



FROM: Committee of 100 on the Federal City

SUBJECT: Issues regarding the process by which §§X-301.1 and .2 became a part of the ZRR Notice of Final Rulemaking text

DATE: May 3, 2016

Currently 11 DCMR §2401 sets the minimum area requirements for Planned Unit Developments (PUDs), and allows a waiver of 50% of the minimum area requirement for projects in any zone that are outside the Central Employment Area, are at least 80% residential and are deemed to be “of exceptional merit and in the best interest of the city or country.” The corresponding provision in the final ZRR text allows a 100% waiver in such projects in almost all zones. Steps in the process by which the one evolved into the other are set out in the discussion below, which concludes that the changes in the zones to which this waiver is available were apparently not advertised in accord with the Administrative Procedure Act and not authorized by the Zoning Commission for inclusion in the text published with the Notice of Final Rulemaking.

1. In the Notice of Proposed Rulemaking (NPRM), dated May 28, 2015, the corresponding provision (§§X-301.1 and .2) dropped this 50% waiver for predominantly residential projects altogether, and allowed 100% waiver only in three limited classes of cases and a limited number of zones (twelve NC zones, all R and RF zones, and RA-1 and -2). The full NPRM text of this provision read as follows:

301 PUD MINIMUM LAND AREA

301.1

The minimum area included within a proposed development application, including the area of public streets or alleys proposed to be closed, shall be as follows:

**TABLE X § 301.1:
MINIMUM PUD
LAND AREA**

Zone Group	Applicable Zone	Minimum Area
1	Any R zone Any RF zone	2 acres
2	RA-1, RA-3 MU-11	1 acre
3	RA-4, RA-9, RA-11 MU-16, MU-17, MU-23	1 acre
4	MU-18, MU-19, MU-20, MU-21, MU-22	0.5 acre
5	NC-7, NC-8, NC-9, NC-10, NC-11, NC-12, NC-13, NC-14, NC-15, NC-16, NC-17	10,000 sq. ft.
6	Any Other Zone	15,000 sq. ft.

301.2

The Zoning Commission may waive the minimum area requirement of this section for applications in Zone Groups 1, 2, and 5, or up to five percent (5%) for applications in Zone Groups 3 and 4, provided that the Zoning Commission shall find one (1) of the following:

- (a) The development is a redevelopment project identified in an approved Small Area Plan;
- (b) The development will be constructed or operated by the District of Columbia or federal government and serves a compelling government interest; or
- (c) The development will result in compatible infill development.

2. OP’s tabulations of public comments on the NPRM text submitted between the date of publication of that Notice and the close of record indicate that only one comment on §X-301.1 was received.¹ Submitted by the Committee of 100 on the Federal City (C100), it recommended among other things deleting subparagraph (c) and substituting a requirement of 50% GFA devoted to moderate income housing or a requirement of 30% GFA for multi-bedroom units for low and moderate income families.² OP responded, in its

¹ Reported at p. 53 of the “completed summary of comments”, styled “ZRR Summary of Comments NPRM to Close of Record”, attached to OP’s Supplemental Report in ZC 08-06A of October 19, 2015. In its Memorandum in ZC 08-06A of November 6, 2015, OP attached a two-page tabulation of additional comments, none of which addressed X-301.

² See ZC Case 08-06A, Exhibit 1053.

tabulation of public comments on the NPRM text,³ that “OP agrees clarity is needed and recommends adding on 301.2 ‘ . . . that the ZC shall find after the public hearing that’.”

