



March 29, 2023

Zoning Commission of the District of Columbia
441 4th Street, NW - Suite 210
Washington, DC 20001
VIA IZIS

Re: Z.C. Case No. 21-23 – OAG Text Amendment to Apply Inclusionary Zoning to Downtown Zones – Response to OP’s Setdown Report

Dear Members of the Zoning Commission (the “**Commission**”):

The Equitable Land Use Section of the Office of Attorney General (“**OAG**”) respectfully reiterates its request that the Commission set down for a public hearing OAG’s petition to remove the outdated exemption from the Inclusionary Zoning (“**IZ**”) program for the D-1-R, D-3, D-4-R, D-5, D-5-R, D-6, D-6-R, and D-7 zones (the “**non-IZ D zones**”). OAG acknowledges that the Office of Planning (“**OP**”) disagrees with OAG’s proposal to apply IZ to these non-IZ D zones, but respectfully disagrees with OP’s recommendation that the Commission not allow public discussion and debate on OAG’s proposal at a public hearing. appears to the petition. The subject of the petition is, however, critically important. The District has a once-in-a-lifetime opportunity to ensure that the transformation and revitalization of the downtown following the COVID-19 pandemic includes new and permanently affordable housing that, consistent with the Comprehensive Plan (Title 10A DCMR, the “**CP**”), makes the District more equitable and inclusive. The Zoning Commission should not decide the merits of the petition without holding a public hearing at which it can receive additional data and input from a broad swath of stakeholders, including landowners, developers, downtown workers, residents, and community groups.

Creating Affordable housing Downtown Is Both Critically Important and Consistent with the Comprehensive Plan

The CP identifies the District’s affordable housing crisis as “one of the most pressing and critical issues facing the District.”¹ Multiple CP policies, including those in the Framework, Land Use, and Housing Elements, as well as the two applicable planning area elements (i.e., Central Washington and Lower Anacostia Waterfront/Near Southwest)² emphasize the critical need to create and preserve affordable housing across the city, and especially in amenity-rich areas close to transit options, such as the downtown area.³ For example, CP § 220.5 states that “**the production of new affordable housing** ... [is] essential to avoid a deepening of racial and economic divides in the city, **and must occur city-wide to achieve fair housing objectives.**” As another example, CP § 503.8 states that, in the Central Washington area, the District should “encourage affordable housing production” “**through regulation** and incentives.” The CP also highlights the crucial role of IZ in producing affordable housing,

¹ CP § 206.1; *see generally*, CP § 206 discussing the changes to housing costs in the District.

² Most of the non-IZ D zones fall within the Central Washington Planning Area although several non-IZ D Zones are located in the Lower Anacostia Waterfront/Near Southwest Planning Area.

³ Please see the Appendix for a list of these policies and elements.

noting in CP § 500.21, that IZ “**produces units in high-amenity, high-cost neighborhoods, where land prices make it very expensive to financially subsidize affordable housing.**”

As OAG has previously explained, removing the IZ exemption for the listed downtown zones would advance the CP policies noted above by creating critically needed affordable housing in the downtown area, one of the most amenity-rich areas of the District. It would also advance the affordable housing goals set for the Central Washington and Lower Anacostia Waterfront/Near Southwest planning areas in the Mayor’s 2019 Housing Order, which the District is currently not on track to meet.⁴

The Mayor’s goal of 15,000 new downtown residents in the next five years will further setback satisfaction of these affordable housing targets since they are predicated on the Mayor’s 2019 Housing Order’s goal that one of every three new housing units be affordable. The Mayor’s DC Comeback Plan for revitalizing the downtown explicitly linked the District’s economic success with increasing both new residents and affordable housing in the District given that the “desire for more affordable and better housing is the top driver of outmigration from DC.”⁵ Terminating the outdated IZ exemption from the non-IZ D zones is particularly important as some of the District’s affordable housing tools are likely to be inapplicable to these zones, such as the Affordable Rental Covenants program that has protected almost 2,000 units in the District’s peripheral planning areas (Rock Creek East, Mid-City, Upper Northeast, Far Northeast and Southeast, and Far Southeast and Southwest) but zero units in either the Central Washington or Lower Anacostia Waterfront/Near Southwest planning areas.⁶

The Proposed Text Amendment Deserves a Public Hearing

OP’s set down report opposes setting the petition for a public hearing because of concerns about the merits of the petition. In its report, OP contends that the proposed change is inconsistent with the CP. It further contends that the proposed change could reduce the value of residential projects in the downtown area, which could, in turn, impede housing production and have adverse effects on housing costs.

