

Zoning Commission Case 18-03
Consolidated PUD and Related Map Amendment
November 9, 2018 Response of Marilyn J. Simon to
Applicant Submission, Exhibit 34, October 29, 2018 and
Office of Planning Supplemental Report, Exhibit 38, November 2, 2018

Inclusionary Zoning: Current Regulations

Both the Office of Planning and the Applicant are citing proposed regulations, ZC 04-33I, rather than the current regulations, as amended in ZC 04-33G.

- These proposed regulations are not yet in effect.
- In fact, the Zoning Commission has not yet even had deliberations on this proposal.
- The proposed text amendments in ZC 04-33I are not a clarification, but a substantial change, frequently resulting in a reduced IZ requirement

Subtitle C, §1003.2 describes when a project is eligible for a reduced set-aside requirement.

- The reduced requirement applies only when a development employs concrete and steel construction to construct the majority of dwelling units.

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).
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- 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.

The current set-aside requirement is ambiguous:

- As acknowledged in the OP Supplemental Report, 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 50 feet or more.
- 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 be resolved in favor of more affordable housing or in favor of a reduced set-aside requirement, as proposed by OP and the Applicant?
- The ambiguity can be addressed in ZC 04-33I 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.

In summary, OP and the Applicant are citing proposed regulations that have not been approved. The current regulation describing when a project is eligible for a reduced set-aside requirement limits that reduction to buildings that use concrete and steel for more than half the dwelling units. Specific comments on each filing follow.

Specific Comments on OP Supplemental Report

- As stated above, OP is basing its opinion on proposed regulations, and not the current regulations.
- OP is correct in stating that the current regulations do not include a formula that would apply for a project like this, a project that does not fit in either §1003.1 or §1003.2.
- OP’s summary of the set-aside requirements in the second paragraph is incorrect:
 - OP states that §1003.1 applies only when a building is 50 feet or less in height and predominantly stick built.
 - In fact, §1003.1 clearly applies to largely stick-built buildings with a height above 50 feet in a “listed” zone, such as a PUD in an MU-4 zone, which could be 65 feet in height.
 - Contrary to OP’s statement, a PUD in an MU-4 zone would be required to use the standard set-aside requirement (§1003.1), rather than the reduced requirement (§1003.2), if it does not employ concrete and steel for more than half the residential units.
 - The actual height of the building is not part of the criteria in this section, except to the extent it affects the developer’s choice of the portion of the construction that is concrete and steel.
- OP states that the Applicant will be providing a public benefit of 1,136 SF (3,882 SF – 2,746 SF) of affordable housing above that required for a MOR project on this site.
 - This is based on the current zoning, MU-4, not on the requested map amendment.
 - If a project gets the reduced set-aside formula only if they use the more costly construction methods, then the set-aside requirement for a MOR project on this site with MU-5 zoning would be 3,774 SF, and the developer would be providing only 108 SF of affordable housing above that required for a MOR building with the requested map amendment on this site.
 - OP’s stated benefit is less than the amount that the ANC relied upon in voting to support the project. In the MOU, the ANC stated that the Applicant is dedicating 1,441 SF of gross floor area to affordable units above the amount required by the Zoning Regulations.

Specific Comments on Applicant’s Response

- As stated above, like OP, the Applicant, in claiming eligibility for the reduced set-aside requirement, is basing the requirement on proposed regulations, and not the current regulations.
- The Applicant mentioned earlier cases when the reduced set-aside requirement was applied to largely stick built projects in zones such as MU-5 or higher. Those cases might have been prior to the change in the regulations (ZC 04-33G), or cases where the project should have provided the standard set-aside, but the erroneous IZ self-certification slipped through the cracks.
- In my earlier calculations, I netted out the commercial floor area in calculating the residential floor area, but missed the parking area in GFA, which wasn’t listed in the zoning tabulations. I use the numbers the Applicant provided as the basis for the calculations below.
- It appears as though the Applicant did not include the projections in the calculation based on residential floor area, which should be included. See §1003.9. There are fifteen units with enclosed projections of 14.63 SF each for a total of approximately 219 SF.
- Even if one applies the reduced set-aside formula, the Applicant’s calculation of IZ requirement for PUD is incorrect.
 - The Applicant calculated the amount based on residential floor area, but failed to calculate the amount based on 50% of the bonus density.
 - In this case, the amount based on 50% of the bonus density is larger than the amount based on 8% of the residential floor area.
 - Even applying §1003.2, the IZ requirement for the PUD would be 2,539 SF (including 140 SF for PH), rather than 2,441 SF as stated in the Applicant’s response.

