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 **and these Temporarily Exempt Affordable Inclusionary Units shall be identified on plans submitted for building permit;**

(2) The **Temporarily Exempt Affordable Inclusionary** Units shall be reserved ...

(3) The **Temporarily Exempt Affordable Inclusionary** Units shall be sold or rented in accordance with the Inclusionary Zoning Program (as defined by the IZ Act) upon the expiration of the affordable housing requirements of the District law or financial subsidies administered by DHCD, DCHFA, or DCHA;

- (4) The requirements set forth in subparagraphs (1), (2), and (3) of this paragraph, shall be stated as declarations, **accompanied by plans identifying the Temporarily Exempt Affordable Inclusionary Units**, within a covenant running with the land for the benefit of the District of Columbia ...

...