



GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL
Karl A. Racine

Z.C. Case No. 22-11

ALEXANDRA CAIN
EQUITABLE LAND USE SECTION
PUBLIC HEARING – NOVEMBER 14, 2022

OAG's Concern

The PUD's affordable housing proffer is insufficient because it:

- Fails to provide the same ratio of affordable housing that would be required as a matter of right project for the same density (Subtitle X § 300.1(a)); and therefore
- Fails to satisfy the PUD requirement that the application proffer public benefits that:
 - Balance the Application's requested development incentives/flexibility - 60ft of height and 132,042 sf of density over what is permitted as a matter of right in the existing zone; and
 - Outweigh the adverse impacts on the surrounding area resulting from the PUD's added density and height and exacerbation of economic and cultural displacement pressures (Subtitle X §§ 304.3-304.4).

OAG's Recommendations

Increase IZ set aside to ensure PUD is superior to matter-of-right:

- IZ proffer *at least* equivalent to the IZ+ formula
- Would result in a **21% IZ set aside or approximately 42 affordable units**
- **This is 12 more units than would be provided by the current 15% proffer**

I. The PUD Should Provide More Significant Affordable Housing Benefits

A PUD Must Exceed Matter-of-Right Requirements

The Zoning Regulations require that:

“[A] PUD ... results in a project *superior* to what would result from the matter-of-right standards” (Subtitle X § 300.1, emphasis added); and that

“*public benefits are superior features* of a proposed PUD that benefit the surrounding neighborhood or the public in general to a *significantly greater extent* than would likely result from development of the site under the matter-of-right provisions of this title.” (Subtitle X § 305.2, emphases added)

A PUD Related Map Amendment = PUD Flexibility that Must Be Balanced

Subtitle X § 300.4 - *A PUD application may include a related zoning map amendment. A PUD-related zoning map amendment is valid only in combination with and contingent upon a project being built and operated under the conditions of a PUD approval...*

Subtitle X § 303.4 - *The twenty percent (20%) PUD related increase in density permitted under Subtitle X § 303.3 may be calculated using the matter-of-right density and the IZ bonus density when the PUD includes a full allocation of Inclusionary Zoning units consistent with Subtitle C, Chapter 10.*

Subtitle X § 303.12 - *A PUD-related zoning map amendment shall be considered flexibility against which the Zoning Commission shall weigh the benefits of the PUD.*

Updated CP focus on Zoning and PUDs

- “The PUD process is not to be used to circumvent the intent and purposes of the Zoning Regulations or result in an action inconsistent with the Comprehensive Plan” (CP § 224.7)
- Established that the *only* “High-Priority” PUD Benefits are (CP § 224.9):
 - Affordable Housing – New or Preserved
 - Anti-Displacement Measures

(CP Framework Element § 224, August 27, 2020)

Not All PUD Benefits are Created Equal ...

Section 224.9 of the Comprehensive Plan states that:

- A PUD's public benefits “should respond to critical issues facing the District as identified in the Comprehensive Plan and through the PUD process itself.”
- Given the “acute need to preserve and build affordable housing” and “prevent displacement,” the following should be considered “**high-priority public benefits**” in the evaluation of residential PUDs:
 - **Production of new affordable units above and beyond existing legal requirements** or a net increase in the number of affordable units that exist on-site;
 - Preservation of units made affordable through subsidy, covenant, or rent control, or replacement of such units at the same affordability level and similar household size;
 - The minimizing of unnecessary off-site relocation through the construction of new units before demolition of existing occupied units; and
 - Granting existing residents a right to return to new on-site units at affordability levels similar to or greater than existing units.”

