



OAG TEXT AMENDMENT PETITION TO THE ZONING COMMISSION
Z.C. CASE NO. 21-XX – INCLUSIONARY ZONING APPLICABILITY TO ALL D-ZONES
DECEMBER 2, 2021

PROPOSED TEXT AMENDMENT

The Office of the Attorney General (“OAG”) petitions the Zoning Commission for the District of Columbia (the “**Commission**”) to amend the following provisions of the Zoning Regulations (Title 11 of the DCMR, Zoning Regulations of 2016, to which all citations refer unless otherwise specified):

- Subtitle I §§ 502.3, 516.2, 531.4, 539.2, 547.3, 555.2, 562.3, 569.2

OAG’s [proposed text amendment](#) would create critically needed affordable housing by applying the Inclusionary Zoning (“**IZ**”) regulations of Subtitle C, Chapter 10, to the D-1-R, D-3, D-4-R, D-5, D-5-R, D-6, D-6-R, and D-7 zones (the “**non-IZ D zones**”) in some of the fastest growing parts of the District that are currently exempt from the IZ program and that are located in planning areas that are failing to meet the targets for affordable housing set by the [Mayor’s 2019 Housing Equity Report](#).

OAG requests the following actions to address the current affordable housing crisis identified by the Comprehensive Plan (Title 10A of the DCMR, the “**CP**”, particularly §§ 206, 504) and the Mayor’s 2019 Housing Initiative¹ by ensuring that all pending applications for zoning relief and building permits in these zones provide IZ units, including pending developments that could provide up to 110 affordable units²:

- Take **emergency action** to adopt the proposed text amendment as necessary for the “immediate preservation of the public ... welfare,” as authorized by Section 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.));
- Set the petition for a public hearing;
- Authorize an immediate publication of the 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 notice period requirement of Subtitle Z § 502.1.

JUSTIFICATION

OAG proposes to remove the outdated IZ exemption from non-IZ D zones as a crucial step toward creating the affordable housing called for by the CP and by the Mayor’s 2019 Housing Initiative and Housing Equity Report as a vital step towards addressing the “rising cost of housing [that] is one of the most pressing and critical issues facing the District.” (CP § 206.1).

¹ [Mayor’s Order 2019-036](#) (May 10, 2019).

² Based on the number of residential units proposed in Z.C. Case Nos. 20-14 and 21-12, which would be subject to any regulations that take effect prior to the issuance of building permits per Subtitle A § 301.4.

The Commission originally exempted the non-IZ D zones when it created the IZ program in 2006 as proposed by the Office of Planning (“OP”) to incentivize housing production in the downtown core that then was almost exclusively devoted to commercial and office uses. OP feared that if IZ applied to these zones, developers would choose to construct only commercial and office buildings since these zones could not provide bonus density as “incentives or compensation for inclusionary housing.”³ Yet these areas now include not only the traditional downtown core, but also NOMA and areas in Southwest and Southeast that have seen some of the District’s most intense residential redevelopment⁴ over the 15 years since IZ was launched.

Not only are these non-IZ D zones in areas where residential construction is booming, but they are located in two planning areas that are falling behind the affordable housing targets established by the Mayor’s 2019 Housing Equity Report that are required to be completed by December 2025:

- **Lower Anacostia Near Southwest Area** – as of October 2021 (40% of the 2019-2025 period)
194 affordable units, 3% of the total 5,075 housing units produced
Less than 23% of the target 850 affordable units – 17% short of the pace to be on track
- **Central Washington Area** – as of October 2021 (40% of the 2019-2025 period)
298 affordable units – 14% of the 2,130 total housing units produced
Less than 29% of the target 1,040 affordable units – 11% short of the pace to be on track

This shortfall reflects the overall District performance, with only 26% of the affordable housing goal completed in over 40% of the 84 months between January 2019 and December 2025 – 1,663 units short of the 4,800 units needed to meet the 12,000 affordable unit target by 2025.⁵ This pace – approximately 92 affordable units a month – is a significant slowdown from the roughly 111 affordable units created each month between 2015 and 2018, for a total of 5,352 affordable units over a 48-month period (CP § 206.11).

Beyond the necessity of affordable housing, the stated justification for exempting the non-IZ D zones – fear of preventing residential development in these zones – has been disproven by the more than 7,000 housing units created in these two planning areas since January 2019 alone (not including those built in the previous 13 years following the launch of the IZ program). Had IZ applied to the non-IZ D zones since IZ’s 2006 launch, it would have covered three design review projects in the D-5 zone already approved by the Commission that provided a total of 1,648 housing units, with only 20 affordable units, only 1 of which was required by the Zoning Regulations – vastly less than the approximately 132 affordable units that would have been required if IZ applied to these projects.⁶ An additional project is currently before the Commission, proposing approximately 520 units, none of which will be affordable – instead of the

³ Z.C. Case No. 04-33, [Ex. 20](#) at p. 44-45, 50-52. Testimony from members of the development community echoed these concerns. See Z.C. Case No. 04-33 [July 25, 2005 Transcript](#) at 114, 130, and 159 and the [July 28, 2005 Transcript](#) at 104. See also, Z.C. Case No. 04-33G, [Ex. 8](#) at p.2.