OAG respectfully disagrees. As noted above, requiring development of affordable housing in the downtown area would advance numerous CP directives encouraging the production of affordable housing city-wide and in the relevant planning areas. Further, applying IZ to the listed downtown zones would not impede residential development. That is because the IZ program authorizes landowners to obtain relief from the IZ set-aside requirements as a special exception upon demonstration that IZ compliance “would deny an inclusionary development owner economically viable use of its land” (Subtitle C § 1007.1). If a landowner were to establish that satisfying IZ requirements would render development economically infeasible, the Commission would waive the requirements. The IZ program also authorizes exemptions for projects that meet or exceed IZ

⁴ In the Central Washington Area, the District is less than 45% of the way to meeting its target of 1,040 affordable units, despite being 60% of the way to the target date of 2025. In the Lower Anacostia Waterfront/Near Southwest Area, the District is only 52% of the way to meeting its target of 850 affordable units, despite being 60% of the way to the target date of 2025.

⁵ DC Comeback Plan p. 30, noting that the average income of people leaving the District because of housing is \$67,865.

⁶ [DMPED 36,000 by 2025 Dashboard](#).

affordability requirements due to funding from Federal or District sources (Subtitle C § 1001.6) and it discounts the IZ set-aside by exempting non-residential gross floor area and by reducing the nominal 8% IZ set-aside by an approximately 15% gross-to-net conversion (Subtitle C § 1003.6).

Given the clear and present need identified by the CP for additional affordable housing and given the difficulty of forecasting the economic future of the downtown development market in the wake of COVID and remote work,⁷ shifting the burden to landowners to demonstrate that they are unable to comply with IZ is the most balanced way to fulfill the CP's goals and vision. Considering the individual economic circumstances of a specific project at a particular time, instead of relying on outdated data from a larger area, would best capture the impact of IZ compliance, particularly given that the downtown property market is in the midst of significant and unpredictable changes. Significantly, OP's report nowhere addresses why the special exception process would not adequately address its concerns.

Ultimately, however, the Zoning Commission need not decide the merits of the petition at this juncture. The only question before it is whether the petition should receive a public hearing at which all stakeholders—not just OP—can have the opportunity to discuss the wisdom of the proposed changes. Holding a public hearing would allow the Zoning Commission to receive additional data about the changing market dynamics of the downtown area and the impact that applying IZ (or not applying IZ) to the downtown zones would have on the production of housing, including affordable housing, downtown.

Conclusion

Given the paramount importance of equitably revitalizing downtown to fulfill the CP's vision of an inclusive and diverse city, the Commission should set down the proposed text amendment for a public hearing. A public hearing will ensure adequate airing of the potential costs and benefits of removing the IZ exemption and help guide the Zoning Commission to decide how best to ensure that the heart of DC is open to residents of different financial means as a matter of justice and equity.

Respectively submitted,

BRIAN L. SCHWALB

Attorney General for the District of Columbia

/s/ Maximilian L.S. Tondro

Chief, Equitable Land Use Section

D.C. Bar No. 1031033

/s/ Alexandra L. Cain

Assistant Attorney General

D.C. Bar No. 1674308

⁷ OP's Setdown Report's analysis is based on building and property values that predate COVID and cannot fully anticipate the long-term changes that the pandemic and the increasing shift to telework will have (OP Setdown Report, Exhibit 13 at pp. 4-5, 8).