Recent PUDs: Same IZ Proffer for Vastly Different PUD Relief

Requested PUD Incentives – Density, Height & Relief	IZ Proffer
<p>Additional 286,555 sf or 5.0 FAR (Total = 458,644 sf/8.0 FAR)</p> <p>Additional 80 ft height (130 ft total)</p> <ul style="list-style-type: none"> • Map Amendment • Additional Relief - Yards 	<p>15%</p>
<p>Additional 62,484 sf or 0.2 FAR (Total = 766,109sf/4.9FAR)</p> <p>Additional 24 ft height (84 ft total)</p> <ul style="list-style-type: none"> • Map Amendment • Additional Relief - Lot occupancy, yards 	<p>15%</p>
<p>Additional 133,528 sf or 3.0 FAR (Total = 286,038/7.2 FAR)</p> <p>No additional height (90ft total)</p> <ul style="list-style-type: none"> • Map Amendment • Additional Relief - Yards 	<p>15%</p>
<p>Additional 87,701sf or 1.92 FAR (Total = 189,680 sf/4.92 FAR)</p> <p>Additional 46.8 ft height (96.8 ft total)</p> <ul style="list-style-type: none"> • Map Amendment • Additional Relief - setbacks, lot width & area, lot occupancy, yards, courts, street frontage, parking 	<p>15%</p>
<p>Additional 132,042 sf or 5.58 FAR (Total = 203,034 sf/8.58 FAR)</p> <p>Additional 60ft height (110 ft total)</p> <ul style="list-style-type: none"> • Map Amendment • Additional Relief - Lot occupancy, yards 	<p>15%</p>

II. IZ+ Should Establish the Minimum IZ Set- Aside

IZ+ (July 23, 2021) – Increased Density Requires Increased IZ

“OP anticipates that requests for private map amendment applications will increase at properties where the draft FLUM [Future Land Use Map] increases the land use designation to a higher category. These map amendments would likely result in properties being “up-zoned” to a higher density than currently permitted. An expanded IZ set-aside scale would establish a requirement for more affordable housing when a zoning map amendment results in greater residential density permitted on a site than allowed under the current zone. **The intent is to produce a significant amount of affordable housing when residential density is increased through a map amendment.**”

(Z.C. Case No. 20-02, Ex. 6 - OP Set Down Report)

Matter of Right Equivalent = Map Amendment to PUD zone

- IZ+ intended to capture increase in density for increased affordable housing, particularly when resulting from an “up-FLUMing” increasing the land use designation to a higher density category.
- The PUD site was up-FLUMed from Low Density Commercial to Medium Density Commercial/Medium Density Residential in the fall of 2021 (Amendment 2103), increasing the maximum matter-of-right density from 2.5 to 6.0 FAR.
- The PUD also provides additional density and so should provide at least the equivalent IZ Set-Aside percentage as a map amendment for the same square footage – especially because the only “**high-priority**” PUD benefits are affordable housing & anti-displacement measures (CP § 224.9)

Minimum PUD proffer should be 21%

= equivalent of IZ+ formula

to all square footage above maximum allowed under existing MU-12 zone

IZ+ Option 1: 70% of bonus density (IZ and PUD = 61,050 sf) over maximum by-right density of proposed MU-10 zone = **42,735 sf**

IZ+ Option 2: 18%* of residential GFA (203,034 sf) = 36,546 sf**

*based on ~243% increase over maximum by-right density of existing MU-12 zone (59,260 sf or 2.5 FAR) – Subtitle C §1003.5(b) & Subtitle X § 502.4

** Applicant's residential GFA + Bay Projections GSF (196,435 sf) and Habitable Penthouse space (6,599 sf) – [Ex. 69A1](#) at Sheet 004

IZ set-aside by “layer”