1003.9	An inclusionary development’s entire residential floor area including dwelling units located in cellar space or enclosed building projections that extend into public space, shall be included for purposes of calculating the minimum set-aside requirements of Subtitle C §§ 1003.1 and 1003.2
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General Comment:

The regulations state that:

- (1) the ZC cannot include the amount of affordable housing that would be required in a MOR project on the site [§305.5(g)], and
- (2) absent an express request and an express grant of relief, the Applicant is required to provide the amount of affordable housing required for the actual proposed project [§310.1].

However, the regulations do not include a requirement that the ZC count as a benefit the entire amount of affordable housing in excess of that which would be provided in a MOR building.

Instead, the ZC can choose to credit as a public benefit only the amount of affordable housing above that which is actually required. The amount of affordable housing that would be credited as a benefit could be limited to the affordable housing in excess of that which is required for the proposed building. This is an option available to the ZC.

In fact, given that the developer is required to provide the amount of affordable housing that would be required for the proposed building, as required in §§ 1003.1 and 1003.2, it might be appropriate to consider a text amendment to Subtitle X, §305.5(g) to redefine the public benefit calculation to include affordable housing only to the extent it exceeds the greater of the amount of affordable housing required for the actual project proposed or the amount of affordable housing that would be required for a MOR project in the proposed zone.

310	LIMITATIONS ON DEVELOPMENT OF A PUD SITE
310.1	No order approving a PUD shall be deemed to include relief from any zoning regulation, including, but not limited to, the Inclusionary Zoning requirements of Subtitle C, Chapter 26 unless such relief was expressly requested by the applicant and expressly granted in the order.

Generally, can we be surprised that the IZ regulations have not produced a significant amount of affordable housing when each ambiguity in the regulations is resolved in favor of reduced requirements, when IZ compliance is not carefully monitored and when, in some instances, clear language defining the requirement¹ is rewritten in favor of a reduced set-aside requirement?

Residential Parking Permits

The conditions in the MOU are not sufficient to address the issue, as demonstrated by the failure of these conditions in an earlier PUD, Jemal's Babes at Wisconsin and Brandywine, NW, where there were similar conditions. The Jemal's Babes PUD address was added to the RPP database prior to the completion of construction.

But with a minor change, the conditions would be sufficient.

Applicant's proposed conditions are: "obtaining written authorization from each tenant through a required lease provision that allows the DMV to release to the Applicant every 12 months any and all records of that tenant requesting or receiving an RPP for the Site. The Applicant shall take all reasonable steps to obtain and review such records for noncompliance with such lease provisions." [Exhibit 39, page 9]

With the following minor edit, it could, in my individual opinion, be adequate: "obtaining written authorization from each tenant through a required lease provision that allows the DMV to release to the Applicant every 12 months any and all records of that tenant requesting or receiving an RPP or VPP for the Site. ~~The Applicant shall take all reasonable steps to obtain and review such records for noncompliance with such lease provisions~~ shall request annual reports from the DMV and annually provide the ANC with either a statement from the DMV that indicates that no tenants have requested or received an RPP or VPP, or a statement as to how the Applicant and the DMV will address the issued or requested RPP or VPP."

This simple reporting requirement would address the Applicant's lack of incentive to enforce the RPP condition. A similar on-going reporting requirement would be necessary if the Applicant sells units in the project.