OAG Response to OP's Setdown Report – March 29, 2023
Text Amendment to Remove D-Zone IZ Exemption
Z.C. Case No. 21-23

cc:

Jennifer Steingasser – Office of Planning (via email)
All ANCs (via email)

Attachments:

Appendix – Comprehensive Plan Sections

APPENDIX – COMPREHENSIVE PLAN SECTIONS

Central Washington Area Element

While recognizing Central Washington's national and international role, the area should also play a special role for District residents. It should serve the needs of all residents and users of all abilities, without regard to age, income level, race, and gender. Many activities serving very low-income persons, persons with disabilities, including social services, low cost housing, and emergency shelter, have faced displacement as land values and rents have increased. Given the area's location, urban character, and accessibility, a significant number of housing units for persons with disabilities and older adults and human service facilities should be retained in the future. This should be achieved by preserving the remaining affordable housing units, preserving (or replacing) emergency shelter space, and creating new forms of affordable housing that work best in a downtown setting such as Single Room Occupancy (SRO) hotels. Other social service facilities, such as day care centers and job training facilities, are needed to sustain downtown as a community hub. (CP § 1607.3)

Policy CW-1.1.5: Central Washington Housing Diversity It is important to keep Central Washington a mixed-income community and avoid the displacement of lower-income residents. Preserve Central Washington's existing low- to moderate-income housing, including public housing, housing (both contracts and vouchers), and other subsidized units. The District has taken a proactive approach to preserving affordable units at the Museum Square, Golden Rule, and other Central Washington Area redevelopment sites. The District should continue to expand the number of affordable units through land disposition with affordability requirements and through the use of zoning and other regulatory incentives. (CP § 1608.6)

Data from the Department of Employment Services (DOES) and OP indicates there were approximately 475,531 jobs in Central Washington in 2017, primarily in the government, professional, and non-profit sectors. This represents about 59 percent of the District's job base. (CP § 1605.1)

According to the 2017 Census, the median household income in the Planning Area was \$94,318. This is substantially above the District-wide average of \$77,649. More than 19.5 percent of the area's residents lived below the federal poverty level in 2017. The addition of thousands of market-rate condominiums and apartments since 2000 has undoubtedly brought a sharp rise in median household income in the area. (CP § 1605.2)

Framework Element

Fitting such development into the fabric of a mature city creates a number of challenges. One is displacement, a threat that has become more real in the District as the cost of housing and other real estate has increased due to rising demand that has not been met with proportional supply. Displacement not only affects District residents – particularly those of lower income – it also affects businesses, non-profits, and municipal operations that may be displaced by rising rents and land prices. (CP § 205.7)

Rising housing costs and decreasing availability of affordable housing are causing more households to be severely burdened, which means their housing costs consume more than 50 percent of household income. In 2017, more than 42,800 households were severely burdened by rental housing costs, while another 32,600 rental households were burdened by housing costs consuming 30 to 50 percent of their income. These households must reduce expenditures on other necessities, such as food and health care. Further, households that are severely burdened by housing costs must often choose between a home that is in a desirable location – close to their community, jobs and/or services – and a home that is more affordable. (CP § 206.6)

These patterns of household change have affected the District's neighborhoods in varied ways. For example, the greatest decline in the number of lower income households was in Capitol Hill and Upper Northeast, whereas the greatest increase in higher income households was in Central Washington. Affordable housing is unevenly distributed across the District. The Rock Creek West area has fewer than 500 subsidized affordable units, while areas east of the Anacostia River provide over 25,000. While the need for affordable housing, particularly deeply affordable housing for low- and extremely low-income households, affects the city, discrete challenges vary at the neighborhood level. (CP § 206.10)

As an example, the stress of poverty, combined with substantial population growth, has created a housing affordability crisis that must be addressed. The need for more housing, and more affordable housing, has become an important policy goal that, if addressed and achieved, will help the city be more resilient. (CP § 213.5)

The District seeks to create and support an equitable and inclusive city. Like resilience, equity is both an outcome and a process. Equity exists where all people share equal rights, access, choice, opportunities, and outcomes, regardless of characteristics such as race, class, or gender. Equity is achieved by targeted actions and investments to meet residents where they are, to create equitable opportunities. Equity is not the same as equality. (CP §213.6)

The District seeks to create and support an equitable and inclusive city. Growth must be managed equitably to support all District residents, including vulnerable communities and District protected classes. We must recognize that managing growth and change includes addressing the historic, structural, and systemic racial inequities and disenfranchisement of many District residents. And, we must recognize the importance of longtime businesses, as well as educational and cultural institutions. An equitable and inclusive city includes access to housing that is healthy, safe, and affordable for a range of household types, sizes, and incomes in all neighborhoods. A citywide problem requires citywide solutions – ones that overcome the legacy of segregation, avoid concentrating poverty, and afford the opportunity to stay in one's home and not be displaced. (CP § 219.1)

