

**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF PROPOSED RULEMAKING**

Z.C. Case No. 22-01

Office of Planning

(Text Amendments to Subtitle G, Chapter 2 (General Development Standards for MU Zones), Subtitle H, Chapter 2 (General Development Standards for NC Zones), and Subtitle I, Chapter 2 (General Development Standards for D Zones), to permit Matter-of-Right Residential Use of Non-Residential Buildings Built Prior to 01/01/2022 that Exceed Development Standards for Residential Use)

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 Subtitles G, H, and I 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 proposed text at the end of this notice.

SETDOWN

On January 2, 2022, the Office of Planning (OP) filed a petition (OP Set down and Prehearing Report) to the Commission proposing text amendments that would permit existing non-residential buildings that do not conform to some or all of the residential development standards to convert to residential use as a matter-of-right in the MU, NC, and D-3 through D-8 zones, if the building is not enlarged and was built prior to January 1, 2022. (Exhibit [Ex.] 2.)

OP's Set down and Prehearing Report provided background information explaining how the proposed amendments came about. OP stated that the Zoning Regulations prior to 1978 generally permitted higher floor-area-ratios (FAR) for nonresidential uses and lower FARs for residential uses. A text amendment in 1978 switched the FAR requirements by generally prescribing higher FARs for residential uses and lower FARs for nonresidential uses. A provision was added in the Zoning Regulations regulating the conversion of existing gross floor area to residential use:

For a building or structure in existence with a valid Certificate of Occupancy prior to November 17, 1978, or for which an application for a building permit was filed prior to November 17, 1978, a conversion of non-residential GFA to residential GFA, even if in excess of otherwise permitted FAR, shall be permitted.

The intent of the provision was to allow an office building (for example) to convert to an apartment house even if the FAR for the residential use exceeded what was permitted prior to the FAR regulations being changed in 1978. The Zoning Administrator has interpreted this provision to also apply to other residential development standards, such as lot occupancy and yards. For instance, an office building built before November 17, 1978 that occupies one hundred percent (100%) of its lot may convert to residential use as a matter-of-right without having to comply with the residential lot occupancy development standard, which is lower than one hundred percent (100%). However, for non-residential buildings existing after November 17, 1978, a residential conversion

would need to either comply with the residential lot occupancy development standard by demolishing part of the building or request relief from the Board of Zoning Adjustment. This post-1978 situation obstructs the intent and purpose of the recent amendments in Z.C. Case 21-05, which applied an Inclusionary Zoning (“IZ”) requirement to non-residential buildings that convert floor area to residential use in most mixed-use zones. (Ex. 2.)

For these reasons, OP proposes these amendments to:

- Codify the existing Zoning Administrator interpretation to allow an existing legally built non-residential building to convert to residential use even if the building does not comply with some or all of the residential development standards;
- Change the existing vesting date from November 17, 1978 to January 1, 2022; and
- Continue to require any new enlargement to an existing building to comply with the residential development standards. (Ex. 2.)

At its January 13, 2022 public meeting, the Commission voted to grant OP’s request to set down the petition for a public hearing.

On June 6, 2022, OP submitted a report (“OP Hearing Report”) making the following changes to the proposed amendments:

- Adding language to apply the amendments to the D-1-R zone and the D-2 zone; and
- Adding language to clarify that the following residential development standards would not apply to residential conversions in the applicable zones, if the building is not enlarged:
 - Courts; FAR; GAR; Height; Lot Occupancy; Yards; Waterfront Setback

NOTICE

Pursuant to Subtitle Z § 502, the Office of Zoning (OZ) sent notice of the June 16, 2022 public hearing on April 14, 2022, and published notice of the public hearing in the April 22, 2022 *D.C. Register* as well as on the calendar on OZ’s website. (Ex. 4-6.)

COMMENTS

Prior to the public hearing, comments/testimony was submitted to the record from the Committee of 100 on the Federal City (Committee of 100), the DC Office of the Attorney General (OAG), Foulger Pratt Development, and the Service Employees International Union 32BJ (SEIU).

