

## NOTICE OF FINAL RULEMAKING

The District of Columbia Deputy Mayor for Planning and Economic Development and the District of Columbia Chief Financial Officer hereby give notice of their final rulemaking action taken in connection with the adoption of an amendment to Title 10 DCMR, by adding a new Chapter 60. The new Chapter 60 to Title 10, DCMR, establishes criteria to be used in determining whether or not a project for which tax increment financing is sought has "special merits" that may warrant the use of such financing.

The Notice of Emergency and Proposed Rulemaking was published in the D.C. Register on July 2, 2004 at 51 DCR 6662. Final action to adopt these rules was taken on August 15, 2006.

These final rules will be effective upon the date of publication of this Notice of Final Rulemaking in the D.C. Register.

Title 10 DCMR is amended by adding a new Chapter 60 - SPECIAL MERITS, to read as follows:

### CHAPTER 60 - SPECIAL MERITS

#### 6000 AUTHORITY AND SCOPE

6000.1 The Tax Increment Financing ("TIF") program is administered jointly by the Office of the Chief Financial Officer ("OCFO") and the Office of Deputy Mayor for Planning and Economic Development ("ODMPED"). The TIF program is intended to enhance the feasibility of private capital projects that are of significant economic, cultural, social, and financial value, which cannot otherwise proceed because of the high costs of urban development. This rulemaking describes the standards and procedures under which the OCFO and the ODMPED shall determine whether a project for which TIF assistance is sought has Special Merits.

#### 6001 DETERMINATION OF SPECIAL MERITS

6001.1 Except for the determination required of the OCFO pursuant to Section 4(c)(3) of the TIF Act, the designation of Special Merits is within the discretion of the ODMPED.

6001.2 In evaluating whether a Project has Special Merits, ODMPED will take into consideration the criteria set forth in this subsection. The ODMPED will be entitled to give priority or more weight to any one of these criteria based on its view of the current needs of the District or as directed by law. These criteria are not intended to be used in a mathematical equation; consequently, mere compliance with a majority of these criteria does not guarantee a designation of Special Merits. The following criteria shall be used by the ODMPED to determine Special Merits:

- (a) the quantity and quality of housing units (both rental and owner-occupied) to be constructed by the Project that are affordable to low-and-moderate-income residents;
- (b) the quantity and quality of housing units that are available and accessible to physically or mentally challenged persons;
- (c) the quantity of permanent full time jobs and part time administrative, managerial, technical and service jobs that will be generated during construction and operation of the Project after its completion that pay 10% or more above Minimum Wage;
- (d) the quantity of the jobs set forth in subparagraph (c) above that pay wages that are equal to or exceed the prevailing wages in comparable jobs in the area;
- (e) the quantity of jobs generated during construction of the Project that pay 10% or more above the Minimum Wage;
- (f) the quantity of jobs generated during construction of the Project that will pay Davis Bacon wages;
- (g) the amount of expected Local Small Disadvantaged Business Enterprise ("LSDBE") participation in the Project above the LSDBE Minimum Requirement;
- (h) the extent to which the Project is expected to serve as a catalyst for other related development, particularly development that will not require additional public subsidy;
- (i) the extent to which the Project will increase property values and growth in net tax revenue collection by the District;
- (j) the extent to which the Project takes unproductive property and makes it more productive and profitable to the District from the standpoint of tax revenue generation;
- (k) the history of efforts to develop the proposed site of the Project;
- (l) the extent to which the Project is a rehabilitation of an historically significant site;
- (m) the amount of direct and indirect tax revenues that will flow to the District after payment of debt service on the TIF Bonds;

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- (n) the extent to which the Project draws new and diverse businesses into the District, both in terms of the quantity of employers and the types of businesses (e.g., high-tech companies and scientific research companies);
- (o) the extent to which the Project reduces the need for other direct expenditures by the District, such as for streets, traffic controls, and sewers that otherwise would be funded from the General Fund;
- (p) the extent to which the Project maximizes the use of the District's public transportation infrastructure or enhances the utilization of mass transit facilities;
- (q) the extent to which the Project provides parking in excess of legal requirements;
- (r) the extent to which the Project improves environmental air, water, and soil quality within the District;
- (s) the extent to which the Project provides community meeting and recreational space;
- (t) the extent to which the Project will have a positive effect on tourism by increasing the quantity of tourists who come to the District, the length of their stay, or the amount of money that they spend, or by enhancing the experience of tourists in the District in a manner that strengthens the District's reputation as an important and attractive tourist destination;
- (u) the extent to which the Project contributes to the expansion of shopping, dining, cultural, and educational activities in the Downtown Area;
- (v) the extent to which the Project will improve the vitality or economic health of a neighborhood commercial center or corridor;
- (w) the extent to which the Project will encourage activities within the District, including the production and performance or display of works of art including, but not limited to, music, drama, dance, film, and writing;
- (x) the extent to which the Project will enhance a District-sponsored or supported development project which already has been approved or is already developed.

