

Comments of Marilyn J. Simon on  
Notice of Proposed Rulemaking  
Zoning Commission Case No. 04-33I (Inclusionary Zoning)  
Text Amendment – 11 DCMR  
May 10, 2019

In these comments, I discuss the substantial changes in the Inclusionary Zoning requirements proposed in this NPRM. These substantial changes frequently result in a lower set-aside requirement without any offsetting reduction in the bonus density available to the developer.

The changes discussed below are all described in the Commission's NPRM as clarifying the applicability of IZ. These text amendments discussed below are not clarifications, but significant changes in the formula for calculating the set-aside and significant changes in the conditions under which a reduced set-aside formula (the set-aside defined in §1003.2) can be used rather than the standard set-aside formula (the set-aside defined in §1003.1).

For the reasons stated below and in the attached letter, I ask that the Commission reject the proposed changes in the formula for calculating the set-aside requirement (change in the definition of bonus density, and the formula in §§1003.1 and 1003.2) and in the conditions under which a project is eligible for the reduced set-aside formula of §1003.2.

I am attaching a copy of the letter I sent to the Zoning Commission on September 27, 2018 after the September 20 hearing which was not included in the record. In that letter, I address:

- (1) how the change in the definition of IZ bonus density in proposed text amendment reduces the set-aside requirement;
- (2) how the proposed text change in the sections describing when a project is eligible for the reduced set-aside requirement resolves the current ambiguity in §1003.2 and can result in a reduction in the set-aside requirement, not justified by increased construction costs; and
- (3) how, with this text amendment, a PUD with a map amendment (with a significantly higher IZ bonus density than a MOR project) might result in a lower set-aside requirement than a MOR project, even when both projects use the same construction methods.

The attached letter includes examples to illustrate how this NPRM will change the set-aside requirement and in some instances reduce the required IZ set-aside.

In this submission, I am adding additional citations on the proposed change to §§1003.1 and 1003.2 (changing the conditions under which a project is eligible for the reduced set-aside requirement of §1003.2) and additional comments on OP's discussion of bonus density in its November 2019 Supplement Report (ZC 04-33I).

Additional Comments on proposed changes in §§1003.1 and 1003.2 - conditions for eligibility for a reduced set-aside requirement:

In the OP set-down report in ZC 04-33G, the Office of Planning clarified that OP's intent in ZC 04-33G, the regulation currently in effect: The reduction in the IZ requirement is permitted "only when steel and concrete is used to frame more than 50% of the dwelling units."

ZC Application 04-33G, Inclusionary Zoning Amendments July 3, 2015
§ 2603.1 & 2603.2 was requested by the ZA to address the growing number of projects that mix construction techniques between steel and concrete and wood frame "stick" construction. The goal is to clearly define when a project has an 8 percent requirement versus a 10 percent requirement. OP will be continuing to work the ZA and developers to refine this language for the final report. This amendment would permit a reduction of the IZ requirement for the entire building only when steel and concrete construction is used to frame more than 50 percent of the dwelling units.

Clearly, OP's intent in drafting the set-aside requirement in 04-33G was to allow the reduction in the set-aside requirement based on construction costs, and only when, according to their study, the higher cost construction methods were used for a substantial portion of the building. OP's analysis did not support a reduction in the set-aside requirement based on the underlying zone.

The language in the current set-aside requirement is ambiguous:

- There is an ambiguity in the current regulations:
  - The current regulations do not define a set-aside requirement for largely stick-built developments in zones (such as MU-5) with a MOR height of more than 50 feet.
- This should be resolved in favor of the original intent, limiting the reduced set-aside to the cases where it is justified based on increased construction costs.
- There is also a basic policy question:
  - Should the ambiguity should be resolved in favor of more affordable housing or in favor of allowing more frequently a reduced set-aside requirement, as proposed in this NPRM?
- The ambiguity can be addressed in this proceeding by deleting the reference to zones with MOR heights of 50 feet or less in the current §1003.1.
- The cost analysis provided by OP in 04-33G was based entirely on construction type and not on the underlying zone. Thus there is no justification for allowing the reduced set-aside requirement based on zone rather than construction method.