On January 12, 2022, the Committee of 100 submitted testimony to the record. (Ex. 3.) The Committee of 100 testimony argued that the proposed amendments will benefit developers without mandating the creation of affordable housing, and more planning is needed before adopting this policy change. Their comments focus primarily on their support for the proposed amendments in another text amendment case, Z.C. Case No. 21-23, which proposes amendments to apply IZ to the downtown zones.

On June 3, 2022, OAG submitted comments to the record. (Ex. 7.) OAG’s comments stressed the need for residential conversions to require some additional IZ set aside to mandate the creation of affordable housing as these conversions occur, consistent with the Comprehensive Plan’s focus on addressing the District’s housing crisis. OAG submitted revised text suggesting the following additions to the proposed amendments:

- An additional IZ set aside requirement for these conversions depending on whether the converted Gross Floor Area (GFA) complies with the applicable development standards.
 - For GFA that complies with standards:
 - OAG proposed a 2% additional IZ set-aside to reflect that the cost of conversion is less than the cost of building a new building.
 - For GFA that does not comply with the applicable development standards:
 - OAG proposed a 20% set-aside to reflect that this square footage would not be permitted under the Zoning Regulations for a new building;
- Providing for special exception relief from the additional IZ set aside requirement where a property owner demonstrates that the additional IZ set aside renders the conversion financially unviable despite the owner's best efforts to obtain financial subsidy for the additional IZ set aside.

As further justification for its proposed revisions to the amendments, OAG also cited and attached an OP Segregation Report dated November 2020 (Ex. 7A), in which OP acknowledges that the concentration of poverty east of the river is the result of long-standing discrimination and lack of affordable housing in the downtown areas.

On June 14, 2022, Foulger Pratt Development submitted comments in support of the amendments to the record. (Ex. 9.) Foulger Pratt Development's comments stated that it is currently working on multiple residential conversion projects and the proposed amendments would positively impact both the opportunity for residential conversions to occur and the District's housing supply.

On June 15, 2022, SEIU submitted comments in opposition to the amendments to the record. (Ex. 10.) SEIU's comments expressed concern that the proposed amendments would allow for matter-of-right residential conversions and remove the opportunity for community engagement among residents, the District, and developers to ensure that conversions do not erode job standards that make living in the District unaffordable for its members. SEIU stressed that requiring requests for zoning relief is one way through which community members can provide meaningful input to create good jobs, including service jobs, during the redevelopment process.

No other comments were filed to the record in response to the public hearing notice.

PUBLIC HEARING

At the June 16, 2022 public hearing, OP presented the petition and responded to questions from the Commission. OP stated that the proposed amendments are straight-forward, and their intent is to codify the Zoning Administrator's interpretation of the Zoning Regulations and reduce procedural burdens not to provide a windfall to developers as suggested. Both OP and the Commission noted that by right residential conversions are currently allowed. OP clarified and reiterated that the proposed amendments would allow by right residential conversions in the applicable zones for buildings built prior to January 1, 2022, where the building was not enlarged and would also not require compliance with certain express residential development standards.

OAG testified at the public hearing further explaining the rationale and justification for its suggested revisions to the proposed amendments. OAG testified that the amendments as proposed are a boon to developers and would not increase affordable housing or address the District's affordable housing crisis. The Commission questioned OAG about whether any financial or economic analyses were completed by OAG to support its suggested additional IZ set aside requirement. OAG explained that it did not perform any analyses but did include an option for special exception relief from the additional set aside requirement to account for circumstances where the requirement would result in a financially unviable residential conversion.

Allison Prince of Goulston & Storrs law firm testified in support of the amendments as proposed. Ms. Prince stated that the proposed amendments would provide clarity because currently matter-of-right residential conversions apply to buildings built before November 17, 1978, and the rules require an existing building that converts after this date to get approval for legally built portions of the building that do not comply with the residential development standards. Ms. Prince testified that by right residential conversions are not a windfall to developers because they result in less building square footage and lower rents and are only considered by developers when non-residential use is no longer an option. Ms. Prince also stated that the cost difference between a new build and a retrofit is typically not substantial.