⁴ [DMPED’s “Economic Intelligence Dashboard – Counting the District’s Housing Production.”](#)

⁵ *Ibid.*

⁶ Z.C. Case Nos. [12-09](#), [17-25](#), and 20-14. In [Z.C. Case No. 20-14](#), the applicant voluntarily proffered 19 non-IZ affordable units in addition to the one required by penthouse habitable space requirements.

approximately 42 units that would be required under IZ.⁷ Of the approximately 155⁸ affordable housing units that these four projects could have provided if non-IZ D zones were not exempt from IZ, approximately 83 IZ units were lost because two of these projects have already received building permits and are therefore vested under the exemption for the non-IZ D zones.⁹

OAG’s proposed text amendment, however, would apply to the two outstanding projects¹⁰ in the D-5 zones to produce approximately 91 IZ units, or almost 11% of the affordable housing unit target for the Lower Anacostia Southwest Area in the Mayor’s 2019 Housing Equity Report – since a building permit must comply with the Zoning Regulations in effect at the time of permit issuance (Subtitle A § 301.4). This would require the Commission to take **emergency action**, as requested by OAG, to ensure that these large developments contribute to addressing the District’s affordable housing crisis. The District has already lost a significant number of potential IZ units with this outdated exemption over the past 15 years, and District residents have waited for almost a year since OP publicly told the Commission that it was studying how to apply IZ to the non-IZ D zones.¹¹ Waiting for OP to conclude its study, already six months late (planned for “late spring or early summer” 2021¹²), would allow these two projects to exclude affordable housing units and frustrate the updated CP’s goal to make the District a more inclusive and equitable city with new affordable housing in all neighborhoods throughout the District (CP §§ 201.1, 204.15, 213.6, 219.4, 220.5, 220.7).

Maintaining the exemption for non-IZ D zones contradicts this public goal of equitable distribution of affordable housing by shifting the burden of providing affordable units to projects in neighboring zones subject to the IZ – effectively subsidizing all market-rate residential development in the non-IZ D zones. This disparate impact can be seen most clearly in the IZ-exempt D-5 zones in Southwest and NOMA that abut zones subject to IZ. This is not only unfair to owners of properties subject to IZ that are across a street from a non-IZ D zone, but it also is antithetical to the District’s goals of fostering a diverse and inclusive city. Indeed, OP had recommended against a voluntary IZ program in 2006 on the basis that the requirements should be applied uniformly and consistently across the District.¹³ In adopting the IZ implementation program, the Council of the District of Columbia identified IZ as a key tool to maintain and foster inclusive, mixed-income neighborhoods vital to the District’s strength.¹⁴

CONSISTENCY WITH THE COMPREHENSIVE PLAN

As discussed above, OAG’s proposed text amendment complies with the Zoning Act’s charge that

⁷ [Z.C. Case No. 21-12](#).

⁸ Accounting for the 19 voluntary non-IZ units proffered by the applicant in Z.C. Case No. 20-14.

⁹ Z.C. Case Nos. 17-25 and 12-09.

¹⁰ Z.C. Case Nos. 20-14 and 21-12.

¹¹ Z.C. Case No. 21-02, [Public Meeting Transcript of January 28, 2021](#) at 79.

¹² *Ibid.*

¹³ Z.C. Case No. 04-33, [Ex. 20](#) at 29. OP, based on advice from OAG, concluded that a takings challenge to IZ, even without any bonus density, was unlikely to succeed because of the clear government purpose as expressed by the CP and the limited impact of the IZ regulations, which did not deprive property owners of the full value of property subject to IZ.

