

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 21-25
Z.C. Case No. 21-25
Office of the Attorney General
(Text Amendment to Subtitle C § 1003.6 [increase affordable
housing benefits for required IZ units off-site])
February 8, 2024

On February 8, 2024, the Zoning Commission for the District of Columbia (the “Commission”) held a properly noticed public meeting to consider set down for a public hearing of a petition from the Office of the Attorney General (the “Petitioner” or “OAG”), for proposed text amendments to Subtitle C § 1003.6 of Title 11 of the District of Columbia Municipal Regulations (“DCMR”) (Zoning Regulations of 2016 [“Zoning Regulations”], to which all references are made unless otherwise specified) to deepen the levels of affordability required for dwelling units set aside under the Inclusionary Zoning (“IZ”) program.

For the reasons stated below, the Commission hereby **DENIES** the Petition without a hearing.

FINDINGS OF FACT

Petition and OAG Filings

1. On December 2, 2021, the Petitioner submitted a petition (the “Petition”) proposing text amendments to Subtitle C § 1003.6 to add additional criteria that must be met for the Commission to grant relief from providing IZ units on-site and for the ability to locate some or all required IZ units off-site. Specifically, the off-site location must provide a greater IZ requirement than required by the on-site location through one of the following:
 - Provide at least twenty percent (20%) more IZ units than required by the IZ program for on-site compliance;
 - Reserve at least twenty percent (20%) of the IZ units required for on-site compliance to households earning equal to or less than thirty percent (30%) of the median family income (“MFI”) for rental units or sixty percent (60%) of the MFI for ownership units; or
 - Provide twenty percent (20%) of the IZ units required for on-site compliance with three or more bedrooms.(Exhibits [“Ex.”] 1-3.)
2. The Petition stated the proposed text amendments would not be inconsistent with the Comprehensive Plan (Title 10-A of the DCMR, the “CP”) and stated that:

- Requiring an additional affordable housing benefits when IZ units are placed off-site would compensate for the loss of inclusive affordable housing and address the District’s affordable housing crisis acknowledged by the CP; (CP § 220.5.)
 - Providing IZ units at 30% of the MFI as an additional affordable housing benefit would address the important need for affordable housing for extremely low-income households. The updated CP recognizes this need and calls for 40% of new affordable units to be reserved at 30% of the MFI; and (CP § 206.8, 504.8, 504.19, 504.20, 504.21).
 - The updated CP confirms the need for three-bedroom-plus units and notes that the lack of affordable family-sized units has contributed to displacement of existing residents, primarily families with children, lower income residents and residents of color. (CP §§ 206.2, 500.29-30, 500.33, 505.6.)
- (Ex. 3.)
3. The Petition stated that the proposed text amendment would define a “greater affordable housing benefit” to include not only an increased number of off-site IZ units, but also a deeper affordability level for the off-site IZ units or larger family-sized off-site IZ units than required for on-site IZ compliance because these benefits address critical affordable housing needs. The Petition further stated that the proposed text amendment would advance objectives of numerous specific CP Housing Element policies. (CP §§ 503.4, 503.10, 503.11, 503.14, 504.8, 504.9, 504.10, 504.19, 504.26, 505.8, 505.9, 505.14, 507.2; Ex. 3.)
 4. On January 24, 2024, OAG submitted a supplemental report (“OAG Statement”) in response to the OP Setdown Report (defined and discussed below) reiterating that the Commission should set down the proposal for a hearing because (1) the proposed text amendment would establish standards for an application seeking to move required IZ units off-site instead of leaving such standards to be determined on a case-by-case basis; (2) the text amendment would clarify that an applicant for this relief must provide a significantly increased affordable housing benefit to make up for the failure to provide the IZ units on-site, a key element of the IZ program that seeks to create mixed-income developments; and (3) an applicant could provide these additional affordable housing benefits as additional IZ units, deeper levels of affordability, and/or family-sized units with three or more bedrooms. (Ex. 12.)

OP Filings

5. On December 29, 2023, OP filed a report (“OP Setdown Report”) recommending that the Commission not set down the Petition for a public hearing. (Ex. 10.)
6. The OP Setdown Report stated that the Petition is inconsistent with the intent of the IZ regulations and the CP because making the off-site IZ requirements more economically stringent, as proposed, is inconsistent with the intent of the off-site compliance regulation, which is to serve as a release valve for the IZ program when an applicant demonstrates economic hardship. (Ex. 10.)
7. The OP Setdown Report further stated that the proposed text amendment is inconsistent with the Comprehensive Plan given the lack of balance between increased requirements

and incentives and OAG has not demonstrated that it would in fact advance the CP policies cited in the Petition because:

- OAG did not provide any analysis of the impact of the increased off-site requirements on a development or on the underlying IZ principles such as zoning incentives;
- The existing IZ regulations already encourage market-rate and affordable housing in high-cost areas. The proposal does not include any new or innovative tools and techniques to incentivize providing affordable housing;
- The proposal would not encourage development of family-sized housing because there would be no production incentives available. Further, the proposal does not encourage or prioritize the development of family sized housing that is proximate to preferred land uses and amenities; and
- The IZ program is designed to produce low-income housing units, which range between sixty percent (60%) and eighty percent (80%) MFI. As discussed in the Comprehensive Plan, thirty percent (30%) MFI units, as proposed, are considered extremely low-income and are provided through substantial federal and local subsidies. The Petitioner's submission does not propose any public programs or funding to subsidize IZ units at the thirty percent (30%) MFI level.

(Ex. 10.)