OP REPORTS

OP's Reports (Ex. 2, 8) determined that the proposed amendments would not be inconsistent with the Comprehensive Plan and would further the housing priorities of the District. OP stated that varying Comprehensive Plan policies work together to support new ways to provide additional housing and to distribute additional mixed income housing more equitably across the entire District. Also, many buildings with the potential to be converted from non-residential to residential use are located in high-cost areas and the proposed amendments would help increase the supply of housing in these areas without the need for additional zoning relief. The proposed amendments would further Comprehensive Plan policy objectives, particularly with respect to the following policies within the Citywide Housing Element as noted below.

Policy H-1.1.1: Private Sector Support

Encourage or require the private sector to provide both new market rate and affordable housing to meet the needs of present and future District residents at locations consistent with District land use policies and objectives. (10-A DCMR § 503.3.)

Policy H-1.1.2: Production Incentives

Provide suitable regulatory, tax, and financing incentives to meet housing production goals, prioritizing affordable housing production in support of the targets in Policy H-1.2.2. These incentives should continue to include zoning regulations that permit greater building area for commercial projects that include housing than for those that do not, and relaxation of height and density limits near transit. Strongly encourage incentives and strategies that result in the production of more deeply affordable housing, such as the use of income averaging across a range of affordable housing income levels. (10-A DCMR § 503.4.)

Policy H-1.1.3: Balanced Growth

Strongly encourage the development of new housing, including affordable housing, on surplus, vacant, and underused land in all parts of Washington, DC. Ensure that a sufficient supply of land is planned and zoned to enable the District to meet its long-term housing needs, including the need for low- and moderate density single-family homes, as well as the need for higher-density housing. (10-A DCMR § 503.5.)

Policy H-1.1.8: Production of Housing in High-Cost Areas

Encourage development of both market rate and affordable housing in high-cost areas of the District, making these areas more inclusive. Develop new, innovative tools and techniques that support affordable housing in these areas. Doing so increases costs per unit but provides greater benefits in terms of access to opportunity and outcomes. (10-A DCMR § 503.10.)

Policy H-1.2.2: Production Targets

Consistent with the Comprehensive Housing Strategy, work toward a goal that one-third of the new housing built in Washington, DC from 2018 to 2030, or approximately twenty thousand (20,000) units, should be affordable to persons earning eighty percent (80%) or less of the area-wide MFI. Newly produced affordable units shall be targeted toward low-income households in proportions roughly equivalent to the proportions shown in Figure 5.8. (10-A DCMR § 504.8.)

Racial Equity

In applying the standard of review applicable to proposed amendments, the Comprehensive Plan requires the Commission to do so through a racial equity lens. (10-A DCMR § 2501.8.) Consideration of equity is intended to be based on the policies of the Comprehensive Plan, and part of the Commission's consideration of whether the proposed amendments are "not inconsistent" with the Comprehensive Plan, rather than a separate determination about a zoning action's equitable impact.

OP concluded that when evaluated through a racial equity lens, the proposed text amendments will reduce barriers to converting existing non-conforming non-residential buildings to residential use. Such conversions could increase the total supply of housing units in the District, which could help alleviate the pressure on housing costs overall. In addition, the text amendment will facilitate the provision of new affordable housing by applying IZ to conversions in those zones where IZ applies. Making room for additional housing, including affordable housing, has the potential to benefit non-white populations who on average have lower incomes than white residents.

"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 analyses in its reports and its recommendation that the Commission take proposed action to adopt the proposed amendments. The Commission acknowledges the comments to the record expressing concern about increasing affordable housing and the position that affordable housing goals would be furthered by imposing

an additional IZ set aside requirement with these amendments. However, the Commission is persuaded by OP's conclusion that the amendments as originally proposed are straightforward, would provide clarity, and would not be inconsistent with the Comprehensive Plan or its housing policies, specifically. Further, were the Commission persuaded otherwise, it would expect financial and economic analyses/modeling from OP before the imposition of policy changes involving additional IZ set aside requirements. Moreover, the Commission believes many of the comments and concerns that were expressed in this case regarding affordable housing goals and IZ are more directly related to Z.C. Case No. 21-23 instead of the proposed amendments in this case.