The attached letter includes an example (at page 3) of a PUD with a map amendment, which, with this proposed text amendment, would have an IZ requirement slightly less than a MOR project on the same site. While the PUD would be 68% larger than the MOR project with an IZ bonus density 40% higher than the MOR project, the PUD (with a map amendment to MU-5 from MU-4) would have a slightly lower IZ set-aside. The developer of the MOR project would need to set-aside 12.5% of the GFA for IZ, while the PUD with map amendment would need to set-aside only 7.2% of the GFA, since the map amendment from MU-4 to MU-5, would trigger the reduced set-aside formula with the proposed language. On the other hand, if the set-aside was based only on the construction method, as described in OP's Supplemental report on ZC 04-33G, the MU-5 PUD would benefit from a 40% increase in bonus density, set aside 10.4% of the GFA for IZ, and provide 40% more affordable housing than the MOR project.

### Additional Comments on Change in Definition of Bonus Density

In its November 9, 2018 Supplemental Report, the Office of Planning addressed whether the change from achievable bonus density to bonus density utilized represents a substantive change, rather than a technical change.<sup>1</sup> OP states that the proposed language change “is in line with administrative practice of the past nine years.”

As noted in the C100 statement, the Commission, in ZC 04-33G (2017), reversed the change from potential bonus density to bonus density utilized that was included in ZC 04-33B (2006).

During part of the time period cited by OP, prior to the 2017 change in the regulations after a well-attended hearing, the bonus density, as defined in ZC 04-33B, was based on bonus density utilized. However, this definition was changed in 2017, and the proposed language in this NPRM clearly is not consistent with the current regulations, as laid out in the clear language of ZC 04-33G.

In that Supplemental Report, to justify the description of this amendment as a “clarification,” OP cites administrative practice, based on a DCRA form for certifying compliance with IZ. That form had not been updated to reflect the changes in this provision with ZC 04-33G. The form also includes the disclaimer: “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.”

While the DCRA form reflected the regulations in effect until 2017, apparently the form and the administrative practice has not been changed to reflect changes in the zoning regulations in ZC 04-33G. However, DCRA’s failure to update the form to reflect these changes does not, as OP would have you believe, justify reversing those changes, or describing a reversal of those changes as a mere clarification. DCRA’s failure to update its forms to reflect the Zoning Commission’s ZC 04-33G text amendment should not be used to negate the Commission’s decision.

### Conclusion

In summary, I ask that the Commission reject the proposed changes in the sections that describe the conditions under which a project is eligible for the reduced set-aside requirement of §1003.2, by removing the reference to zones with a MOR height, exclusive of any bonus height, of 50 feet or less in both §1003.1 and §1003.2.

I further ask that the Commission reject the proposed change in the definition of bonus density (changed from potential or achievable bonus density to bonus density utilized) used in the calculation of the set-aside, and restore the definition of achievable bonus density.

I also note that the language in the NPRM did not fully address the issues I raised on the IZ requirement in MU-13. Currently, a project with habitable penthouse space has an IZ requirement based on that space, even though projects in that zone are otherwise exempt from IZ. With this text amendment, the IZ requirement based on habitable penthouse space was eliminated. I ask that that requirement be restored.

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<sup>1</sup> From the OP Supplemental Report on 04-33I (Nov 9, 2018): Question C. Testimony received on September 20, 2018 raised the issue of whether the recommended amendments in both §§ 1003.1 and 1003.2 from “*achievable* bonus density” to “bonus density *utilized*” represent a substantive change that is contrary to the Commission’s intent and not a technical change. “OP’s 04-33I recommended language clarifies the regulation, is consistent with the Commission’s intent under 04-33G and is in line with administrative practice of the past nine years.”

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 D.C. Zoning Commission  
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**Re: Comments on Z.C. Case No: 04-331: Description of current ambiguity in the set-aside requirement and how the proposed text amendments can reduce the set-aside requirements**

In this submission, I provide examples to respond to some of the questions asked at the September 20 hearing. The questions related to: (1) the effect of the change in the definition of IZ bonus density on the set-aside requirement; (2) the current ambiguity in the rule for when the reduced set-aside requirement applies; and (3) how the proposed amendment resolves that ambiguity by reducing the set-aside requirement in some cases and can yield a lower set-aside requirement for a PUD with a map amendment than a MOR project, even when both projects use the same construction methods.

