

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Zoning Commission**



**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA**  
**NOTICE OF FINAL RULEMAKING<sup>1</sup>**

**Z.C. Case No. 21-05**

**Office of Planning**

**(Text Amendment – Subtitle C, IZ-XL Phase #2, Applying Inclusionary  
Zoning to Conversions of Non-Residential Buildings to Residential Use)**

**December 16, 2021**

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 of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1206; D.C. Official Code § 2-505(c) (2016 Repl.)), hereby gives notice of its intent to amend Subtitle C 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), with the text at the end of this notice.

**SET DOWN**

On March 1, 2021, the Office of Planning (OP) filed a petition (Petition) to the Commission proposing a text amendment to apply the existing Inclusionary Zoning (IZ) program to buildings that are converted from non-residential use to residential use. The amendments would apply the IZ requirements, in zones where IZ already applies, to non-residential use conversions to residential use, regardless of whether the existing building envelope is enlarged or retained. A conversion must be in a zone where IZ already applies and propose ten (10) or more dwelling units at the time of the building permit. The ten (10) or more dwelling unit threshold can be a combination of existing floor area converted to residential use and new floor area built for residential use. All other requirements of the IZ program would apply to a conversion, including the existing set-aside requirements and the use of bonus density.

The following table summarizes the existing regulations and the change in how IZ would be applied to a conversion from non-residential to residential use under the text amendment.

<b>Non-Residential Building Converts to Residential Use</b>	<b>Uses IZ-Related Bonus Density</b>	<b>IZ Applies Under Existing Regulations?</b>	<b>IZ Applies Under Text Amendment?</b>
Less than 10 units	Not available	No	No
10 units or more; no addition	No	No	Whole building

<sup>1</sup> For Office of Zoning tracking purposes only, this Notice of Final Rulemaking shall also be known as Z.C. Order No. 21-05.

<b>Non-Residential Building Converts to Residential Use</b>	<b>Uses IZ-Related Bonus Density</b>	<b>IZ Applies Under Existing Regulations?</b>	<b>IZ Applies Under Text Amendment?</b>
10 or more units that result from addition of less than 50% of existing GFA	No	New GFA only	Whole building
	Yes	Whole building	Whole building
10 or more units that result from addition of 50% or more of existing GFA	No	Whole building	Whole building
	Yes	Whole building	Whole building

At its March 11, 2021 public meeting, the Commission voted to grant OP’s request to set down the Petition for a public hearing.

**PUBLIC HEARING**

On June 17, 2021, OP submitted its Analysis of Assessments of Commercial to Residential Conversions in the District of Columbia Q2, 2020 along with a report (OP Hearing Report), stating that no substantive changes to the proposed amendments had been made since set down, but that the amendments were revised to:

- Reorganize Subtitle C § 1001 to streamline the existing program applicability requirements and to better integrate the new applicability requirements for conversions;
- Refine what establishes a conversion by referencing the residential use category of Subtitle B § 200.2;
- Clarify that a conversion is subject to an IZ requirement when ten (10) or more dwelling units are proposed by either:
  - Converting existing non-residential floor area to residential floor area; or
  - A combination of converting existing non-residential gross floor area to residential floor area and adding new residential floor area that did not previously exist; and
- Revise Subtitle C § 1001.4 to clarify when existing residential floor area in a mixed-use building is subject to the IZ set aside requirements where the non-residential portion of the building converts to residential use.

Prior to the public hearing, no comments or testimony were submitted to the record.

At the June 28, 2021 public hearing, OP presented the Petition and responded to questions of the Commission. In addition, organizations and members of the public testified:

- In opposition to the Petition, concerned it will act as a disincentive to non-residential to residential conversion projects and make such projects less likely to be underwritten;
- In opposition to the Petition, concerned that applying IZ to conversions without any offsetting benefit will further challenge conversion projects, and concerned about including a vesting provision to allow projects currently underway to continue; and
- In support of the Petition, noting that non-residential buildings such as hotel, institutional and office uses may be obsolete and/or located in high-cost areas with potential to be converted to affordable housing.

At the conclusion of the hearing, the Commission decided to continue the hearing to allow time for the following:

- City wide input from ANCs;
- Submission of all the hearing testimony in writing to the record; and
- Submission of an OP supplemental report to the record addressing all opposition to the proposed amendments.