6001.3

Any application for tax increment financing that was filed with the OCFO prior to April 30, 2001, was the subject of a favorable Special Merits ruling issued in the form of a memorandum from the ODMPED to the OCFO prior to April 30, 2001, and was approved by resolution of the Council of the District of Columbia prior to

April 30, 2001, shall be deemed to have Special Merits as defined by this rulemaking.

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**DEFINITIONS**

District – the Government of the District of Columbia.

Downtown Area — the Downtown Area, as defined by § 2 of the TIF Act.

Project – a private capital improvement project for which tax increment financing is sought.

## ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA

## NOTICE OF FINAL RULEMAKING

and

Z.C. ORDER NO. 04-33

Z.C. Case No. 04-33

(Text Amendments – 11 DCMR)

(Chapter 26 Inclusionary Zoning)

May 18, 2006

The Zoning Commission for the District of Columbia (the “Commission”), pursuant to its authority under §§ 1 and 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended, D.C. Official Code § 6-641.01); having held a public hearing as required by § 3 of the Act, (D.C. Official Code § 6-641.03); and having referred the proposed amendments to the National Capital Planning Commission for a 30-day period of review pursuant to § 492 of the District of Columbia Charter; hereby gives notice of the adoption of a new Chapter 26 “Inclusionary Zoning” to the Zoning Regulations (Title 11 DCMR). A Notice of Proposed Rulemaking was published in the March 10, 2006 edition of the *D.C. Register* at 53 DCR 1783. The comments received, and the changes made by the Commission in response, will be discussed below. The changes were minor in nature and do not require the publication of another notice of proposed rulemaking. The new chapter will require certain types of new and rehabilitated residential developments to set aside a portion of their gross floor area for the provision of units to be sold or rented to moderate-income and, in some instances, low-income households at rents and prices to be determined by the District.

Because the Commission has not yet determined the specific locations where the incentives and requirements of the new chapter will apply, and because the program cannot function until the D.C. City Council (the “Council”) adopts implementing legislation, new § 2608.1 provides that the adopted text will not become effective until 90 days after both events occur. The Zoning Commission voted on July 11, 2006 to set down Case No. 04-33A, which will result in a determination of the locations where the Chapter will apply. A public hearing notice for that case appeared in the August 18, 2006 edition of the *D.C. Register*<sup>1</sup>. However the “set down rule” 11 DCMR § 3202.5, which normally would have required the areas identified in the hearing notice to comply with these rules, does not apply in this instance, because the rules are not presently in effect. Therefore, applications for building permits and planned unit developments in those areas may continue to be processed under existing zoning controls.

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<sup>1</sup> The public hearing notice indicated that this notice of final rulemaking would also appear in August 18<sup>th</sup> issue. However, the Office of Documents was unable to accommodate the publication of both notices.

### Set Down Proceeding and Public Hearings

This case was initiated by the filing of a petition with the Zoning Commission by the Campaign for Mandatory Inclusionary Zoning (CMIZ) in November of 2004. The petition sought to require new and rehabilitated residential developments with ten (10) or more units to set aside a percentage of the units to be constructed for low- and moderate-income households. Bonus density would be available to accommodate additional units, both affordable and market-rate. Similar requirements and incentives exist in cities and counties throughout the United States and are generally referred to as Inclusionary Zoning ("IZ") programs. The Office of Planning ("OP") recommended that the Commission set down the case for hearing in its report dated April 26, 2005. However, the OP report noted their disagreement with certain aspects of the petition and requested the Commission to also set down an alternative approach. The principal distinction between the two programs concerned how the affordability requirement should be determined. As noted, CMIZ favored a unit-based methodology whereby a development's requirement would be a percentage of the actual number of units to be constructed. OP favored basing the requirement on a percentage of the bonus density that could be used or a percentage of the matter-of-right gross floor area ("GFA") allowed, whichever was greater. OP also recommended that less stringent provisions apply to the more expensive types of construction.

Instead of including specific text, OP suggested that the public advertisement summarize both the CMIZ and OP proposals, as is allowed under the Zoning Act<sup>2</sup>. The Commission agreed to advertise the hearing in this manner. However, the Commission decided not to advertise those portions of the petition that described how the Mayor should administer and enforce the program, since no District officer or entity, other than the Mayor and the Council, can delegate functions to others<sup>3</sup>.

Both CMIZ's proposed text and OP's report identified specific areas of the District where the IZ requirements should apply. The petition identified thirty-six locations by description and OP offered an interpretative map representing these locations. CMIZ also wanted the requirements to apply to properties applying for residential planned unit developments, regardless of location.

Consistent with its past practice, the Commission decided to first consider the merits of the zoning controls proposed before deciding where the controls should apply. The Commission therefore decided to defer consideration of the location issue until it resolved the threshold question of whether to go forward with a mandatory Inclusionary Zoning program at all.

