



May 10, 2019

Anthony Hood, Chairman
D.C. Zoning Commission
441 4th Street, N.W.
Suite 200-S
Washington, D.C. 20001

Re: Comments on Z.C. Case No. 04-33I Notice of Proposed Rulemaking

Dear Chairman Hood and Members of the Zoning Commission,

The Committee of 100 on the Federal City offers the following comments on the modifications proposed in the above-referenced case:

General Comments

- It would be helpful, and good practice, if proposed rulemaking changes issued for public comment included “plain English” explanations of the intended effect of, and rationale behind, each proposed change.
- Contrary to the preamble text in the NOPR, the proposal is not limited to minor clarifications. It includes several changes which, if adopted, will have significant effect.
- Several of the proposed changes in the NOPR run counter to and undercut the goal of more affordable housing at a time when the need in the District of Columbia greatly outstrips availability. Ambiguity in the existing text and/or its history should be resolved in favor of more affordable housing, not less.

Specific Comments

Inclusionary Zoning (IZ) and Planned Unit Developments

The Office of Planning is proposing various changes aimed at empowering the ZC and the BZA to approve proffered affordable housing that exceeds the requirements of the IZ program (i.e., “beyond IZ”). Under OP’s proposed approach, it would be up to the discretion of the ZC/BZA whether such proffered affordable housing would be subject to the Subtitle C, Chapter 10 IZ requirements or not. OP suggests to the Commission that the PUD evaluation standard for what should be considered inclusionary units are those units designated affordable for the life of the project and meeting income guidelines published by the Department of Housing and Community Development.

OP's proposed approach gives ZC/BZA a great deal of flexibility in the treatment of proffered affordable housing exceeding the scope of the IZ program. There are pluses and minuses to this approach. It is hoped that such flexibility will encourage proffers of more affordable housing than would otherwise occur. But, because "beyond IZ" will be defined project-by-project, it means a multitude of variations will result. This could cause a great deal of confusion about how "beyond IZ" housing is actually implemented and enforced. In the recent past, DHCD, which implements the IZ program, has expressed concerns about the potential confusion and implementation challenges posed by having to administer affordable units project-by-project instead of based on a well-defined uniform application of the IZ statute and regulations. DHCD has encouraged the Zoning Commission to encourage developers to work within IZ's statutory and regulatory parameters to provide more IZ than required and/or IZ units at deeper affordability levels. DHCD has not formally opined on this NOPR (i.e., there are no DHCD comments in the case log). Their view of the potential advantages and/or disruptions to a program they administer would be of particular interest.

C100 strongly supports Zoning Commission efforts to ensure that PUDs continue to provide "beyond-IZ" affordable housing. To help stem potential confusion over implementation but still leave flexibility enough to encourage such proffers, C100 suggests adopting OP's suggested PUD evaluation standards into the requirements. We believe this can be accomplished with a change to OP's proposed definition of "Inclusionary Unit" as follows:

Ch. 1, Title 11-B DCMR Section 100 Subsection 100.2

Inclusionary Unit: A dwelling unit set aside for sale or rental to eligible households as required by Subtitle C, Chapter 10, Inclusionary Zoning or by an order of the Zoning Commission or of the Board of Zoning Adjustment **provided that any such dwelling unit remains affordable for the life of the project and meets maximum income, rent and purchase price guidelines published by the Department of Housing and Community Development pursuant to D.C. Law 16-275, Chapter 10 of Title 11-C and Chapter 22 of Title 14 of the DCMR.**

Moving Zone Lists and Tables Out of Subtitle C of Chapter 10 Inclusionary Zoning Requirements

OP proposes to eliminate the IZ- applicable zone lists, tables of modifications of development standards and bonuses from Subtitle C of Chapter 10 Inclusionary Zoning Requirements and move them to the various regulatory sections pertaining to each zone. OP believes this will clarify the IZ requirements for each zone. C100 strongly disagrees. Retaining the IZ requirements in a single place is most clear. The reader is able to easily see - in one place - which zones are affected, how the requirements compare from zone-to-zone, and the city-wide impact of changes. If OP believes that moving the requirements to the regulatory sections pertaining to each zone adds clarity, then it should do both: i.e., maintain the requirements where they currently are in Subtitle C of Chapter 10 as well as add them to the regulatory sections pertaining to each zone.