**1. The proposed change in definition of IZ bonus density can reduce the IZ Set-Aside Requirement:**

The current zoning regulations include a clear definition of the bonus density used to calculate the required set-aside. The proposed amendment would reduce the required set-aside for matter-of-right projects if the project does not use the entire bonus density. This is a material change in the requirement, not a clarification, and as such can only be adopted after the change is advertised.

The following table shows how for an 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.

	<b>Current IZ Regulations</b>	<b>Proposed IZ Regulations</b>
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 density: 5,000 SF	Difference between the MOR density and the utilized density: 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
<b>IZ Set-aside requirement: the greater of 75% of the bonus density or 10% of the residential floor area</b>	<b>3,750 SF</b>	<b>2,000 SF</b>
<b>REDUCTION IN THE IZ SET-ASIDE WITH THE PROPOSED AMENDMENT</b>		<b>Set-Aside reduced by 1,750 SF, 46.6% of the current set-aside requirement</b>

In this example, there would be a large reduction in the IZ set-aside requirement,<sup>2</sup> approximately 46%, and if it was assumed to have a higher percentage of non-residential space, the reduction would have been higher.

## 2. The Current Ambiguity in the IZ Set-Aside Requirement

The current zoning regulations<sup>3</sup> do not define the set-aside requirement when more than half the residential units are not steel and concrete construction and it is in a zone with a MOR height of more than 50 feet:

	Zone with a MOR height of 50 feet or less, for example, MU-4 (C-2-A)	Zone with a MOR height of more than 50 feet, for example, MU-5 (C-2-B)
Does not employ Type 1 construction to construct the majority of the dwelling units	§ 1003.1 (standard set-aside) ("10%/75%" rule)	UNDEFINED
Employs Type 1 construction to construct the majority of the dwelling units	§ 1003.2 (reduced set-aside) ("8%/50%" rule)	§ 1003.2 (reduced set-aside) ("8%/50%" rule)

**The proposed amendment in ZC 04-33I would apply the reduced set-aside rule to the projects in the box where the requirement is currently undefined. This would resolve the ambiguity by choosing the lower requirement, rather than the requirement that matches its construction methods/costs.**

Applying the 10%/75% set-aside requirement for these projects would follow the logic of reducing the requirement only when it is justified by the higher costs associated with Type 1 construction as discussed in earlier IZ proceedings. That would resolve the ambiguity in favor of providing more

<sup>2</sup> 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)

<sup>3</sup> Subtitle C, Section 1003 SET-ASIDE REQUIREMENTS ([www.dcregs.dc.gov](http://www.dcregs.dc.gov))

1003.1 An inclusionary development which does not employ Type I construction as defined by Chapter 6 of the International Building Code as incorporated into District of Columbia Construction Codes (Title 12 DCMR) to construct a majority of dwelling units and which is located in a zone with a by-right height limit of fifty feet (50 ft.) or less shall set aside the greater of ten percent (10%) of the gross floor area dedicated to residential use including penthouse habitable space as described in Subtitle C § 1001.2(d), or seventy-five percent (75%) of its achievable bonus density to inclusionary units plus an area equal to ten percent (10%) of the penthouse habitable space as described in Subtitle C § 1001.2(d).

1003.2 An inclusionary development which employs Type I construction as defined by Chapter 6 of the International Building Code as incorporated into the District of Columbia Construction Codes (Title 12 DCMR) to construct the majority of dwelling units shall set aside the greater of eight percent (8%) of the gross floor area dedicated to residential use including penthouse habitable space as described in Subtitle C § 1001.2(d), or fifty percent (50%) of its achievable bonus density to inclusionary units plus an area equal to eight percent (8%) of the penthouse habitable space as described in Subtitle C § 1001.2(d).

affordable housing, rather than less. In addition, that would also eliminate the perverse incentive to request a map amendment in order to reduce the IZ obligations that is described below.

**3. The Proposed Text Amendment and Treatment of Map Amendments: A PUD with a map amendment might have a lower IZ Set-aside requirement than a much smaller MOR project.**

In the following table, I compare the IZ set-aside for a MOR (with IZ) project in an MU-4 zone on a 10,000 SF lot with the IZ set-aside for a PUD with Map Amendment to MU-5 on the same site. The set-aside for the PUD is calculated (1) with the reduced IZ set-aside applying only if more than half the residential units are use Type 1 construction, and (2) with the proposed text amendment.