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<sup>2</sup> Section 5 of the Zoning Act (D.C. Official Code § 6-641.05 (2001)) only requires that a hearing notice include "a summary of all changes in existing zoning regulations which would be made by adoption of the proposed regulation." The hearing notice also indicated that any portions of the petition not summarized were nevertheless incorporated into the hearing notice.

<sup>3</sup> The Commission also decided not to advertise an incentives-based program, which OP had suggested in the alternative.

### Public Testimony

Public hearings were held on July 25, July 28, and August 1, 2005. The Zoning Commission heard considerable testimony from residents and community representatives, policy experts, both for profit and non-profit developers, and other development and land use professionals. Testimony generally focused on the following issues:

- The need for workforce housing in the District of Columbia.
- The impacts of additional density on neighborhood character, particularly in row dwelling and historic districts.
- Whether consideration of the program should await the completion of the Council's forthcoming consideration of an update to the District Elements of the Comprehensive Plan for the National Capital.
- The experience of other jurisdictions with IZ programs.
- Whether residential development would be best served by the certainty of absolute requirements or the flexibility of basing a development's requirements on its particular circumstances.
- Whether mandatory IZ requirements would threaten the District's housing revitalization.
- The merits of using shorter control periods to permit equity appreciation for low-income homeowners versus the use of an extended or no control period<sup>4</sup> to guarantee a permanent stock of affordable units.
- Whether the program would result in a reduction of residential planned unit developments and their associated public benefits.

In addition, those in support of a mandatory program presented arguments both in favor and against the differing approaches offered by CMIZ and OP.

### Proposed Action

The Commission discussed the merits of the proposals before it at public meetings held on September 26, November 10, and November 22, 2005. Using a decision-making template provided by the Office of the Attorney General ("OAG")<sup>5</sup>, the Commission resolved the major issues presented by both proposals and determined, in most respects, to follow the OP recommendations. The Commission then requested OAG to produce draft text consistent with the decisions reached. That text was submitted and considered at the Commission's February 9, 2006 meeting. Except for some minor refinements, the Commission voted to authorize the publication of the draft text in a notice of proposed rulemaking with a 45-day comment period and to refer the text to the National Capital Planning Commission for review and comment. A description of the proposed text follows:

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<sup>4</sup> A control period is the length of time during which a unit must be rented or sold at affordable levels.

<sup>5</sup> Because the template included OAG's analysis of the legal issues related to the decisions to be made, the document is privileged.

Requirements

The proposed regulation placed a mandatory affordable housing requirement on new residential construction of ten (10) or more dwelling units and the construction of ten (10) or more units that also represents an expansion of an existing building by 50% or more, if located within an Inclusionary Zoning Overlay District. The Commission agreed with OP that the extent of the set-aside should be measured in GFA, not units. The area set-aside could only be sold or rented to moderate-income households at prices set by the District, although in some areas, a portion of the set-aside was also to be reserved for low-income households.

The proposed regulations used the Comprehensive Plan's definitions of low- and moderate-income households, with moderate-income households defined as those earning between 50% and 80% of the Area Median Income ("AMI") and low-income households as those earning less than that amount. The Commission left it to the Council to determine how the inclusionary units should be priced so as to be affordable to these households, but required that such controls remain in place for so long as the project exists.<sup>6</sup>

The Commission established maximum and minimum set aside requirements. The maximum requirement is based upon the potential bonus density available to each site, which is 20% of its matter-of-right density (*i.e.*, GFA). The minimum requirement is the amount below which the Board of Zoning Adjustment ("BZA") cannot reduce IZ compliance pursuant to § 2606.1 (to be discussed below). The maximum and minimum requirements, and the level of affordability required, vary depending on the density of the zone district involved, and in some instances, on the type of construction method used.

Thus, the maximum set-aside for wood frame, "stick built" construction in an R-3 through an R-5-B Zone District or in a C-1, C-2-A, W-0 or W-1 Zone District is 75% of the bonus density, which cannot be reduced by the BZA to less than 10% of the matter-of-right density. For properties located in C-2-B, C-3, CR, R-5-C, R-5-D, R-5-E, SP, W-2 or W-3 and for steel- and concrete-based construction in all mapped areas, the maximum set aside is 50% of the bonus density, which the BZA cannot reduce to less than 8% of the matter-of-right density permitted.

In terms of the level of affordability required, properties located in lower density residence and mixed-use zone districts must reserve 50% of the set aside for sale or rental to low-income households, with the remainder reserved for moderate-income households. Affordable units located in higher density residential and mixed-use zoning categories need only be sold to moderate-income households.

The Commission imposed less stringent requirements in higher density zones and for steel- and concrete-based construction, in recognition of the higher construction costs for larger

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<sup>6</sup> Both OP and CMIZ assumed that the maximum rents and prices would be established in a schedule periodically updated by the District. The schedule would be based upon benchmark incomes (adjusted for family size) at the 80% and 50% AMI levels, with the maximum purchase price and rents set so that a family earning those exact amounts would spend no more than 30% of its annual income on housing costs. Thus if 50% of the AMI were \$60,000, a low-income family of four would pay \$20,000 in annual rent regardless of its actual income.