3. On October 19, 2015 the Commission requested that OP provide it with recommendations based on public comments on the NPRM text.⁴ Accordingly, on November 6, 2015 OP filed a Supplemental Report that, in its attachment 1, recommended a number of revisions in the NPRM text.⁵ These included a revised text of §X-301.1, in which OP accepted C100’s recommendation to delete subparagraph (c) regarding “compatible infill” projects, from the list of projects for which the 100% waiver would be available, but replaced it with language from the corresponding provision in the current Regulations, 11 DCMR §2401, regarding projects of exceptional merit outside the Central Employment Area with at least 80% residential floor area. OP’s stated reason for this recommended change was that “clarity is needed regarding flexibility to waive the minimum area requirement.”⁶

4. The Commission discussed OP’s November 6 report at a special meeting on November 16, 2015. It explicitly addressed some but not all of OP’s recommendations for changes in the Notice of Proposed Rulemaking text, and modified some. In its discussion of Subtitle X no mention was made of §X-301.1 or OP’s recommendation with regard to it. In the end the Commission decided to include in the Final Rulemaking text even those recommended changes that they had not explicitly addressed, and proceeded to adopt that text.⁷ The Commission characterized the intended scope and content of this action in the Notice of Final Rulemaking:

“In its deliberations, the Commission provided further guidance to OP as to several additional changes to be made to the text of the new regulations, as follows: the word ‘recess’ should be eliminated from the definition of ‘Courtyard’; the restrictions included in the definition of ‘Mezzanine’ should be incorporated into the regulations for the Residential Flat (RF) zones; OP should ensure that the standards for measuring a ‘Yard’ are consistent; and the preservation of historic view sheds should be added to the list of goals contained in Subtitle X.

At the conclusion of the public meeting [on November 16], the Commission voted to take preliminary final action on the proposed regulations, *as modified pursuant to the guidance provided at the meeting and the alterations as detailed in OP’s supplemental report of November 6, 2015. In using the word “preliminary” to describe its action, the Commission signified that had made all of the decisions necessary for*

³ Supplemental Report ZC 08-06A of October 19, 2015, Attachment, ZRR Summary of Comments NPRM to Close of Record, p. 53.

⁴ “At its regularly scheduled meeting held October 19, 2015, the Commission . . . requested OP to provide recommendations based on public comments in response to the Notice of Proposed Rulemaking.” Notice of Final Rulemaking, p. 16.

⁵ “On November 6, 2015, OP provided its recommendations as well as clarifications recommended by the Office of Zoning. (Exhibit A-1097.) In the report, OP explained the major changes it recommended to be made to the text as published in the notice and included, item-by-item, the recommended changes made to the regulations. (*Id.* at 3-18.) Among the recommended changes was for the Commission to not follow OP’s original recommendation that the existing references to Yards (Rear and Side), be replaced with references to Setbacks (Rear and Side), but to continue with the use of Yards. Also, OP indicated that it was no longer recommending that Alley and Tax Lots existing before a certain date be permitted to convert to a record lot as a matter of right. OP agreed to the revisions in the chancery regulations proposed by the Department of State, and also recommended accepting all of the recommendations made by NCPC in its action taken September 3, 2015. (Exhibit A-921).” *Id.*

⁶ OP Memorandum in ZC 08-06A, November 6, 2015, Attachment 1, p. 13.

⁷ See also transcript of ZC Special Public Meeting of November 16, 2015, pp. 153-54, 160-62.

OP, the Office of Zoning, and the Office of the Attorney General to provide it with a final text for its adoption.” Id., at p. 17 [emphasis added].

5. That final text was published as the Final Proposed Rulemaking on the Office of Zoning website on January 7, 2016 and adopted by the Commission on January 14, 2016 in a brief meeting at which there was no discussion of the details of any provision in it.⁸ In that text, §X-301.1 and .2 had been further and materially changed with the effect that the number of zone districts in which the 100% waiver would be available was substantially increased. This was done by two changes in the zones listed in Zone Group 2 in the Zone Group table set out in §X-301.1, and more significantly by amending §X-301.2 to add Zone Group 6 – “Any Other Zone”-- to the list of zones in which the 100% waiver is available, thus making the waiver available in *all* zones except for the eleven MU and RA zones listed in Zone Groups 3 and 4.⁹ The text with tracked changes is as follows:

301 ~~PUD~~ MINIMUM LAND AREA (PUD)

