

## NOTICE OF SECOND PROPOSED RULEMAKING

Z.C. Case No. 20-25

Office of Planning

### (Text Amendment to Subtitles C, U, and X to Clarify Conforming Use Status of Lawfully Constructed Apartment Houses in the RF Zones)

The Zoning Commission for the District of Columbia (Commission), pursuant to its authority under § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Official Code § 6-641.01 (2018 Repl.)), and pursuant to § 6(c) of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1206; D.C. Official Code § 2-505(c) (2016 Repl.) (DCAPA)), hereby gives notice of its amendment of the following provisions of the Zoning Regulations (Title 11 of the District of Columbia Municipal Regulations, Zoning Regulations of 2016, to which all references are made unless otherwise specified) (specific text at end of this notice):

- Subtitle C, General Rules - § 204<sup>1</sup>
- Subtitle U, Use Permissions - § 301
- Subtitle X, General Procedures - § 1001

#### **Setdown**

On October 27, 2020, the Office of Planning (OP) filed a petition (Petition) to the Commission proposing the text amendment to clarify that:

- Existing, legally constructed apartment houses in the RF zones are conforming uses that may be renovated and expanded as a matter-of-right, provided that there is 900 square feet of land area for each existing and new dwelling unit or that the number of existing units are not increased if there is less than 900 square feet of land area for each existing unit; and
- Variance relief from the 900 square feet per unit rule is an area variance.

#### **Emergency & Proposed Action**

At its October 29, 2020, public meeting, the Commission heard testimony from OP in favor of the Petition. At the close of the meeting, the Commission voted to grant OP's requests to:

- Take emergency action to adopt the Petition because the Commission concluded it was necessary for the "immediate preservation of the public ... welfare," as authorized by § 6(c) of the DCAPA, approved October 21, 1968 (82 Stat. 1206; D.C. Official Code § 2-505(c) (2016 Repl.)) in order to correct the unintended consequences of an inadvertent change in the regulations on nonconforming uses adopted in the Zoning Regulations adopted by the Commission in 2016;
- Set the Petition down for a public hearing;
- Authorize an immediate publication of proposed rulemaking for the Petition; and
- Authorize a 30-day notice period prior to the public hearing by granting a waiver under Subtitle Z § 101.9 from the 40-day requirement of Subtitle Z § 502.1 for good cause because the conforming status of these lawfully existing apartment houses had been unintentionally

---

<sup>1</sup> All references are made to the text adopted by the Commission in Z.C. Case No. 19-21 as published in the Notice of Final Rulemaking in the November 13, 2020, *D.C. Register* (67 DCR 13340 *et seq.*).

affected by the amendment of the regulations on nonconforming uses as part of the 2016 rewrite of the Zoning Regulations.

**VOTE** (October 29, 2020): **5-0-0** Anthony J. Hood, Peter G. May, Robert E. Miller, Peter A. Shapiro, and Michael G. Turnbull to **APPROVE**

The emergency rule is effective as of the Commission’s October 29, 2020 vote and will expire on February 24, 2020, which is the one hundred-twentieth (120<sup>th</sup>) day after the adoption of this rule, or upon publication of a Notice of Final Rulemaking in the *D.C. Register* that supersedes this emergency rule, whichever occurs first.

OZ published a Notice of Emergency and Proposed Rulemaking (“**NOEPR**”) in the November 13, 2020, *D.C. Register* (67 DCR 13340, *et seq.*).

The Commission received no comments in response to the NOEPR.

### **Public Hearing**

OP submitted a December 29, 2020, report (OP Report) that supported the Petition and proposed a minor change to the Petition to clarify that Subtitle U § 301.5 applies only to apartment houses that were legally constructed as such and therefore to delete subparagraphs (a)(1) and (2) as redundant.

At its January 7, 2021, public hearing, the Commission heard testimony from OP in favor of the Petition. No entity or person appeared to testify.

### ***“Great Weight” to the Recommendations of OP***

The Commission must give “great weight” to the recommendations of the Office of Planning (OP) 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 § 405.8.) (*Metropole Condo. Ass’n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1087 (D.C. 2016)).)

The Commission finds persuasive OP’s recommendation that the Commission adopt the Petition and concurs in that judgment.

### ***“Great Weight” to the Written Report of the ANCs***

The Commission must give great weight to the issues and concerns raised in the written report of an affected ANC that was approved by the full ANC at a properly noticed public meeting pursuant to § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2012 Repl.)) and Subtitle Z § 406.2. To satisfy the great weight requirement, the Commission must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. (*Metropole Condo. Ass’n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1087 (D.C. 2016).) The District of Columbia Court of Appeals has interpreted the phrase “issues and concerns” to “encompass only legally relevant issues and concerns.” (*Wheeler v. District of Columbia Board of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (1978) (citation omitted).)

Since no ANC filed a response to the Petition, the Commission has nothing to which it may give “great weight”.

### **Revised Proposed Action**

At the close of the meeting, the Commission voted to amend the Petition to reflect the OP Report’s proposed revisions and to authorize a Notice of Second Proposed Rulemaking with a reduced seven (7)-day comment period because the Petition has already been open for public comment for 30 days and these revisions are limited and do not change the substance of the Petition.