Connection of IZ Set-Asides with Underlying Zone

C100 continues to have concerns about connecting the IZ Set-Asides in Section 1003 to the underlying zone. The Committee of 100 has commented on this subject several times in past rulemakings and has proposed that the connection that now exists in Section 1003.1 be eliminated. Today, OP is not only not proposing to eliminate the connection, but proposes to further lock it in by incorporating a connection into the regulatory text of Section 1003.2 where it does not now exist.

OP's proposed approach has a real-world effect: it reduces the quantity of IZ affordable housing. By dint of location, a relatively inexpensive stick-built building that otherwise should be subject to the standard 10% Set-Aside, under OP's proposed approach will become subject to the reduced 8% Set-Aside.

The 8% and 10% IZ Set-Asides* were originally based on analyses of the costs of stick-built construction vs. the costs of steel-and-concrete construction. The 8% and 10% reflect the costs of the construction materials: the reduced 8% Set-Aside applies to the more expensive steel-and-concrete construction; the standard 10% Set-Aside applies to the less expensive stick construction. The zone underlying the location of the construction materials is, and always has been irrelevant, and was never part of the economic analysis.

Besides having the net result of reducing the square footage of inclusionary housing, the existing connection to the underlying zone of the Set-Aside in Section 1003.1 and OP's proposed connection of the Set-Aside in Section 1003.2 generates unnecessary confusion. It engenders at least several questions. First, which Set-Aside applies to a stick-built project in a zone with a by-right height limit of more than fifty feet? By virtue of the change proposed to Section 1003.2, OP proposes that the answer to that question be the reduced 8% Set-Aside. If the underlying zone were irrelevant, as it is, the answer would be: the standard 10% Set-Aside. Second, which Set-Aside applies to a stick-built project in a zone with a by-right height limit of less than fifty feet but where the developer is seeking a map amendment to a zone with a by-right height limit of more than fifty feet? If the underlying zone were irrelevant, as it is, the answer would be: the standard 10% Set-Aside.

In summary:

1. There is no economic analysis or support for connecting the existing Set-Asides with the underlying zone;
2. The Zoning Commission requested this analysis and support over two and a half years ago;
3. OP is now indicating it will conduct this analysis after the current review of the District's Comprehensive Plan is completed and adopted;
4. The existing text connecting the Set-Asides with the underlying zone creates unnecessary implementation confusion; and
5. The existing text has the wrongful effect of reducing the amount of affordable housing produced under the IZ program.

The Committee of 100 suggests the following changes to OP's proposal and existing text:

Section 1003, SET-ASIDE REQUIREMENTS

1003.1 An inclusionary development which does not employ Type I construction as classified in Chapter 6 of the District of Columbia Building Code Supplement (Title 12-A DCMR) to construct a majority of dwelling units ~~and which is located in a zone with a by-right height limit, exclusive of any bonus height, of fifty feet (50 ft.) or less~~ shall set aside for Inclusionary Units ...

1003.2 An inclusionary development which employs Type I construction as classified in Chapter 6 of the District of Columbia Building Code Supplement (Title 12-A DCMR) to construct a majority of dwelling units, ~~or which is located in a zone with a by-right height limit, exclusive of any bonus height, that is greater than fifty feet (50 ft.)~~ shall set aside for Inclusionary Units ...

Section 1001, APPLICABILITY

1001.6(a)(1) The development shall set aside, for so long as the project exists, affordable dwelling units (Exempt Affordable Units) in accordance with the minimum income standards of Subtitle C Section 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 Section 1003 ~~for the zone in which the development is located;~~ ...

If OP's future analysis of the Set-Asides shows adverse economic effects of eliminating the connections to the underlying zone, the Commission is always free to revisit the issue and make changes at that time as it deems appropriate.

*Note: We refer in several instances throughout these comments to the "8% and 10% Set-Asides". We do this as a form of shorthand to make our comments less cumbersome to the reader. We recognize this abbreviates a lengthier regulatory formula for calculating the applicable Set-Aside.

Change in the Formula for Calculating the IZ Set-Asides

This NOPR proposes a change in the formula for calculating the Set-Aside requirements. The NOPR proposes to change the formula to allow Set-Asides based on a percentage of bonus density actually utilized instead of based on a percentage of the full 20% potential bonus. The NOPR describes the purpose of this change: "to clarify the applicability of IZ". This proposed change is not a clarification; it is a significant substantive change in the Set-Aside requirement.