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developments. The Commission also acted out of a concern that property owners in higher density mixed-use districts would opt for non-residential development if the affordability requirements imposed too great of an economic burden.

Incentives & Zoning Flexibility

As noted, properties subject to the set aside requirement are permitted 20% more GFA than allowed under matter-of-right controls. Because height and lot occupancy restrictions in more restrictive zones would act to preclude some properties from fully utilizing the entire bonus density allowed, the text amends pertinent provisions to permit the additional height and lot occupancy needed.

The use of bonus density to allow for the creation of inclusionary units is consistent with the Housing Element of the Comprehensive Plan, which favors using land use incentives to provide affordable housing. Subsection 302.2 (b) states:

Review and recommend suitable regulatory zoning, tax, and financing incentives under appropriate controls to meet housing production goals, particularly for low-income, moderate-income and elderly households ...

Consistent with this provision, the Commission may authorize greater density than might otherwise be permitted by a strict application of the Generalized Land Use Map's designations.

Relief Provisions

The proposed text allowed for two forms of relief from the IZ requirements. The first is complete relief from compliance down to the minimum set-aside requirement. The second allows for the requirement to be met off-site.

The BZA is empowered to reduce the IZ set-aside, down to the minimums required, in direct proportion to any reduction in the achievable bonus density caused by site conditions such as shape, slope, or other similar physical conditions or development restrictions imposed on the property by District or federal government agencies or tribunals. The Commission agreed with OP that a property's inability to access bonus density does not warrant a complete exemption from compliance. The Commission is confident that most residential projects will be able to succeed under the IZ program with or without bonus density. For those that cannot, the BZA is given the flexibility to reduce or eliminate on-site IZ compliance.

In order to be granted off-site compliance, a property owner must demonstrate, through a specific economic analysis, that compliance would impose an economic hardship. If such a hardship is proven, the BZA may permit off-site compliance on another property owned by the applicant and located within the same census tract as the inclusionary development. Off-site compliance beyond this geographic limit is allowed if the applicant proves that, after good faith efforts, it was unable to locate properties within the same census tract, or that the costs to purchase and develop available properties would render both the inclusionary and off-site projects economically infeasible.

The proposed rules did not include buy-out provisions, such as contributions of money or land to the District. Creating diverse neighborhoods is one of the central themes found in the Comprehensive Plan. Subsection 101.1 (j) states "Providing for diversity and overall social responsibilities." OP highlighted Comprehensive Plan § 111.1 (b) in its set down report. That subsection states:

[A]ll neighborhoods should share in the overall social responsibilities of the community, including, but not limited to, housing the homeless, feeding the hungry, accommodating the disabled, and welcoming residents of diverse backgrounds and needs.

The Commission concluded that the goal of creating diverse neighborhoods would not be advanced by anything less than on-site compliance or compliance in close proximity to the site, and therefore did not include a buyout option.

As will be explained in the discussion of the Commission's final action, relief from compliance may also be requested through the planned unit development process.

#### Written Public Comment

The Zoning Commission received written comments from the petitioner, OP, and a wide variety of stakeholders including residents and community representatives, policy experts, both for profit and non-profit developers, and other development and land use professionals. Chief among the concerns expressed were:

- An automatic exclusion of planned unit developments from IZ requirements would create a considerable loophole that would undermine the intent of the regulations.
- Control periods on the inclusionary units tied to the life of the project would create inequities and potential violations of homeowners' civil rights.
- Tying inclusionary unit sizes to within 95% of the market-rate units reduced the total potential number of units.

#### **National Capital Planning Commission**

The proposed rulemaking was referred to the National Capital Planning Commission ("NCPC") as required by § 492 of the District of Columbia Charter. NCPC, by report dated April 24, 2006, expressed full support of for the proposed IZ regulations, concluding that the Inclusionary Zoning text helped fulfill the Federal Element of the Comprehensive Plan.

#### **Final Rulemaking**

The Commission took final action on Inclusionary Zoning after extensive deliberations on the written comments received on the proposed text. Modifications were made to several components based on the comments received including:

- § 2602.3 – exemptions were added for developments that are exclusively for university or diplomatic housing.
- § 2603.3 – added guidance on how inclusionary units are distributed between low-income and moderate-income households.
- § 2603.5 – which requires property owners to offer for sale up to twenty-five percent (25%) of inclusionary units in a for-sale inclusionary development to the Mayor was modified to also include the District of Columbia Housing Authority as a purchaser.
- The text of §§ 2605.1 and 2605.2 was deleted, thereby permitting the renting of affordable units located in for-sale development and the sale of affordable units in rental buildings. These changes were made in response to comments indicating that allowing such flexibility would assist in the development of additional affordable units.
- § 2605.4 (now § 2605.2) – was reworded to provide that the proportion of studio, efficiency, and one-bedroom inclusionary units to all inclusionary units may not exceed the proportion of market-rate studio, efficiency, and one-bedroom units to all market-rate units. The exclusion of larger units from this requirement will allow a greater proportion of family-size units of two or more bedrooms at the owner/developer's discretion.
- § 2605.7 – was deleted, thereby placing no limitation on the minimum size of inclusionary units, without prejudice to the imposition of such a requirement by Council statute or agency regulation.
- § 2605.8 (now § 2605.6) – was reworded from a requirement that the inclusionary units be reasonably dispersed throughout a building to a prohibition against over-concentrating the units on a floor.