¹⁴ [Committee Report on B16-779, Inclusionary Zoning Act of 2006 \(D.C. Law 16-275\)](#).

the zoning regulations “shall not be inconsistent with the comprehensive plan ...[and] shall be designed ... to promote health and the general welfare ... [and the] distribution of population and of the uses of land as would tend to create conditions favorable to health ...[and] prosperity ...” (D.C. Code § 6-641.02). Furthermore, the proposed text amendment would further the following CP policies:

- ***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 Page 19 of 63 opportunity and outcomes. (CP § 503.10)

- ***Action H.1.1.D: Research New Ways to Expand Housing***

Continue research to expand market rate and affordable housing opportunities in Washington, DC, such as expanding existing zoning tools and requirements. Consider a broad range of options to address housing constraints, which could include updating the Height Act of 1910 (a federal law) outside of the L’Enfant Plan area, if it can promote housing production. (CP § 503.13)

- ***Policy H-1.2.1: Low- and Moderate-Income Housing Production as a Civic Priority***

The production and preservation of affordable housing for low- and moderate-income households is a major civic priority, to be supported through public programs that stimulate affordable housing production and rehabilitation throughout all District neighborhoods. (CP § 504.7)

- ***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 20,000 units, should be affordable to persons earning 80 percent 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. (CP § 504.8)

- ***Policy H-1.2.3: Affordable and Mixed-Income Housing***

Focus investment strategies and affordable housing programs to distribute mixed-income housing more equitably across the entire District by developing goals and tools for affordable housing and establishing a minimum percent affordable by Planning Area to create housing options in high-cost areas, avoid further concentrations of affordable housing, and meet fair housing requirements. (CP § 504.9)

- ***Policy H-1.2.11 Inclusive Mixed-Income Neighborhoods***

Support mixed-income housing by encouraging affordable housing in high-cost areas and market rate housing in low-income areas. Identify and implement measures that build in long-term affordability, preferably permanent or for the life of the project, to minimize displacement and achieve a balance of housing opportunities across the District. (CP § 504.18)

- ***Action H-1.2.E: Leveraging Inclusionary Zoning***

Review and consider expansion of the Inclusionary Zoning program as needed to encourage additional affordable housing production throughout the District. Examine and propose greater IZ requirements when zoning actions permit greater density or change in use. Factors supporting a greater requirement may include high-cost areas, proximity to transit stations or

high-capacity surface transit corridors, and when increases in density or use changes from production, distribution, and repair (PDR) to residential or mixed-use. Consider requirements that potentially leverage financial subsidies, such as tax-exempt bonds. (CP § 504.25)

- ***Policy H-1.3.2: Tenure Diversity***

Encourage the production of both renter- and owner-occupied housing, including housing that is affordable at low-income levels, throughout the District. (CP § 505.9)

- ***Action H-1.3.A: Create Tools for the Production and Retention of Larger Family-Sized Units in Multi-Family Housing***

Research land use tools and techniques, including development standards, to encourage the development of residential units that meet the needs of larger families, with a focus on financing affordable units in high-cost areas. (CP § 505.14)

- ***Policy H-1.5.1: Land and Building Regulations***

Ensure the District’s land regulations, including its housing and building codes, zoning regulations, construction standards, and permitting fees, enable the production of housing for all income groups. Avoid regulations that make it prohibitively expensive or difficult to construct housing. (CP § 507.2)

OAG requests that the Zoning Commission set this petition for a proposed text amendment down for a public hearing and is prepared to respond to any questions or concerns of the Commission.

Respectively submitted,

KARL A. RACINE
Attorney General for the District of Columbia

/s/ Maximilian L.S. Tondro
Chief, Land Use Section
D.C. Bar No. 1031033

/s/ Alexandra L. Cain
Assistant Attorney General
D.C. Bar No. 1674308

PROPOSED TEXT AMENDMENT

The proposed revisions 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.

Subsection 502.3 of § 502, DENSITY FLOOR AREA RATIO (FAR) (D-1-R), of Chapter 5 REGULATIONS SPECIFIC TO PARTICULAR DOWNTOWN (D) ZONES, of Subtitle I DOWNTOWN ZONES, is proposed to be amended to read as follows:

502.3 ~~Except for IZ Plus Inclusionary Developments, residential~~ Residential density in the D-1-R zone is ~~not~~ subject to the Inclusionary Zoning requirements ~~or~~ and bonuses of Subtitle C, Chapter 10.

Subsection 516.2 of § 516, DENSITY FLOOR AREA RATIO (FAR) (D-3), of Chapter 5 REGULATIONS SPECIFIC TO PARTICULAR DOWNTOWN (D) ZONES, of Subtitle I DOWNTOWN ZONES, is proposed to be amended to read as follows:

516.2 ~~Except for IZ Plus Inclusionary Developments, residential~~ Residential density in the D-3 zone is ~~not~~ subject to the Inclusionary Zoning requirements ~~or~~ and bonuses of Subtitle C, Chapter 10.

Subsection 531.4 of § 531, DENSITY FLOOR AREA RATIO (FAR) (D-4-R), of Chapter 5 REGULATIONS SPECIFIC TO PARTICULAR DOWNTOWN (D) ZONES, of Subtitle I DOWNTOWN ZONES, is proposed to be amended to read as follows:

531.4 ~~Except for IZ Plus Inclusionary Developments, residential~~ Residential density in the D-4-R zone is ~~not~~ subject to the Inclusionary Zoning requirements ~~or~~ and bonuses of Subtitle C, Chapter 10.