Background:

In the original rule-making (04-33, 2006), the Set-Aside based on bonus density was 75% (or 50% for the reduced requirement) of the “achievable bonus density,” which was defined in §2601.1 to be the bonus density that “potentially may be utilized”.¹

In 2007 (04-33B), the text for the calculation of the Set-Aside based on bonus density was amended. The reference to achievable bonus density was eliminated and the language was changed to be 75% (or 50% for the reduced requirement) of the bonus density utilized. In §2603.1, “75% of its achievable bonus density,” where achievable bonus density was defined to be the bonus density that potentially may be utilized, was changed to “75% of the bonus density being utilized.” A similar change for the reduced requirement was made in 2603.2. In addition, in that rule-making the Set-Aside requirement for the 8%/10% rule was reduced by changing it from 8% or 10% of its matter of right density to 8% or 10% of the gross floor area being devoted to residential use, reducing that calculation by 8% or 10% of the non-residential floor area. The Notice of Final Rulemaking did not offer an explanation for these changes.

In 2016 (04-33G), following the recommendation of the Office of Planning in its Report, the Commission struck the term “being utilized,” and restored the definition of achievable bonus density as “the amount of the permitted bonus density that potentially may be utilized within a particular residential development.”

In this NOPR, a text amendment is proposed that would reverse the actions taken in 2016 in ZC 04-33G. The NOPR states that this is a clarification of the applicability of IZ, but really this is a change in the formula for calculating the IZ Set-Aside that, if adopted, will allow a significant reduction of the Set-Aside requirement for many inclusionary developments.

Impact of the Proposed Amendment:

The proposed amendment will decrease the required IZ Set-Aside when the developer 1) chooses not to use the entire achievable bonus density, and 2) calculates the Set-Aside based on the bonus density utilized rather than 8 or 10% of the residential floor area.

The current zoning regulations include a clear definition of the “achievable bonus density” used to calculate the required Set-Aside. Section 1001.1 states that “Achievable bonus density is the amount of the permitted bonus density that potentially may be utilized (emphasis added) within a particular inclusionary development provided in Subtitle C Section 1002. The proposed amendment would reduce the required Set-Aside if the project does not use the entire bonus density that potentially may be utilized. This is a material change in the requirement, not a clarification, and as such can only be adopted after the change is advertised.

¹ 2601.1 When used in the Chapter, the following terms and phrases shall have the meanings ascribed:

Achievable bonus density - The amount of the bonus density permitted under § 2604 that potentially may be utilized within a particular inclusionary development, notwithstanding constraints resulting from the physical characteristics of the land or restrictions imposed by District or federal laws and agencies. (ZC Order 04-33, May 18,2006.)

The following table shows how, for a MU-4 (C-2-A) matter-of-right mixed-use project on a regularly shaped 10,000 SF lot, the proposed amendment results in a reduction in the requirement when only part of the bonus density is used.

	Current IZ Regulations	NOPR Proposed Change
Zoning, Land Area	MU-4, 10,000 SF	MU-4, 10,000 SF
MOR FAR, Floor Area	2.5, 25,000 SF	2.5, 25,000 SF
MOR with IZ FAR (20% bonus density), Floor Area	3.0, 30,000 SF	3.0, 30,000 SF
Proposed Mixed Use Project, ground floor retail with apartments above. No habitable rooftop space	2.75 FAR, 27,500 SF 0.75 commercial, 7,500 SF 2.0 residential, 20,000 SF No habitable rooftop space	2.75 FAR, 27,500 SF 0.75 commercial, 7,500 SF 2.0 residential, 20,000 SF No habitable rooftop space
Calculation of the IZ Set-Aside		
Achievable Bonus Density	Difference between MOR density and the IZ bonus density that potentially may be utilized: 5,000 SF	Difference between the MOR density and the IZ bonus density that is utilized: 2,500 SF
75% of the Bonus Density	3,750 SF	1,875 SF
10% of Residential Floor Area	2,000 SF	2,000 SF
IZ Set-Aside requirement: the greater of 75% of the bonus density or 10% of the residential floor area	3,750 SF	2,000 SF
REDUCTION IN THE IZ SET-ASIDE WITH THE PROPOSED AMENDMENT		Set-Aside reduced by 1,750 SF, 46.6% of the current Set-Aside requirement

In this example, there would be a large reduction in the IZ Set-Aside requirement,² approximately 46%, and if it were assumed to have a higher percentage of non-residential space, the reduction would have been higher.

² Current Text: Subtitle C, Section 1001.1 Achievable bonus density is the amount of the permitted bonus density that potentially may be utilized within a particular inclusionary development provided in Subtitle C § 1002.