The Commission decided to retain the set-aside ratios proposed by OP, because no empirical evidence was offered to support the other ratios suggested.

As to planned unit developments, the Commission reaffirmed its earlier decision that a property subject to the Inclusionary Zoning program should not be automatically exempted because its construction was approved as a planned unit development under Chapter 24. The goal of the planned unit development process is to “permit flexibility of development and other incentives ... provided, that the project offers a commendable number or quality of public benefits and that it protects and advances the public health, safety, welfare, and convenience” (24 DCMR § 2400.2). The Commission concluded that partial or full relief from the IZ requirements was a type of flexibility that could be granted through a PUD, but that the “number and quality of commendable public benefits” proffered would clearly have to exceed those that would ordinarily suffice to gain PUD approval.

Of all the decisions faced by the Commission, the determination of whether to allow the purchaser of an affordable unit to later sell it at a market-rate price, and thereby gain wealth through the appreciation of unit's value, proved the most difficult. The Commission was called upon to balance two competing societal interests: namely the need to maintain a sufficient stock of affordable units versus the desirability of allowing purchasers of affordable units, who have diligently maintained and perhaps added improvements to the property, to better their economic circumstances.

In deciding between the two, the Commission is mindful that this proceeding was initiated to further goals articulated in the Housing Element of the Comprehensive Plan (10 DCMR § 300, *et seq.*) that seek to: (1) create diverse neighborhoods by providing affordable housing areas where development cost have previously inhibited the supply of affordable housing and (2) more broadly provide affordable housing for current and future residents of the District -- in that order of priority. Specifically, 10 DCMR § 301.1 provides:

It is the goal of the District to have adequate affordable housing for all District residents in communities that have access to services and facilities to meet their needs.

The Commission concludes this goal can best be accomplished by keeping the IZ requirements in place for the life of a project.

As to the assertion that this choice will result in a violation of the civil rights of the persons whose property ownership would not have happened but for this program, the Commission notes that OAG has reviewed this argument and nevertheless certified the final text as legally sufficient.

Lastly, the Commission is cognizant of the concerns expressed by many that a mandatory IZ program may dampen or destroy the District's current housing revitalization. The Commission recognizes that this boom is a relatively short-lived phenomenon and could end as quickly as it began. But, while the future of residential development in the District is not entirely predictable, the need for workforce housing is. Enough evidence has been presented to the Commission to allow it to conclude that the imposition of these requirements, even without bonus density, will not cause otherwise profitable projects to become economically infeasible. In any event, relief is available for those that can prove otherwise. Nevertheless, the Commission restates its instruction to OP that it expects to be informed of any sign of adverse impact on the housing market or on the number or quality of residential PUDs, and that it will not hesitate to take prompt action, if the IZ program is to blame.

The Zoning Commission believes that the proposed amendments to the Zoning Regulations are in the best interests of the District of Columbia, are consistent with the intent and purpose of the Zoning Regulations and Zoning Act, and are not inconsistent with the Comprehensive Plan of the District of Columbia.

In consideration of the reasons set forth herein, the Zoning Commission hereby orders APPROVAL of amendments to the Zoning Regulations regarding the establishment of a mandatory Inclusionary Zoning program.

Title 11 of the District of Columbia Regulations (Zoning) is amended by adding a new Chapter 26 to read as follows:

## **CHAPTER 26 INCLUSIONARY ZONING**

**2600 General Provisions**

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**2600 GENERAL PROVISIONS**

2600.1 This Chapter establishes an Inclusionary Zoning Program that furthers the Housing Element of the Comprehensive Plan by increasing the amount and expanding the geographic distribution of adequate, affordable housing available to current and future residents.

2600.2 It is the intent of the Zoning Commission to promulgate only such regulations as are necessary to establish the minimum obligations of property owners applying for building permits or certificates of occupancy under an Inclusionary Zoning Program. All other aspects of the program, including the setting of maximum purchase prices and rents, the minimum sizes of the units, the selection and obligations of eligible households, and the establishment of enforcement mechanisms such as covenants and certifications shall be as determined by the Council and Mayor of the District of Columbia.