**VOTE** (January 7, 2021): **5-0-0** Robert E. Miller, Peter A. Shapiro, Anthony J. Hood, Peter G. May, and Michael G. Turnbull to **APPROVE**)

All persons desiring to comment on the subject matter of this proposed rulemaking action should file comments in writing no later than seven (7) days after the date of publication of this notice in the *D.C. Register*. Comments should be filed with Sharon Schellin, Secretary to the Zoning Commission, Office of Zoning, through the Interactive Zoning Information System (IZIS) at <https://app.dcoz.dc.gov/Login.aspx>; however, written statements may also be submitted by mail to 441 4<sup>th</sup> Street, N.W., Suite 200-S, Washington, D.C. 20001; by e-mail to [zcsubmissions@dc.gov](mailto:zcsubmissions@dc.gov); or by fax to (202) 727-6072. Ms. Schellin may be contacted by telephone at (202) 727-6311 or by email at [Sharon.Schellin@dc.gov](mailto:Sharon.Schellin@dc.gov). Copies of this proposed rulemaking action may be obtained at cost by writing to the above address.

Final rulemaking action shall be taken not less than seven (7) days from the date of publication of this notice of proposed rulemaking in the *D.C. Register*. **This proposed rulemaking completely supersedes the prior Notice of Emergency and Proposed Rulemaking in this case published in the D.C. Register on November 13, 2020.**

The complete record in the case can be viewed online at the Office of Zoning’s Interactive Zoning Information System (IZIS), at <https://app.dcoz.dc.gov/Content/Search/Search.aspx>.

### **REVISED PROPOSED TEXT AMENDMENT**

The following amendments to the Zoning Regulations are proposed for the Commission’s final consideration (additions are shown in **bold** and **underlined** text and deletions are shown in **bold** and **~~strikethrough~~** text):

#### **I. Amendments to Subtitle C, GENERAL RULES**

**Subsection 204.7 of § 204, NONCONFORMING USE, of Chapter 2, NONCONFORMITIES, of Subtitle C, GENERAL RULES, is proposed to be amended, to read as follows:**

204.7 Ordinary repairs, alterations, or modernizations may be made to a structure or portion of a structure devoted to a nonconforming use. Structural alterations shall not be allowed, except those required by other municipal law or regulation; provided that structural alterations shall be permitted to a lawfully existing,

nonconforming flat or apartment house located in a Residential House (R) zone, ~~or to a lawfully existing, nonconforming apartment house located in a Residential Flat (RF) zone.~~

## II. Amendments to Subtitle U, USE PERMISSIONS

**Subsections 301.1 and 301.5 of § 301, MATTER-OF-RIGHT USES (RF), of Chapter 3, USE PERMISSIONS RESIDENTIAL FLATS (RF) ZONES, of Subtitle U, USE PERMISSIONS, is proposed to be amended, to read as follows:**

301.1 The following uses shall be permitted as a matter of right in an RF zone subject to any applicable conditions:

- (a) Any use permitted in the R zones ...<sup>2</sup>
- (b) Residential **flats uses** with a maximum number of principal dwelling units **per lot** as follows:

**TABLE U § 301.1(b): MAXIMUM NUMBER OF PRINCIPAL DWELLING UNITS**

<b>RF Zone</b>	<b>Number of Principal Dwelling Units</b>
RF-1	2
RF-2	2
RF-3	2
RF-4	3
RF-5	4

- (c) A permitted principal dwelling unit ...

...

...

301.5 An apartment house in an RF-1, RF-2, or RF-3 zone that **was constructed as an apartment house prior to May 12, 1958, or that was lawfully constructed as an apartment house prior to August 7, 1981, in compliance with the then-applicable zoning regulations, shall be considered a conforming use and may renovate or expand in conformance with the applicable provisions of this Title, provided that:**

- ~~(a) **The apartment house** has not been:~~
  - ~~(a) **Converted prior to September 6, 2016;**~~
  - ~~(b) **Converted pursuant to Subtitle U §§ 301.2 or 320.2; or**~~

<sup>2</sup> The use of this and other ellipses indicate that other provisions exist in the subsection being amended and that the omission of the provisions does not signify an intent to repeal.

- (e) ~~Expanded~~ **expanded** pursuant to **a special exception approved by the Board of Zoning Adjustment per** Subtitle U §§ 301.4, 320.2, or 320.4;
- (b) **An apartment house with less than nine hundred square feet (900 sq. ft.) of lot area per existing dwelling unit does not increase the number of dwelling units; and**
- (c) **An apartment house with more than nine hundred square feet (900 sq. ft.) of lot area per existing dwelling unit may only add additional dwelling units if the apartment house has** ~~may not renovate or expand so as to increase the number of dwelling units provided that there shall~~ be a minimum of nine hundred square feet (900 sq. ft.) of lot area for each existing and new dwelling unit.

### **III. Amendments to Subtitle X, GENERAL PROCEDURES**

Paragraph (f) of § 1001.3 of § 1001, VARIANCE TYPES, of Chapter 10, VARIANCES, of Subtitle X, GENERAL PROCEDURES, is proposed to be amended, to read as follows:

1001.3 Examples of area variances are requests to deviate from:

- (a) Requirements that affect the size ...
- ...
- (f) Preconditions to the establishment of a special exception use ~~including, but not limited to, the minimum nine hundred square feet (900 sq. ft.) of land area per dwelling unit required by Subtitle U § 320.2(b) applicable to the conversion of a building to an apartment house as permitted by Subtitle U § 320.2;~~ provided, that the variance would not cause the proposed use to meet the definition of a more intense use; **and**
- (g) **Notwithstanding paragraph (f) of this section, the minimum nine hundred square feet (900 sq. ft.) of land area per dwelling unit required by Subtitle U §§ 301.2(b), 301.5, and 320.2(b).**