The recent population boom has triggered a crisis of affordability in the city, creating a hardship for many District residents and changing the character of neighborhoods. The preservation of existing affordable housing and the production of new affordable housing, especially for low-income and workforce households, are essential to avoid a deepening of racial and economic divides in the city, and must occur city-wide to achieve fair housing objectives. Affordable renter- and owner-occupied housing production and preservation is central to the idea of growing more

inclusively, as is the utilization of tools such as public housing, community land trusts, and limited equity cooperatives that help keep the costs of land affordable, particularly in areas with low homeownership rates and those at risk of cost increases due to housing speculation. (CP § 220.5)

Land Use Element

Growth through an equity lens must address and reduce existing racial inequities resulting from systemic racism and meet the needs of the District's most vulnerable residents. The District has divides by income and race, a result of factors that include urban renewal, redlining, segregation, restrictive racial covenants, infrastructure development, and disinvestment. Washington, DC has some of the country's highest disparities in income, education, and access to jobs and housing by race. The District's Black population saw declines between 1980 and 2010, with the most recent period of decline between 2000 and 2010, where the Black population decreased by 11 percent (39,030 residents). Between 2010 and 2019, the Black population has increased by five percent (14,105 residents). As the Land Use Element guides the direction of future growth, it also affects future access to housing, education, jobs, services, amenities, and transportation and impacts the health and safety of residents. Growth can and must occur in a way that expands access to affordable housing, education, transportation, employment, and services for communities of color, low-income households, and vulnerable populations. Achieving equitable development requires attention to both the context and needs of different planning areas and to District-wide equity issues, described throughout the Comprehensive Plan. (CP § 304.4)

As the urban core expands, reinvestment in established business districts, such as the Golden Triangle, the Downtown Core, and the Near Southwest should also continue. These areas are being modernized, better connected to one another, and developed with new infill uses and public improvements. Areas outside the traditional downtown, such as the Florida Avenue Market and Rhode Island Avenue, NE, provide opportunities for revitalization and re-envisioning how people work and live in the District, while smaller sites present the opportunity for new retail, housing, and office development. Across larger and smaller sites, efforts to strengthen the core should serve and attract businesses and people from across the income spectrum, including through the creation and preservation of affordable housing. (CP § 305.4)

The location of these areas is shown in the Central Washington, and Lower Anacostia Waterfront/Near Southwest Area Elements. Land use regulations and design standards for these areas should require that they are developed as attractive pedestrian-oriented neighborhoods, with high quality architecture and public spaces. Housing, especially affordable and deeply affordable housing, is particularly encouraged and must be a vital component of the future land use mix. As areas continue to redevelop, community engagement and actions shall be undertaken to retain existing residents, particularly communities of color and vulnerable populations, and enable them to share in the benefits of area redevelopment while addressing adverse short- and long-term impacts. (CP § 305.11)

Policy LU-1.4.1: Station Areas as Neighborhood Centers - Encourage the development of Metro stations as anchors for residential, economic, and civic development and to accommodate population growth with new nodes of residential development, especially affordable housing, in all areas of the District in order to create great new walkable places and enhance access and opportunities for all District residents. The establishment and growth of mixed-use centers at

Metrorail stations should be supported as a way to provide access to housing opportunities at all income levels and emphasizing affordable housing, improve air quality, increase jobs, provide a range of retail goods and services, reduce reliance on the automobile, enhance neighborhood stability, create a stronger sense of place, provide civic gathering places, and capitalize on the development and public transportation opportunities that the stations provide. Station area development should have population and employment densities guided, but not dictated, by desired levels of transit service. This policy should be balanced with other land use policies, which include conserving neighborhoods. The Future Land Use Map expresses the desired intensity and mix of uses around each station, and the Area Elements (and in some cases Small Area Plans) provide more detailed direction for each station area. (CP § 307.9)