“Great Weight” to the Written Report of the ANC

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 as advertised in the public hearing notice, there is nothing to which the Commission can give great weight.

PROPOSED ACTION

At the conclusion of the June 16, 2022, the Zoning Commission voted to take **PROPOSED ACTION** to:

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

VOTE (June 16, 2022): **4-0-1** (Joseph S. Imamura, Anthony J. Hood, Robert E. Miller, and Peter G. May to **APPROVE**; 3rd Mayoral Appointee seat vacant, not voting)

Final rulemaking action shall be taken not less than thirty (30) days from the date of publication of this notice of proposed rulemaking in the *D.C. Register*.

All persons desiring to comment on the subject matter of this proposed rulemaking action should file comments in writing no later than thirty (30) 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 4th Street, N.W., Suite 200-S, Washington, D.C. 20001; by e-mail to 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. Copies of this proposed rulemaking action may be obtained at cost by writing to the above address.

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>.

PROPOSED TEXT AMENDMENT

The proposed amendments to the text of the Zoning Regulations are as follows) text to be deleted is marked in ~~bold and strikethrough~~ text; new text is shown in **bold and underline** text).

I. Proposed Amendment to Subtitle G, MIXED USE (MU) ZONES

Section 200, GENERAL PROVISIONS, of Chapter 2, GENERAL DEVELOPMENT STANDARDS FOR MU ZONES, of Subtitle G, MIXED USE (MU) ZONES, is proposed to be amended by revising §§ 200.1 and 200.2 and adding new § 200.3, to read as follows:

200 GENERAL PROVISIONS

200.1 The provisions of this chapter apply to all MU zones except as may be modified or otherwise provided for in a specific zone **or as provided in Subtitle G § 200.3.**

200.2 When modified or otherwise provided for in the development standards for a specific zone, the modification or zone-specific standard shall apply, **except as provided in Subtitle G § 200.3.**

200.3 A building or structure in existence with a valid Certificate of Occupancy prior to January 1, 2022, may convert existing gross floor area to the "Residential" use category of Subtitle B § 200.2 as a matter-of-right even if the building or structure or portion thereof to be converted does not comply with the following development standards of this subtitle for residential use:

(a) Courts;

(b) Floor Area Ratio (FAR);

(c) Green Area Ratio (GAR);

(d) Height;

(e) Lot Occupancy;

(f) Waterfront Setback; or

(g) Yards.

Section 201, DENSITY – FLOOR AREA RATIO (FAR), of Chapter 2, GENERAL DEVELOPMENT STANDARDS FOR MU ZONES, of Subtitle G, MIXED USE (MU) ZONES, is proposed to be amended by deleting in its entirety § 201.1, to read as follows:

~~201 DENSITY FLOOR AREA RATIO (FAR)~~

~~201.1 For a building or structure in existence with a valid Certificate of Occupancy prior to November 17, 1978, or for which an application for a building permit was filed prior to November 17, 1978, a conversion of non-residential GFA to residential GFA, even if in excess of otherwise permitted FAR, shall be permitted. [DELETED]~~

II. Proposed Amendment to Subtitle H, NEIGHBORHOOD MIXED USE (NC) ZONES

Section 200, GENERAL PROVISIONS, of Chapter 2, GENERAL DEVELOPMENT STANDARDS, of Subtitle H, NEIGHBORHOOD MIXED USE (NC) ZONES, is proposed to be amended by revising §§ 200.1 and 200.2 and adding new §§ 200.3 and 200.4, to read as follows:

200 GENERAL PROVISIONS

200.1 The provisions of this chapter apply to all zones except as may be modified or otherwise provided for in a specific zone or as provided in Subtitle H § 200.3.