8. As part of its CP analysis through a racial equity lens, the OP Setdown Report provided Districtwide disaggregated race and ethnicity data citing data provided in the its report for Z.C. Case 21-24 (which was discussed at the same public meetings). The OP Setdown Report noted that Districtwide data shows a significant disparity between white and Black median household incomes, with Black household incomes approximately one-third of white households. The disparity in median income suggests that Black households are more likely to need affordable housing than White households. The OP Setdown Report also stated that, to date, there have been no applications for off-site IZ compliance relief for the construction of a new building, and concluded that the proposal could negatively impact racial equity by concentrating affordable housing where mixed-income neighborhoods are desired or by strengthening an applicant's claim for full relief from the IZ program under Subtitle C § 1007 because full compliance with off-site provisions would have more stringent requirements. (Ex. 10.)
9. On February 1, 2024, OP filed a response to the OAG Statement (summarized above) largely reiterating the statements made in the OP Setdown Report and stating that OP continues to not recommend set down of this case and requests that the Commission dismiss the case because:
 - The proposed amendments would be inconsistent with the intent of the IZ regulations and with the Comprehensive Plan;
 - The applicant has not demonstrated a deficiency in the existing regulations or a reason to change the policy for off-site compliance;
 - Using the off-site compliance regulations to achieve affordable housing goals would be inconsistent with one of the underlying principles of both the zoning regulations and the IZ program – to provide dedicated affordable housing as part of otherwise by-right

development throughout DC *without imposing an economic hardship to an applicant*; (Emphasis added.)

- The off-site requirements are intended only to serve as a “last resort” release valve for the IZ program;
- There are multiple Comprehensive Plan policies that call for providing incentives when increased affordability is required. The proposal continues to not offer any incentives to balance the increased IZ requirements that are proposed; and
- OP is concerned that if an applicant claims the IZ requirements on-site result in an economic hardship, the increased amount of IZ square footage and the deeper MFI required for off-site could be used to support an applicant’s claim that full relief is necessary from the IZ program under Subtitle C § 1007. OP stated that it believed that “this would result in fewer IZ units.” (Ex. 14.)

Public Meetings

10. On January 9, 2024, OAG filed a request for the Commission to postpone its setdown decision from the January 11, 2024 public meeting, to its February 8, 2024 public meeting, to allow the OAG to file a response to the OP Setdown Report. (Ex. 11.)
11. At the Commission’s public meeting on January 11, 2024, representatives of OP testified and presented OP’s recommendation that the Commission not set down the Petition for a public hearing. OP’s representative restated the issues and arguments identified in the OP Setdown Report. The Commission then granted OAG’s postponement request. (January 11, 2024 meeting Transcript [“Tr.”] at pp. 14-25.)
12. At the February 8, 2024, public meeting, the Commission considered the Petitioner’s filings and OP’s filings, and voted to deny the Petition because the Commission believed that OAG had not demonstrated a sufficient deficiency in the IZ regulations regarding off-site compliance, and that implementing the proposed changes could have negative unintended consequences, as stated by OP in its reports. (February 8, 2024 meeting Tr. at pp. 10-14.)

ANC Setdown Form

13. The Commission did not receive any ANC Setdown Forms or other reports from any Advisory Neighborhood Commissions.

CONCLUSIONS OF LAW

1. Once the Commission receives a petition, it must decide whether to schedule a public hearing on the petition. This decision is commonly referred to as “setdown.” After considering the petition, the recommendations of OP, and the ANC Setdown Form of the affected ANC, the Commission may decide to dismiss the petition or set it down for public hearing. (Subtitle Z § 500.9.) If the Commission denies or dismisses a petition without a public hearing, it must issue an order that includes a statement of reasons for the denial or dismissal. (Subtitle Z § 500.11.)

2. 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 § 504.6, the Commission must give “great weight” to the recommendations of OP. The Commission finds the OP Setdown Report, which provided an in-depth analysis of the proposed text amendment and the CP as evaluated through a racial equity lens and recommended that the Petition should not be set down for a public hearing, persuasive.

After careful consideration, the Commission concludes that the Petition should not be set down and denies the Petition without a hearing for the following reasons.

- The Petitioner has not demonstrated a deficiency in the existing regulations or a reason to change the policy for off-site compliance;
- Using the off-site compliance regulations to achieve affordable housing goals would be inconsistent with one of the underlying principles of both the zoning regulations and the IZ program – to provide dedicated affordable housing as part of otherwise by-right development throughout DC without imposing an economic hardship to an applicant. The off-site requirements are intended only to serve as a “last resort” release valve for the IZ program;
- There are multiple Comprehensive Plan policies that call for providing incentives when increased affordability is required. The proposal does not offer any incentives to balance the increased IZ requirements that are proposed; and
- The Commission agrees with OP that if an applicant claims the IZ requirements on-site result in an economic hardship, the increased amount of IZ square footage and the deeper MFI required for off-site could be used to support an applicant’s claim that full relief is necessary from the IZ program under Subtitle C § 1007; and this could result in fewer IZ units, which would be an unintended negative consequence of the proposed amendments.

(Finding of Fact 6-9.)


3. As noted above, no ANCs filed a Setdown Form to the record in this case; therefore, the Commission could not consider any ANC Setdown Form recommendation in making this setdown decision.

DECISION


In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia orders **DENIAL** of the Petition without a hearing.

On February 8, 2024, the Zoning Commission **DENIED** the Petition without a hearing at its public meeting by a vote of **4-0-1** (Anthony J. Hood, Robert E. Miller, Joseph S. Imamura and Tammy Stidham to deny; 3rd Mayoral Appointee seat vacant, not voting).

In accordance with the provisions of Subtitle Z § 604.9, this Order No. 21-25 shall become final and effective upon publication in the *District of Columbia Register*; that is, on August 23, 2024.



ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION



SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.