	<u>Density per layer</u>	<u>IZ set-aside formula</u>	<u>IZ set-aside per layer</u>	<u>IZ set-aside as % of added density per layer</u>
PUD Density Utilized (MU-10) [Includes 8,195 sf of residential GFA, not included in FAR calculations]	32,653 sf 1.38 FAR (203,034 sf** or ~8.58 FAR total)	IZ+ Option 1: 70% of bonus density (IZ and PUD = 2.58 FAR = 61,050 sf) of proposed zone = 42,735 sf IZ+ Option 2: 18% of residential GFA (203,034 sf) = 36,546 sf	12,066 sf (42,735 sf – 30,669 sf MA + MoR IZ set-aside)	37% of PUD bonus density (32,653 sf or 1.38 FAR) = 21% of 203,034 sf total
Map Amendment (MU-12 → MU-10) 3.0 FAR → 7.2 FAR	99,389 sf 4.2 FAR (IZ) (170,381 sf or 7.2 FAR total)	IZ+ Option 1: 70% of bonus density (IZ = 1.2 FAR = 28,397 sf) of proposed zone: = 19,878 sf IZ+ Option 2: 18% of residential GFA (170,381 sf) = 30,669 sf	21,795 sf (30,669 sf – 8,874 sf MoR IZ set-aside)	22% of MA added density (99,389 sf or 4.2 FAR)
Matter-of-Right (MU-12)*	70,992 sf 3.0 FAR (IZ)	Option 1: 75% of bonus density (IZ = 0.5 FAR = 11,832 sf) = 8,874 sf Option 2: 10% of residential GFA = 7,099 sf	8,874 sf (Ex. 69, at 2)	12.5% of 70,992 sf of residential GFA (3.0 FAR)

* Applicant’s Public Benefits Analysis, [Ex. 69E](#) at p.2 (Note the Applicant’s statement included a typo as to the sf amount of 75% bonus density).

** Applicant’s residential GFA + Bay Projections GSF (196,435 sf) and Habitable Penthouse space (6,599 sf) – [Ex. 69A1](#) at Sheet 004

Application's Current IZ Proffer is Less than What a Map Amendment Would Require

- Application's current proffer of 15% or 30,455 sf is **LESS** than the 30,669 sf that would be required under a map amendment to the MU-10 zone which would provide less height and density.
- While providing less IZ, the Application is gaining an additional 32,653 sf or 1.38 FAR over a map amendment through the PUD.

OAG Recommends Minimum PUD proffer of 21%

~21% of 203,034 sf of total residential GFA
= **12,280 sf** more than Applicant's current 15% proffer
(30,455 sf)
= approximately **12 additional IZ units**

Application's Proffered Public Benefits

The Application's public benefits package includes a number of items that, while positive, should not factor into the Commission's determination of whether the PUD's public benefits outweigh the requested development incentives and adverse impacts. For example:

- Certain "benefits" are mitigations that cannot be cross-counted as benefits, per Subtitle X § 305.9 – e.g. the Application's transportation benefits which are required conditions of DDOT's approval;
- Certain "benefits" would be required under the matter-of-right provisions – e.g. how much of the green roof is used to satisfy the Green Area Ratio requirements?; and
- Certain "benefits" lack sufficient information to determine whether they exceed what would be required under the matter-of-right provisions.– e.g. the architectural design features.

PUD Public Benefit Requirements

Subtitle X § 305

Subtitle X § 304.3 - *In deciding a PUD application, the Zoning Commission shall judge, balance, and reconcile the relative value of the public benefits and project amenities offered, the degree of development incentives requested, and any potential adverse effects according to the specific circumstances of the case.*

Subtitle X § 305.9 - *Elements or items required as mitigation to potential adverse impacts of the PUD **shall not also be considered as benefits** for the purposes of this section.*

Subtitle X § 305.11 - *The Zoning Commission may not compel an applicant to add to proffered public benefits, but shall deny a PUD application if the proffered benefits do not justify the degree of development incentives requested (including any requested map amendment). Nevertheless, the Zoning Commission may at any time note the insufficiency of the public benefits and suggest how the benefits may be improved.*

Subtitle X § 305.12 - *A project may qualify for approval by being particularly strong in only one (1) or a few of the categories in this section, **but must be acceptable in all proffered categories and superior in many.***

Conclusion

OAG recommends that the Commission should require the Applicant to provide an affordable housing proffer of at least 21%.

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