Prior to the continued hearing on October 7, 2021, OP submitted an October 4, 2021 (OP Supplemental Hearing Report). OP's report noted that it had addressed the Commission's requests by:

- Contacting all ANCs by email on August 18, 2021, to serve as a reminder that this case was heard at a public hearing on June 28, 2021, and that the Commission was providing an additional opportunity for their comment on the case. No ANC comments were submitted to the record; and
- Responding to all opposition testimony and comments submitted to the case record in four categories: financing and housing production comments; density comments; vesting comments; and set-aside comments, as follows:
  - Financing and Housing Production Comments  
OP explained that: (i) the proposed amendments should be clear, but the language must be flexible to cover a diversity of potential scenarios making clarity more challenging; (ii) the proposed amendments will not have an impact on the supply or demand of office uses due to the limits on office floor-area-ratio (FAR) in mixed-use (MU) zones, other than Downtown zones (D zones), where there is usually additional residential FAR available for redevelopment; and (iii) the proposed amendments application of IZ to existing structures will result in a net gain in IZ units compared to the hypothetical loss of conversion projects that choose to stay non-residential;
  - Density Comments  
OP explained that: (i) due to the limits on non-residential FAR in mixed-use (MU) zones, there is likely additional density for redevelopment; and (ii) for properties where there is not additional residential FAR available, the decision about conversion becomes a business decision by the property owner as to how they will maximize land value given potential costs, revenues, and profit requirements;
  - Vesting Comments  
OP reiterated that the proposed amendments will only apply to IZ conversions located in zones where IZ already applies; given that set down occurred on March 11, 2021, OP does not see a need for a vesting provision; and
  - Set-Aside Comments  
OP explained that it recommends keeping the set-aside for conversions consistent with existing IZ requirements rather than lowering it, which also keeps the regulations clear and simple.

At the October 7, 2021 continued public hearing, the Commission acknowledged OP for its outreach efforts and its detailed supplemental report addressing all issues raised at the initial hearing. The Commission also expressed disappointment that there was no ANC input submitted to the record. OP reiterated the statements in its supplemental report regarding how the expansion of IZ to non-residential to residential conversions would likely not reduce affordable housing

because the amendments will impact MU zones the most, and in those zones residential FAR is more available because of limits on non-residential FAR.

### **PROPOSED ACTION**

The Commission found persuasive, and concurred with, OP's recommendations that the Commission adopt the Petition, particularly:

OP's conclusion that the decision to pursue a conversion is a business decision where a property owner considers how to maximize land value given potential costs, revenues, and profit requirements. Further, when an existing non-residential use is no longer viable, a property owner has several options to ensure the best use of the land, including retaining existing non-residential uses or converting to residential uses.

Since no ANC filed a response to the Petition as advertised in the public hearing notice, there was nothing to which the Commission could give great weight at proposed action.

At the conclusion of the October 7, 2021 continued public hearing, the Commission voted to take **PROPOSED ACTION** to:

- Adopt the Petition; and
- Authorize the publication of a Notice of Proposed Rulemaking (NOPR).

**VOTE (October 7, 2021): 4-0-1** (Peter A. Shapiro, Anthony J. Hood, Robert E. Miller, and Peter G. May to **APPROVE**; Architect of the Capitol Representative, not present, not voting)

### **National Capital Planning Commission (NCPC)**

The Commission referred the proposed amendment to the NCPC on October 8, 2021, for the thirty (30)-day review period required by Section 492(b)(2) of the District Charter (Dec. 24, 1973, Pub. L. 93-198, title IV, § 492(b)(2)); D.C. Official Code 6-641.05 (2018 Repl.).

NCPC filed a November 4, 2021 report, stating that NCPC had determined that the text amendments to Subtitle C-Inclusionary Zoning XL, Phase 2 would not be inconsistent with the Federal Elements of the Comprehensive Plan for the National Capital, nor would it impact any other identified federal interest.

OZ published a Notice of Proposed Rulemaking (NOPR) in the November 5, 2021 *D.C. Register* (68 DCR 011817 *et seq.*).

Prior to its December 16, 2021 public meeting, the Commission received one comment from a community organization in response to the NOPR. The comments were in support of the Petition, but they urged the Commission to take far more comprehensive and aggressive action to better meet the city's growing income divide and affordable housing deficit by:

- Increasing the IZ set aside requirements for the percentage of affordable units produced as they have remained unchanged since enactment in 2006; and
- Lifting the IZ exemption from the central core of the District as a new way to use IZ to create additional affordable housing.

## **FINAL ACTION**

### ***“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, and concurs with, OP’s recommendations that the Commission adopt the Petition, as published in the NOPR.

### ***“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 submitted comments in response to the NOPR, there is nothing to which the Commission can give great weight.

The Commission acknowledged the comment in response to the NOPR encouraging additional amendments to the Inclusionary Zoning program and its intent to address the issues raised in the near future.

At its December 16, 2021 public meeting, the Zoning Commission voted to take **FINAL ACTION** to:

- Adopt the Petition; and
- Authorize the publication of a Notice of Final Rulemaking.

**Vote (December 16, 2021): 4-0-1** (Peter A. Shapiro, Robert E. Miller, Anthony J. Hood, Peter G. May, and to **APPROVE**; Architect of the Capitol Representative, Joseph S. Imamura, not voting, having not participated.)