The proposed amendment is: Subtitle C, Section 1001.1 Achievable bonus density is the amount of the permitted bonus density that ~~potentially may be~~ is utilized within a particular inclusionary development provided in Subtitle C § 1002. (with corresponding amendments to Subtitle C § 1003.1 and 1003.2)

For the reasons described above, C100 recommends the following changes to the NOPR:

Section 1001, APPLICABILITY

1001.1 Achievable bonus density is the amount of the permitted bonus density that **potentially may be is-**utilized within a particular Inclusionary Development provided in Subtitle C Section 1002.

1003.1(a) The greater of ten percent (10%) of the gross floor area dedicated to residential use excluding penthouse habitable space, or seventy-five percent (75%) of **its achievable ~~the~~** bonus density **utilized**; and ...

1003.2(a) The greater of eight percent (8%) of the gross floor area dedicated to residential use excluding penthouse habitable space or fifty percent (50%) of **its achievable ~~the~~** bonus density **utilized**; and ...

If OP believes there is ambiguity in the requirements, it should be resolved with an approach that favors more affordable housing, not less.

Inclusionary Units in Cellar Space

C100 strongly agrees with OP's recommended addition of a new Section 1005.7 : "Inclusionary units shall not be located in cellar space."

C100 believes the addition of this requirement closes a gap in the existing regulations and reinforces the existing suite of IZ development standards. These standards work together to ensure that inclusionary units will incorporate seamlessly in residential buildings, and to guard against the concentration of IZ units in space that's often perceived as undesirable.

Errors in Text

Change to IZ Applicability in Georgetown Historic District

In this NOPR, the IZ requirements for MU-13 have changed. In the current regulations, MU-13 in the Georgetown Historic District is exempt from the IZ requirements, except for the requirements that apply to new penthouse space.³ In the proposed amendment, MU-13 is exempt from all IZ requirements.⁴ This means that new habitable penthouse space in MU-13 in the

³ Currently, §1001.5 is clear in stating that new penthouse habitable space in the MU-13 zone is subject to the IZ regulations:

1001.5 Except for new penthouse habitable space as described in Subtitle C ..., the requirements of this chapter shall not apply to:

(a) Properties located in any of the following areas: ...
(2) The MU-13 zone in the Georgetown Historic District; ...

⁴ Subtitle G, §504.3: **The Inclusionary Zoning requirements and modifications of Subtitle C, Chapter 10 shall not apply to the MU-13 and MU-27 zones; provided that the IZ bonus density of Subtitle C § 1002.3 is available for**

Georgetown Historic District will no longer be required to meet the IZ Set-Aside requirement. Furthermore, if other properties obtain a map amendment to MU-13, they will not be subject to the IZ regulations. We note that in an earlier filing, the Office of Planning was concerned about map amendments into IZ-exempt zones. (See Memorandum from Eric Shaw, Director, Office of Planning to the Zoning Commission, ZC 04-33G, July 3, 2015, pp 8-9, requesting clarifying language to define the boundaries of the areas where IZ would not apply, since “a map amendment to change a zone district within one of the historic districts could result in a property that was intended to be subject to IZ inadvertently being exempted from IZ.”)

The proposed amendment would also allow voluntary IZ in the MU-13 zone, where developers would have a 20% bonus density available if they agree to the IZ Set-Aside requirements. In the NOPR this is described as “clarify(ing) the modifications available under IZ in the MU zones.” This is not a clarification, but a major change in the regulations, making available a 20% increase in FAR for IZ in the MU-13 and MU-27 zones where it had not previously been available.

No Definition of the Term “Studio”

There is no definition for the term “studio”, yet it appears several times throughout the IZ regulations.

“Voluntary” vs. “Voluntarily”

Section 1001.2(d): Any semidetached, row, flat, or multiple dwelling development not described in Subtitle C Section 1001.2(a) through 1001.2(c) if the owner **voluntarily** ~~voluntary~~ agrees to the requirements of Subtitle C Section 1003 and meets all other requirements of this chapter, provided: ...

Deletion of “Hotels”

We believe the NOPR inadvertently deleted the word “hotels” from Section 1001.5(d). We believe it is OP’s intent to maintain IZ penthouse requirements applicable to hotel, motel, and inn uses.

The Committee of 100 appreciates this opportunity to comment.

Sincerely,



Stephen Hansen, Chairman

developments in the MU-13 and MU-27 zones that voluntarily agree to become Inclusionary Developments subject to IZ requirements pursuant to Subtitle C § 1001.2(d).