2600.3 The most important general purposes of the Inclusionary Zoning Program include the following:

- (a) To utilize the skills and abilities of private developers to produce quality affordable housing;
- (b) To leverage private development, combined where appropriate with zoning density increases, to produce affordable housing throughout the District of Columbia;
- (c) To mitigate the impact of market-rate residential development on the availability and cost of housing available and affordable to low- and moderate-income households;
- (d) To increase the production of affordable housing units throughout the District to meet existing and anticipated housing and employment needs;
- (e) To provide for a full range of housing choices throughout the District for households of all incomes, sizes, and age ranges to preserve diversity and to ensure the benefits of economic integration for the residents of the District;

- (f) To stabilize the overall burden of housing costs on low- and moderate-income households;
- (g) To create a stock of housing that will be affordable to low- and moderate-income residents over a long term; and
- (h) To make homeownership opportunities available to low- and moderate-income residents.

## 2601 DEFINITIONS

2601.1 When used in the Chapter, the following terms and phrases shall have the meanings ascribed:

**Achievable bonus density** - The amount of the bonus density permitted under § 2604 that potentially may be utilized within a particular inclusionary development, notwithstanding constraints resulting from the physical characteristics of the land or restrictions imposed by District or federal laws and agencies.

**The Act** - [NAME OF THE LEGISLATION ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA TO IMPLEMENT THE PROVISIONS OF THIS CHAPTER]. References to the Act include any Mayor's Order, agency rule, or other administrative issuance promulgated pursuant to that legislation.

**Development, inclusionary** - a development subject to the provisions of this Chapter pursuant to § 2602.1.

**Development, off-site** - a development that accounts for all or part of an inclusionary development's requirements under this Chapter, if approved pursuant to § 2607.

**Eligible household** - one or more persons certified by the Mayor as being a low- or moderate-income household pursuant to the Act.

**Inclusionary unit** - a unit set aside for sale or rental to an eligible low- and moderate-income household as required by this Chapter or by order of the Board of Zoning Adjustment pursuant to § 2607.

**Inclusionary Zoning Overlay** - the overlay district established by Zoning Commission Order \_\_ - \_\_, published in the \_\_\_\_\_, 200\_ edition of the *D.C. Register*.

**Low-income household** - a household of one or more individuals with a total annual income adjusted for household size equal to less than fifty percent (50%)

of the Metropolitan Statistical Area median as certified by the Mayor pursuant to the Act.

**Mayor** – the Mayor of the District of Columbia, the Director of the agency or agencies delegated the authority to implement the Act, or the agency official or officials re-delegated such authority.

**Moderate-income household** - a household of one or more individuals with a total annual income adjusted for household size equal to between fifty percent (50%) and eighty percent (80%) of the Metropolitan Statistical Area median as certified by the Mayor pursuant to the Act.

**Purchase/rental schedule** - the most current schedule, published by the Mayor pursuant to the Act, establishing the maximum purchase prices and rents for inclusionary units.

**2602****APPLICABILITY**

2602.1 Except as provided in § 2602.3, the requirements and incentives of this Chapter shall apply to developments that:

- (a) Are mapped within the Inclusionary Zoning Overlay; and
- (b) Have ten (10) or more dwelling units (including off-site inclusionary units); and
- (c) Are either:
  - (i) New multiple-dwellings;
  - (ii) New one-family dwellings, row dwellings, or flats constructed concurrently or in phases on contiguous lots or lots divided by an alley, if such lots were under common ownership at the time of construction; or
  - (iii) An existing development described in subparagraph (i) or (ii) for which a new addition will increase the gross floor area of the entire development by fifty percent (50%) or more.

2602.2 A new development with less than ten (10) dwelling units shall become subject to this Chapter upon the filing of an application for a building permit to add one or more dwelling units to the development within a two-year period after the issuance of the last certificate of occupancy, if the construction for which application has been filed would result in the development having ten (10) or more dwelling units.

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2602.3 This Chapter shall not apply to hotels, motels, inns, dormitories, housing developed by or on behalf of a local college or university exclusively for its students, faculty or staff, housing that is owned or leased by foreign missions exclusively for diplomatic staff, rooming houses, boarding houses, community-based residential facilities, single room occupancy developments, or developments in R-1, R-2 and C-4 Districts.

2602.4 Except as provided in §§ 2602.5, 2603.5 and 2607.1 (c), or the Act, all inclusionary units created pursuant to this Chapter shall be leased or sold only to eligible households for so long as the inclusionary development exists.

2602.5 An owner/occupant of an inclusionary unit may sell the unit at a price greater than the maximum permitted under the purchase/rental schedule if the price is offered by the Mayor.

**2603 SET-ASIDE REQUIREMENTS**

2603.1 An inclusionary development for which the primary method of construction does not employ steel and concrete frame structure located in an R-3 through an R-5-B District or in a C-1, C-2-A, W-0 or W-1 District shall devote the greater of 10% of its matter-of-right density or 75% of its achievable bonus density to inclusionary units.

2603.2 An inclusionary development of steel and concrete frame construction located in the zone districts stated in § 2603.1 or any development located in a C-2-B, C-3, CR, R-5-C, R-5-D, R-5-E, SP, W-2 or W-3 District shall devote the greater of 8% of its matter-of-right density or 50% of its achievable bonus density to inclusionary units.