Subsection 539.2 of § 539, DENSITY FLOOR AREA RATIO (FAR) (D-5), of Chapter 5 REGULATIONS SPECIFIC TO PARTICULAR DOWNTOWN (D) ZONES, of Subtitle I DOWNTOWN ZONES, is proposed to be amended to read as follows:

539.2 ~~Except for IZ Plus Inclusionary Developments, residential~~ Residential density in the D-5 zone is ~~not~~ subject to the Inclusionary Zoning requirements ~~or~~ and bonuses of Subtitle C, Chapter 10.

Subsection 547.3 of § 547, DENSITY FLOOR AREA RATIO (FAR) (D-5-R), of Chapter 5 REGULATIONS SPECIFIC TO PARTICULAR DOWNTOWN (D) ZONES, of Subtitle I DOWNTOWN ZONES, is proposed to be amended to read as follows:

547.3 ~~Except for Square 487 and IZ Plus Inclusionary Developments, residential~~ Residential density in the D-5-R zone is ~~not~~ subject to the Inclusionary Zoning requirements ~~or~~ and bonuses of Subtitle C, Chapter 10.

Subsection 555.2 of § 555, DENSITY FLOOR AREA RATIO (FAR) (D-6), of Chapter 5 REGULATIONS SPECIFIC TO PARTICULAR DOWNTOWN (D) ZONES, of Subtitle I DOWNTOWN ZONES, is proposed to be amended to read as follows:

555.2 ~~Except for IZ Plus Inclusionary Developments, residential~~ Residential density in the D-6 zone is ~~not~~ subject to the Inclusionary Zoning requirements ~~or~~ and bonuses of Subtitle C, Chapter 10.

Subsection 562.3 of § 562, DENSITY FLOOR AREA RATIO (FAR) (D-6-R), of Chapter 5 REGULATIONS SPECIFIC TO PARTICULAR DOWNTOWN (D) ZONES, of Subtitle I DOWNTOWN ZONES, is proposed to be amended to read as follows:

562.3 ~~Except for IZ Plus Inclusionary Developments, residential~~ Residential density in the D-6-R zone is ~~not~~ subject to the Inclusionary Zoning requirements ~~or~~ and bonuses of Subtitle C, Chapter 10.

Subsection 569.2 of § 569, DENSITY FLOOR AREA RATIO (FAR) (D-7), of Chapter 5 REGULATIONS SPECIFIC TO PARTICULAR DOWNTOWN (D) ZONES, of Subtitle I DOWNTOWN ZONES, is proposed to be amended to read as follows:

569.2 ~~Except for IZ Plus Inclusionary Developments, residential~~ Residential density in the D-7 zone is ~~not~~ subject to the Inclusionary Zoning requirements ~~or~~ and bonuses of Subtitle C, Chapter 10.

APPENDIX – EXISTING LANGUAGE

Sections 502.3, 516.2, 531.4, 539.2, 547.3, 555.2, 562.3, and 569.2, of Chapter 5, REGULATIONS SPECIFIC TO PARTICULAR DOWNTOWN (D) ZONES, of Subtitle I, DOWNTOWN ZONES

502.3 Except for IZ Plus Inclusionary Developments, residential density in the D-1-R zone is not subject to the Inclusionary Zoning requirements or bonuses of Subtitle C, Chapter 10.

...

516.2 Except for IZ Plus Inclusionary Developments, residential density in the D-3 zone is not subject to the Inclusionary Zoning requirements or bonuses of Subtitle C, Chapter 10.

...

531.4 Except for IZ Plus Inclusionary Developments, residential density in the D-4-R zone is not subject to the Inclusionary Zoning requirements or bonuses of Subtitle C, Chapter 10.

...

539.2 Except for IZ Plus Inclusionary Developments, residential density in the D-5 zone is not subject to the Inclusionary Zoning requirements or bonuses of Subtitle C, Chapter 10.

...

547.3 Except for Square 487 and IZ Plus Inclusionary Developments, residential density in the D-5-R zone is not subject to the Inclusionary Zoning requirements or bonuses of Subtitle C, Chapter 10.

...

555.2 Except for IZ Plus Inclusionary Developments, residential density in the D-6 zone is not subject to the Inclusionary Zoning requirements or bonuses of Subtitle C, Chapter 10.

....

562.3 Except for IZ Plus Inclusionary Developments, residential density in the D-6-R zone is not subject to the Inclusionary Zoning requirements or bonuses of Subtitle C, Chapter 10.

...

569.2 Except for IZ Plus Inclusionary Developments, residential density in the D-7 zone is not subject to the Inclusionary Zoning requirements or bonuses of Subtitle C, Chapter 10....