¹ For example, the original calculation (04-33, May 2006) of the set-aside requirement based on bonus density has been based on the achievable bonus density, defined to be "the bonus density permitted under § 2604 that potentially may be utilized within a particular inclusionary development..." The current regulations also base the requirement on achievable bonus density, defined as "the amount of the permitted bonus density that potentially may be utilized within a particular inclusionary residential Development in Subtitle C § 1002." Any proposal to switch the "bonus density" calculation from "potential bonus density" to "bonus density utilized" will reduce the set-aside requirement for many matter-of-right and design review projects.

Calculations on Set-aside Requirement:

(1) MOR Building in MU-4: The IZ set-aside requirement is 2,746 SF, as derived on page 4 of my October 29 testimony. This matches the calculations in the OP Supplemental Report and the Applicant's response.

(2) MOR Building in MU-5, with a height up to 70 feet and less than half the residential units using concrete and steel.

- Bonus Density Method: Set-aside requirement based on §1003.1
 - IZ bonus density: (0.7 FAR) = 4,798.5 SF
 - 75% of IZ bonus density = 3,598.875 SF
 - Penthouse: 10% of 1,754 SF = 175.4 SF
 - Total IZ Requirement based on bonus density = 3,774.275 SF
- Residential Floor Area Method: Set-aside requirement based on §1003.1
 - Residential floor area (FAR = 4.2) = 28,791 SF
 - 10% of residential floor area = 2,879.1 SF
 - 10% of habitable Penthouse space = 175.4 SF
 - 10% of projections = 21.9 SF
 - Total IZ requirement based on residential floor area = 3,076.4 SF
- **Set-aside Requirement for MU-5 MOR Building with less than half the dwelling units concrete and steel is the larger of the two: 3,774.275 SF.**

(3) Proposed PUD with map amendment, less than half the residential units using concrete and steel.

- Bonus Density Method: Set-aside requirement based on §1003.1
 - IZ bonus density: (0.7 FAR) = 4,798.5 SF
 - 75% of IZ bonus density = 3,598.875 SF
 - Penthouse: 10% of 1,754 SF = 175.4 SF
 - Total IZ Requirement based on bonus density = 3,774.275 SF
- Residential Floor Area Method: Set-aside requirement based on §1003.1
 - Residential floor area = 28,762 SF
 - 10% of residential floor area = 2,876.2SF
 - 10% of habitable Penthouse space = 175.4 SF
 - 10% of projections = 21.9 SF
 - Total IZ requirement based on residential floor area = 3,073.5
- **Set-aside Requirement for proposed PUD with a map amendment and less than half the dwelling units concrete and steel is the larger of the two: 3,774.275 SF.**

(4) Proposed PUD with map amendment, using reduced set-aside requirement (based on proposed text amendment).

- Bonus Density Method: Set-aside requirement based on §1003.2
 - IZ bonus density: (0.7 FAR) = 4,798.5 SF
 - 50% of IZ bonus density = 2,399.25 SF
 - Penthouse: 8% of 1,754 SF = 140.32 SF
 - Total IZ Requirement based on bonus density = 2,539.57 SF
- Residential Floor Area Method: Set-aside requirement based on §1003.2
 - Residential floor area = 28,762 SF
 - 8% of residential floor area = 2,300.96.2SF
 - 8% of habitable Penthouse space = 140.32 SF
 - 8% of projections = 17.52 SF
 - Total IZ requirement based on residential floor area = 2,458.8 SF
- **Set-aside Requirement for proposed PUD with a map amendment, assuming it is eligible for the reduced set-aside requirement in §1003.2: 2,539.57 SF**
- **It is not 2,441 SF as stated in the Applicant's Response and the OP Supplemental Report.**
- **Source of Applicant's Understatement: The Applicant omitted the projections and didn't include the calculation based on 50% of bonus density, only the calculation based on residential floor area.**