2603.3 Inclusionary developments located in R-3 through R-5-E, C-1, C-2-A, W-0 and W-1 Districts shall set aside 50% of inclusionary units for eligible low-income households and 50% of inclusionary units for eligible moderate-income households. The first inclusionary unit and each additional odd number unit shall be set aside for low-income households.

2603.4 Developments located in CR, C-2-B through C-3-C, W-2 through W-3, and SP Districts shall set aside 100% of inclusionary units for eligible moderate-income households.

2603.5 The Mayor or the District of Columbia Housing Authority shall have the right to purchase up to twenty-five percent (25%) of inclusionary units in a for-sale inclusionary development in accordance with such procedures as are set forth in the Act.

**2604 BONUS DENSITY**



2604.1 Inclusionary developments subject to the provisions of this Chapter may construct up to twenty percent (20%) more gross floor area than permitted as a matter of right (“bonus density”), subject to all other zoning requirements (as may be modified herein) and the limitations established by the Act to Regulate the Height of Buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 452; D.C. Official Code § 6-601.01, *et seq.* (2001 Ed.).

2604.2 Inclusionary developments in zoning districts listed in the chart below may use the following modifications to height and lot occupancy in order to achieve the bonus density:

| Base Zone | Matter-of-Right Zoning Constraints |                      |            | IZ Zoning Modifications |               |
|-----------|------------------------------------|----------------------|------------|-------------------------|---------------|
|           | Lot Occupancy                      | Zoning Height (feet) | Zoning FAR | Lot Occupancy           | Height (feet) |
| R-5-E     | 75%                                | 90                   | 6.00       | 90%                     | 90            |
| CR        | 75%                                | 90                   | 6.00       | 80%                     | 100           |
| C-2-A     | 60%                                | 50                   | 2.50       | 75%                     | 50            |
| C-2-B     | 80%                                | 65                   | 3.50       | 80%                     | 70            |
| C-2-C     | 80%                                | 90                   | 6.00       | 90%                     | 90            |
| C-3-A     | 75%                                | 65                   | 4.00       | 80%                     | 65            |
| W-1       | 80%                                | 40                   | 2.50       | 80%                     | 50            |
| W-2       | 75%                                | 60                   | 4.00       | 75%                     | 80            |
| W-3       | 75%                                | 90                   | 6.00       | 80%                     | 100           |
| SP-1      | 80%                                | 65                   | 4.00       | 80%                     | 70            |
| SP-2      | 80%                                | 90                   | 6.00       | 90%                     | 90            |

2604.3 Inclusionary developments in R-3 and R-4 zoning districts may use the minimum lot dimensions as set forth in the following table:

| Base Zone | IZ Zoning Modifications       |                      |
|-----------|-------------------------------|----------------------|
|           | IZ Min Lot Area (square feet) | Min Lot Width (feet) |
| R-3       | 1,600                         | 16.0                 |
| R-4       | 1,500                         | 15.0                 |

**2605 DEVELOPMENT STANDARDS**

2605.1 A development that provides, pursuant to federal or other District housing programs, affordable dwelling units for sale or lease may count such units towards the requirements of this Chapter, provided that all provisions of this Chapter and the Act are met.

2605.2 The proportion of studio, efficiency, and one-bedroom inclusionary units to all inclusionary units shall not exceed the proportion of market-rate studio, efficiency, and one-bedroom units to all market-rate units.

2605.3 All inclusionary units shall be comparable in exterior design, materials, and finishes to the market-rate units.

2605.4 The interior amenities of inclusionary units (such as finishes and appliances) shall be comparable to the market-rate units, but may be comprised of less expensive materials and equipment.

2605.5 All inclusionary units in an inclusionary development shall be constructed prior to or concurrently with the construction of market-rate units, except that in a phased development, the inclusionary units shall be constructed at a pace that is proportional with the construction of the market-rate units.

2605.6 Inclusionary units shall not be overly concentrated on any floor of a project.

**2606 EXEMPTION FROM COMPLIANCE**

2606.1 The Board of Zoning Adjustment shall reduce the requirements of § 2603 for each square foot of achievable bonus density that cannot be accessed due to:

- (a) Site conditions such as shape, slope, or other similar physical conditions or
- (b) Development restrictions imposed on the property by District or federal government agencies.

2606.2 Applicants seeking relief under § 2606.1 (a) shall submit architectural plans and elevations studies demonstrating the impact of site conditions on achieving the maximum permitted bonus density.

2606.3 Applicants for relief under § 2606.1 (b) shall include with their application the written order that imposed the relevant development restriction and shall certify that the restriction was not in the original plans submitted by the applicant to the agency, but was either offered in response to the agency's concerns expressed on the record or was unilaterally imposed by the agency.