301.1 The minimum area included within a proposed development application, including the area of public streets or alleys proposed to be closed, shall be as follows:

**TABLE X § 301.1:
MINIMUM PUD
LAND AREA**

Zone Group	Applicable Zone	Minimum Area
1	Any R zone Any RF zone	2 acres
2	RA-1, -RA-32 <u>RC-1</u> MU-11	1 acre

⁸The meeting transcript states at p. 7: “Staff records the vote five to zero to zero to approve final action in Case No. 08-06A, 08_06B and 08-06C with an effective date of September 6th, 2016, with the flexibility to correct spelling and grammatical errors, add omitted words, remove duplicate text, change section headings for clarity or internal consistency and correct or add cross-references.”

The Notice of Final Rulemaking Order, dated January 14, 2016, states at p. 18: “With respect to the text amendments, the Commission indicated that it reviewed the final text and found that it reflected the instructions it gave when it took preliminary final action. The Commission then unanimously voted on January 14, 2016 to adopt the final text and the map amendments and granted the Office of Zoning the flexibility to make changes in the text to correct spelling or grammatical errors, add omitted words, remove duplicate text, change section headings for clarity or internal consistency, and correct or add cross references.”

The only reference in the January 14 meeting transcript to the changes authorized at the November 16, 2015 meeting and review of the final text is a statement by the Chairman, at pp. 3-4, that “when we dealt with this in proposed, we mentioned that we had a few changes and we have received those texts and tracked changes that we requested. And I want to know first before, we have received them, and I want to know if anyone has anything in this code that they want to revisit.”

The Notice of Final Rulemaking was later published on the OZ website on February 29, 2016 and in the DC Register, Vol. 63/11, part 2, March 4, 2015.

⁹ There were also changes in the zones listed in the Zone Groups in which the 100% waiver would not be available -- Groups 3 and 4. It appears that some of those changes might have been attributable to changes in zone names made elsewhere.

3	RF-2 RA- 48 , RA-9, RA- 11 10 MU- 16 15 , MU- 17 , 16 MU- 23 22	1 acre
4	MU- 17 , MU-18, MU-19, MU-20, MU-21, MU-22	0.5 acre
5	NC-7, NC-8, NC-9, NC-10, NC-11, NC-12, NC-13, NC-14, NC-15, NC-16, NC-17	10,000 sq. ft.

6 Any Other Zone

301.9301.2

The Zoning Commission may waive the minimum area requirement of ~~this section~~ Subtitle X § 301.1 for applications in Zone Groups 1, 2, 5, and 56, or up to five percent (5%) for applications in Zone Groups 3 and 4, provided that the Zoning Commission shall find after the public hearing that the development is of exceptional merit and is in the best interests of the District of Columbia or the country and one (1) of the following:

(a) The development is ~~a redevelopment project~~ identified in an approved Small Area Plan and will be generally not inconsistent with the Small Area Plan;

(b) The development will be constructed or operated by the District of Columbia or federal government and serves a compelling government interest; or

~~(c) The development will result in compatible infill development.~~

(c) If the development is to be located outside the Central Employment Area, at least eighty percent (80%) of the gross floor area of the development shall be used exclusively for dwelling units and uses accessory thereto. ¹⁰

• ¹⁰ The Notice of Final Rulemaking Order somewhat inaccurately characterizes these changes to X§ 301. In a “Discussion of Major Issues” at page 2 in connection with Planned Unit Developments, it states that “[t]he adopted text includes procedural changes to the PUD process including . . . setting new standards for the Commission when they consider a requested reduction of minimum land area requirements. There were comments submitted that suggested language be added to require a showing of need benefits, and require affordable housing as a basis for reducing the minimum land area. The Commission agreed with the suggestions that clarified maintenance and showing of need but did not change the standards for considering a reduction in minimum land area except to include the language ‘after the public hearing.’” (In fact the Commission did more extensively change the standards set out in the NPRM text of X§ 301.2, adopting the proposal by OP in paragraph (c) discussed above.) Appendix A: Summary of Major Changes to Existing Regulations, at page 86, lists “Eliminate the minimum percent of land area that may be requested for waiver” among changes to existing regulations regarding PUDs.