Land area: 10,000 SF Current zone: MU-4 (C-2-A)	<b>MOR with IZ in MU-4</b>	<b>PUD with map amendment to MU-5 Reduced set-aside only if more than half residential units are Type 1 construction</b>	<b>PUD with map amendment to MU-5 Reduced Set-aside rule proposed in 04-33I</b>
FAR	2.5 plus 20% IZ bonus = 3.0	3.5 plus 20% IZ bonus = 4.2 Plus 20% PUD bonus = 5.04	3.5 plus 20% IZ bonus = 4.2 Plus 20% PUD bonus = 5.04
Height	50 feet	79 feet	79 feet
Building type	Possible Type 1 podium, Type 2 above, Type 1 for less than 50% of residential units	Type 1 podium, Type 2 above, Type 1 for retail and less than 50% of residential units	Type 1 podium, Type 2 above, Type 1 for retail and less than 50% of residential units
IZ Bonus density	0.5 FAR, 5,000 SF	0.7 FAR, 7,000 SF	0.7 FAR, 7,000 SF
Non-residential FAR	0.5 FAR, 5,000 SF	0.5 FAR, 5,000 SF	0.5 FAR, 5,000 SF
Residential FAR	2.5 FAR, 25,000 SF	4.54 FAR, 45,400 SF	4.54 FAR, 45,400 SF
<b>Total FAR</b>	<b>3.0, 30,000 SF</b>	<b>5.04 SF, 50,400 SF</b>	<b>5.04 FAR, 50,400 SF</b>
Set-aside requirement	§ 1003.1	§ 1003.1	§ 1003.2 (reduced set-aside requirement)
Achievable IZ Bonus Density	5,000 SF	7,000 SF	7,000 SF
Calculation based on Bonus Density	75% of bonus density 3,750 SF	75% of bonus density 5,250 SF	50% of bonus density 3,500 SF
Calculation based on Residential SF	10% of residential SF 2,500 SF	10% of residential SF 4,540 SF	8% of residential SF 3,632 SF
<b>IZ Set-Aside Requirement</b>	<b>3,750 SF</b> (12.5% of total SF)	<b>5,250 SF</b> (10.4% of total SF)	<b>3,632 SF</b> (7.2% of total SF)

In this example, Type 2 construction was used for more than half the residential units for both the MOR with IZ mixed-use project and the PUD with map amendment project. The PUD had GSF of 50,400 SF compared with 30,000 SF for the MOR with IZ project, an increase of 68%, yet, with the proposed text amendment to resolve the current ambiguity in the regulations (increasing the applicability of the reduced IZ set-aside requirement), the IZ set-aside for the PUD with map amendment would be about

100 SF lower than the set-aside requirement for the much smaller MOR project,<sup>4</sup> and would be 1,618 SF less than the requirement (a reduction of approximately 30% in the requirement) if the ambiguity is resolved to reflect actual construction costs rather than zone designation,

### Summary

§1001.1: There is currently no ambiguity in the definition of bonus density used in the calculation of the IZ set-aside. The proposed text amendment is not a clarification, but a change in the definition.

The text amendment changes the regulations in a way that in some cases reduces the required set-aside. There are no cases for which it would increase the set-aside requirement.

§1003.2: There is currently an ambiguity as to when a project is eligible for a reduced set-aside requirement. The proposed text amendment would resolve that ambiguity by expanding the conditions under which a project is eligible for a reduced set-aside requirement.

This text amendment increases the likelihood that a project gets a reduction in the set-aside requirement. The eligibility for the reduction would be based on the designation on the zoning map or on a request for a map amendment, rather than on the increased costs associated with Type 1 (concrete and steel) construction. Identical projects with different zoning map designations could have different IZ set-aside requirements.

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<sup>4</sup> The reduction in the set-aside requirement would be even larger, if there was more non-residential use in the mixed-use PUD. For example, if the non-residential FAR was 1.0, the set-aside requirement with the text amendment would be 3,232 SF, compared with the set-aside requirement of 3,750 SF for the MOR project and 5,250 SF for the PUD if instead of the proposed text amendment, the ambiguity was resolved to base the reduction on the type of construction, not on the requested map amendment.