**2607 OFF-SITE COMPLIANCE**

2607.1 The Board of Zoning Adjustment is authorized to permit some or all of the set-aside requirements of § 2603 to be constructed off-site on property owned by the applicant upon proof, based upon a specific economic analysis, that compliance would impose an economic hardship. Among the factors that may be considered by the BZA in determining the existence of economic hardship are:

- (a) Exceptionally high fees in condominium developments that cannot be reduced to levels affordable to eligible households;
- (b) The inclusion of expensive and specialized social or health services in a retirement housing development or a development that principally provides housing for the disabled, if such services are not severable from the provision of housing and render units in the development unaffordable to eligible households; or
- (c) For a rental development the owner of which wishes to change the property's use to one listed in § 2602.3, proof that continuation of the rental use is no longer economically feasible.

2607.2 An applicant who has demonstrated the existence of economic hardship shall further demonstrate that the off-site development:

- (a) Is located within the same census tract as the inclusionary development;
- (b) Consists of new construction for which no certificate of occupancy has been issued;
- (c) Is at a location suitable for residential development;
- (d) Has complied with or will comply with all on-site requirements of this Chapter as are applicable to it;
- (e) Has not received any development subsidies from federal or District government programs established to provide affordable housing; and
- (f) Will provide inclusionary units comparable in type to the market-rate units being created in their place, with gross floor areas of not less than 95% of the gross floor area of such market-rate units, and of a number no fewer than the number of units that would otherwise have been required on-site.

2607.3 The requirement of § 2607.2 (a) may be waived upon a showing that the applicant, after good faith efforts, was unable to locate properties within the same census tract or that the costs to purchase and develop available properties would render both the inclusionary and off-site projects economically infeasible.

2607.4 Inclusionary units constructed off-site shall not be counted toward any set-aside requirement separately applicable to the off-site development pursuant to § 2603.

2607.5 No order granting off-site compliance shall become effective until a covenant, found legally sufficient by the Office of the Attorney General, has been recorded in the

land records of the District of Columbia between the owner of the off-site development and the Mayor.

2607.6 The covenant shall bind the owner and all future owners of the off-site development to:

- (a) Construct and reserve the number of inclusionary units allowed to be accounted for off-site, in accordance with the plans approved by the Board and the conditions of the Board's order;
- (b) Sell or rent, as applicable, such units in accordance with the provisions of this Chapter and the Act for so long as the off-site development remains in existence;
- (c) Neither apply for nor accept any development subsidies from federal or District government programs established to provide affordable housing;
- (d) Acknowledge that the owners are legally responsible for the set-aside requirement accepted as if the requirement had been imposed directly on the off-site development; and
- (e) Not request special exception or variance relief with respect to the obligations accepted or its own obligations under this Chapter.

2607.7 Upon the recordation of the covenant, the set-aside requirements permitted to be accounted off-site shall be deemed to be the legal obligation of the current and future owners of the off-site development. All dwelling units as are required to be reserved in the off-site development in accordance with the BZA order shall be deemed inclusionary units for the purposes of this Chapter and the Act.

2607.8 No application for a certificate of occupancy for a market-rate unit on the inclusionary development shall be granted unless construction of the off-site inclusionary units is progressing at a rate roughly proportional to the construction of the on-site market-rate units.

## 2608 APPLICABILITY DATE

2608.1 The provisions of this Chapter shall become effective following the issuance of the first purchase/rental schedule or the publication date in the *D.C. Register* of Zoning Commission Order \_\_\_\_, establishing the Inclusionary Zoning Overlay, whichever is the last to occur.

Vote of the Zoning Commission taken at its public meeting on February 9, 2006, to **APPROVE** the proposed rulemaking: 5-0-0 (Carol J. Mitten, Anthony J. Hood, Gregory N. Jeffries, John G. Parsons, and Kevin L. Hildebrand to approve).

**Z.C. NOTICE OF FINAL RULEMAKING & ORDER NO. 04-33**

**Z.C. CASE NO. 04-33**

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This Order was **ADOPTED** by the Zoning Commission at its public meeting on May 18, 2006, by a vote of 4-1-0 (Anthony J. Hood, Carol J. Mitten, John G. Parsons, and Kevin L. Hildebrand to adopt; Gregory N. Jeffries opposed).

In accordance with the provisions of 11 DCMR § 3028.9, this Order shall become effective upon publication in the *D.C. Register*; that is, on \_\_\_\_\_.

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**CAROL J. MITTEN**  
**CHAIRMAN**  
**ZONING COMMISSION**

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**JERRILY R. KRESS, FAIA**  
**DIRECTOR**  
**OFFICE OF ZONING**

AUG 25 2006

**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA**

**NOTICE OF FINAL RULEMAKING**

**and**

**Z.C. ORDER NO. 04-33**

**Z.C. Case No. 04-33**

**(Text Amendments – 11 DCMR)**

**(Chapter 26 Inclusionary Zoning)**

**May 18, 2006**

The full text of this Zoning Commission order is published in the "Final Rulemaking" section of this edition of the *D.C. Register*.