200.2 When modified or otherwise provided for in the development standards for a specific zone, the modification or zone-specific standard shall apply, except as provided in Subtitle H § 200.3.

200.3 A building or structure in existence with a valid Certificate of Occupancy prior to January 1, 2022, may convert existing gross floor area to the “Residential” use category of Subtitle B § 200.2 as a matter-of-right even if the building or structure or portion thereof to be converted does not comply with the following development standards of this subtitle for residential use:

(a) Courts;

(b) Floor Area Ratio (FAR);

(c) Green Area Ratio (GAR);

(d) Height;

(e) Lot Occupancy; or

(f) Yards.

200.4 Notwithstanding Subtitle H § 200.3, the requirements for ground floor designated uses of Subtitle H § 1101 shall apply.

Section 201, DENSITY – FLOOR AREA RATIO (FAR), of Chapter 2, GENERAL DEVELOPMENT STANDARDS, of Subtitle H, NEIGHBORHOOD MIXED USE (NC) ZONES, is proposed to be amended by deleting in its entirety § 201.4, to read as follows:

201 DENSITY – FLOOR AREA RATIO (FAR)

201.1 The maximum permitted floor area ratio (FAR)...

...

~~**201.4 For a building or structure in existence with a valid Certificate of Occupancy prior to November 17, 1978, or for which an application for a building permit was filed prior to November 17, 1978, a conversion of non-residential GFA to residential GFA, even if in excess of otherwise permitted FAR, shall be permitted, provided that requirements for ground floor designated uses of Subtitle U §1101 are provided. [DELETED]**~~

III. Proposed Amendment to Subtitle I, DOWNTOWN ZONES

Section 102, GENERAL PROVISIONS, of Chapter 1, INTRODUCTION TO DOWNTOWN (D) ZONES, of Subtitle I, DOWNTOWN ZONES, is proposed to be amended by revising §§ 102.3 and 102.5 and adding new §§ 102.6 and 102.7, to read as follows:

102 GENERAL PROVISIONS

102.1 Unless otherwise noted in this subtitle...

...

102.3 Unless otherwise stated **or as provided in Subtitle I § 102.6**, the requirements, restrictions, and incentives of this subtitle apply to all new buildings and to existing buildings where any additions, alterations, or repairs made within a consecutive twelve (12)-month period exceed one hundred percent (100%) of the assessed value of the building as set forth in the records of the Office of Tax and Revenue as of the date of the building permit application.

...

102.5 Where there are conflicts between regulations within this subtitle, the stricter regulations apply, **except as provided in Subtitle I § 102.6**.

102.6 **A building or structure in existence with a valid Certificate of Occupancy prior to January 1, 2022, may convert existing gross floor area to the “Residential” use category of Subtitle B § 200.2 as a matter-of-right even if the building or structure or portion thereof to be converted does not comply with the following development standards of this subtitle for residential use:**

(a) Courts;

(b) Floor Area Ratio (FAR);

(c) Green Area Ratio (GAR);

(d) Height; or

(e) Yards.

102.7 **Notwithstanding Subtitle I § 102.6, the requirements for ground floor designated uses of Subtitle I, Chapter 6, Location-Based Regulations for Downtown Sub-Areas and Designated Street Segments, shall apply.**

Section 200, DENSITY – FLOOR AREA RATIO (FAR), of Chapter 2, GENERAL DEVELOPMENT STANDARDS FOR DOWNTOWN (D) ZONES, of Subtitle I, DOWNTOWN ZONES, is proposed to be amended by deleting in its entirety § 200.7, to read as follows:

200.7 **Within the D-3 through D-8 zones, for a building or structure in existence with a valid Certificate of Occupancy prior to November 17, 1978, or for which an application for a building permit was filed prior to November 17, 1978, a conversion of non-residential GFA to residential GFA, even if in excess of otherwise permitted FAR, shall be permitted, provided that requirements for ground floor designated uses of Subtitle I § 601 are provided. [DELETED]**