The following amendments to the Zoning Regulations are hereby adopted:

## TEXT AMENDMENTS

**Subsections 1001.2, 1001.3, 1001.4, and 1001.6 of § 1001, APPLICABILITY, of Chapter 10, INCLUSIONARY ZONING, of Subtitle C, GENERAL RULES, are proposed to be amended, to read as follows:**

1001.2 Except as provided in Subtitle C § 1001.5, the requirements of this chapter shall apply to, and the modifications to certain development standards and bonus density of this chapter shall be available to, developments in zones in which this chapter is identified as applicable as specified in the individual subtitles of this title; provided the development falls into one of the following categories:

(a) A “Mandatory Inclusionary Development” – a development that:

(1) Proposes to create ten (10) or more new dwelling units, including dwelling units located in a cellar or penthouse, by:

(i) Adding new gross floor area beyond that existing at the time of the building permit application;

(ii) Changing the use of existing gross floor area to the “Residential” use category of Subtitle B § 200.2; or

(iii) A combination of (i) and (ii);

(2) Consists of a residential building that has penthouse habitable space pursuant to Subtitle C § 1500.11; or

(3) An “IZ Plus Inclusionary Development” – a development located on property that was the subject of a map amendment that increased the allowable FAR pursuant to Subtitle X § 502 and as indicated with an “IZ+” on the Zoning Map and that meets one of the categories of subparagraphs (1) through (2) of this paragraph 1001.2(a); or

(b) A “Voluntary Inclusionary Development” – any single household ...<sup>2</sup>

1001.3 The number of dwelling units and the gross floor area used pursuant to Subtitle C § 1001.2(a) to establish the applicability of the IZ requirements, and associated IZ modifications, shall be based on:

(a) The new dwelling units and the gross floor area constructed or converted to the “Residential” use category of Subtitle B § 200.2 concurrently or in

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

phases, on a single lot, on contiguous lots, or on lots divided by an alley, that were under common ownership, control, or affiliation within one (1) year prior to the application for the first building permit; and

- (b) All building permits issued for the development within a three (3)-year period, starting from the issuance of the first building permit for the development.

1001.4 For existing buildings that become subject to the requirements of this chapter pursuant to Subtitle C § 1001.2, the requirements of Subtitle C §§ 1003.1 through 1003.4 and the available modifications to applicable development standards shall apply as follows:

- (a) For any development described by Subtitle C §§ 1001.2(a), to both the existing and new gross floor area if the development:
  - (1) Utilizes the bonus density provided by Subtitle C § 1002; or
  - (2) Results in an increase of fifty percent (50%) or more in the building's existing gross floor area;
- (b) For developments described by Subtitle C §§ 1001.2(a)(1)(i) or (a)(3), to only the new gross floor area if the development:
  - (1) Does not utilize the bonus density provided by Subtitle C § 1002; and
  - (2) Does not result in an increase of fifty percent (50%) or more in the building's existing gross floor area;
- (c) For developments described by Subtitle C § 1001.2(a)(1)(ii), to only the existing gross floor area for which the use is changed to the "Residential" use category of Subtitle B § 200.2 if the development:
  - (1) Does not utilize the bonus density provided by Subtitle C § 1002; and
  - (2) Does not result in an increase of fifty percent (50%) or more in the building's existing gross floor area; and
- (d) For developments described by Subtitle C §§ 1001.2(a)(1)(iii), to the portion of the existing gross floor area for which the use is changed to the "Residential" use category of Subtitle B § 200.2 as well as to the new gross floor area if the development:

- (1) Does not utilize the bonus density provided by Subtitle C § 1002; and
- (2) Does not result in an increase of fifty percent (50%) or more in the building's existing gross floor area.

...

1001.6 The requirements of this chapter shall not apply to:

- (a) Any development subject to a mandatory affordable housing requirement that exceeds the requirements of this chapter as a result of District of law or financial subsidies ... ; provided:
  - (1) The development shall set aside, for so long as the project exists, affordable dwelling units (Temporarily Exempt Inclusionary Units) in accordance with the minimum income standards of Subtitle C § 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 § 1003 for the zone in which the development is located and these Temporarily Exempt Inclusionary Units shall be identified on plans submitted for building permit;
  - (2) The Temporarily Exempt Inclusionary Units shall be reserved ...
  - (3) The Temporarily Exempt Inclusionary Units shall be sold or rented in accordance with the Inclusionary Zoning Program (as defined by the IZ Act) upon the expiration of the affordable housing requirements of the District law or financial subsidies administered by DHCD, DCHFA, or DCHA;
  - (4) The requirements set forth in subparagraphs (1), (2), and (3) of this paragraph, shall be stated as declarations, accompanied by plans identifying the Temporarily Exempt Affordable Inclusionary Units, within a covenant running with the land for the benefit of the District of Columbia ...

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The text amendments shall become effective upon publication of this notice in the *D.C. Register*, that is on December 31, 2021.

  
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**ANTHONY J. HOOD**  
**CHAIRMAN**  
**ZONING COMMISSION**

  
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**SARA A. BARDIN**  
**DIRECTOR**  
**OFFICE OF ZONING**