Policy LU-1.4.3: Housing Around Metrorail Stations - Build housing adjacent to Metrorail stations that serves a mix of incomes and household types, including families, older adults, and persons with disabilities, and prioritize affordable and deeply affordable housing production. Leverage the lowered transportation costs offered by proximity to transit to increase affordability for moderate and low-income households. (CP § 307.11)

Housing Element

However, as Washington, DC remains attractive to and retains higher income households, rising demand and competition has and will put upward pressure on rents and a greater number of lower-income households will experience greater pressure from rising housing costs, leading to residents leaving or bearing a housing burden. Thus, greater public action is needed to fulfill the vision of an inclusive District. (CP § 500.4)

Housing issues affect every facet of the Comprehensive Plan. They influence land use and density decisions, shape infrastructure and community service needs, determine transportation demand, and even drive employment strategies for District residents. At the most basic level, it is the availability of safe, decent, affordable housing across all neighborhoods that will determine whether the District's vision for an inclusive District will be realized. The type of housing constructed or preserved, the cost of that housing, and where it is built will influence whether the District can attract and retain families with children, maintain neighborhood diversity, improve health and educational outcomes, and provide economic opportunity for all. (CP § 500.6a)

The rising costs have continued a crisis of affordability, particularly for the District's lowest-income residents. Over 20 percent (56,700) of all households in 2017 were severely burdened by housing costs, and another 16 percent (44,600) of households were burdened. Residents must set aside a growing share of their earnings for housing and utilities, leaving less disposable income for health care, transportation, food, other basic needs, and the ability to set aside savings to prepare for the future. The greatest share of burdened and severely burdened households are the 39,500 rental households earning less than 30 percent of the MFI.^{viii} The market has also become more segmented, with dwindling housing choices for working families and the middle class in general. Expanded housing options for lower- and middle-income households have become limited, and the opportunity for many residents to build individual wealth through homeownership has become more difficult. Racial representation differs across income groups, and communities of color are disproportionately impacted by increasing housing costs and diminishing supply of affordable

options. The District's Black and Hispanic households experience higher levels of rent burden that increase the likelihood of displacement. (CP § 500.19)

The IZ Program, which requires most new residential buildings of 10 units or more to set aside between eight and 12.5 percent of the project toward affordable units, has now delivered almost 600 affordable units as of Fiscal Year (FY) 2017, with another 800 expected over the next several years, at a pace of close to 200 affordable units per year. The program is particularly beneficial for two reasons. First, it retains the affordable units for the life of the project; second, it produces units in high-amenity, high-cost neighborhoods, where land prices make it very expensive to financially subsidize affordable housing. An expanded IZ program that would encourage additional affordable housing and extend program applicability is under consideration. (CP § 500.21)

Who is moving in and out of the District? Figure 5.5 shows the demographics of migration in and out of the District. It shows that, in 2017, nine percent (65,522) of the District's population moved into Washington, DC that year. Out-movers during the same year numbered 60,873. During the same period, in-movers were less likely than out-movers to be families with children, Black, or homeowners and more likely to be low-income. While this tells a District-wide story, within various neighborhoods affordability issues are reshaping neighborhood demographics; for example, neighborhoods in Southwest Washington have seen extensive new development that attracted younger, more affluent, and whiter residents, while losing both residents of color and lower-income residents. (CP § 500.33)

Policy H-1.1.6: Housing in Central Washington Absorb a substantial component of the demand for new high-density housing in the Central Washington Planning Area and along the Anacostia River. Through regulation and incentives, encourage affordable housing production. Absorbing the demand for higher-density housing within these areas is an effective way to meet housing demands, maximize infrastructure and proximity to jobs, create mixed-use areas, and minimize the cost pressure on existing residential neighborhoods throughout the District. Market rate and affordable mixed-income, higher-density downtown housing also provides the opportunity to create vibrant street life and to support the restaurants, retail, entertainment, and other amenities in the heart of Washington, DC. (CP § 503.8)

Policy H-1.1.8: Production of Housing in High-Cost Areas Encourage development of both market rate and affordable housing in high-cost areas of the District, making these areas more inclusive. Develop new, innovative tools and techniques that support affordable housing in these areas. Doing so increases costs per unit but provides greater benefits in terms of access to opportunity and outcomes. (CP § 503.10)