(The addition of Zone Group 6 has now been invoked by the Applicant in ZC Case15-18, in combination with the OP-recommended change in §X-301.2(c) making the waiver available to primarily residential projects that was adopted by the Commission on November 16. The applicant seeks thereby to obtain a waiver of minimum area requirements in the W-2 zone for a parcel that but for these changes would be too small to qualify for a PUD.)

Conclusions

That an agency is required to provide notice and an opportunity to comment on a proposed rule does not mean that it is barred from making any changes in that rule as eventually adopted. Otherwise there would be no point in receiving comments. In general courts have held, for example, that a modified rule that is a “logical outgrowth” of the rule as advertised may be adopted without any further notice and comment. But the changes in the advertised text of §X-301.1 and .2 that sweepingly expanded the number of zone districts to which the 100% waiver rule would apply were material modifications, and not merely a “logical outgrowth” of that text, and obviously not merely typographical or technical corrections of it. A notice that accurately informs the public about what a proposed rule says, but not about to whom or what it will apply, is clearly not adequate notice. Designation of the zones to which a given rule is applicable is of the essence of land use regulation through zoning, entitling the public and especially property owners in affected zones to adequate notice and opportunity to comment.¹¹

It appears that none of the changes in §X-301.1 and .2 regarding the zone districts in which the 100% waiver would be available were included in the advertised NPRM text, or recommended by OP to the Commission in its November 6, 2015 Memorandum, or addressed by the Commission at the November 16, 2016 meeting at which it considered OP’s recommendations, or, consequently, included in the Preliminary Final Rulemaking text adopted by the Commission at that meeting or contemplated in the instructions that the Commission gave as to preparation of the final text.

From this three things would seem to follow:

First, not having been advertised, §§X-301.1 and .2 so changed were not adopted in compliance with provisions of DC Official Code regarding public notice and participation

¹¹ A cursory examination just of X Chapter 3, Planned Unit Developments, for example §X-303.6, in the Final Rulemaking text, discloses other changes from the NPRM text as regards the zones to which the rule in question applies that were not included in OP’s November 6 recommendations or addressed by the Zoning Commission in its November 16 deliberations.

in rulemaking, specifically §2-505 of the DC Administrative Procedure Act (APA)¹² and DC Official Code §6.641.03.¹³

Secondly, leaving aside the question of compliance with the APA, the preparers of the Final Rulemaking text lacked authorization from the Commission to include these changes in that text, and these changes should therefore be stricken as having been included in error.

Thirdly, if these conclusions are correct, a thorough examination of the final text of the 2016 regulations is necessary to ensure that the validity of none of its provisions is subject to similar challenge.

¹²

§ 2-505. Public notice and participation in rulemaking; emergency rules.

(a) The Mayor and each independent agency shall, prior to the adoption of any rule or the amendment or repeal thereof, publish in the District of Columbia Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) notice of the intended action so as to afford interested persons opportunity to submit data and views either orally or in writing, as may be specified in such notice. The notice shall also contain a citation to the legal authority under which the rule is being proposed. The publication or service required by this subsection of any notice shall be made not less than 30 days prior to the effective date of the proposed adoption, amendment, or repeal, as the case may be, except as otherwise provided by the Mayor or the agency upon good cause found and published with the notice.

...

¹³ **§ 6-641.03. Zoning regulations -- Existing regulations continued; public hearing on amendments required; notice.**

The regulations prior to June 20, 1938, adopted by the Zoning Commission under the authority of § 6-621.01 and in force on June 20, 1938, including the maps which at said date accompany and are a part of such regulations, shall be deemed to have been made and adopted and in force under this subchapter and subchapter V and shall be and continue in force and effect until and as they may be amended by the Zoning Commission as authorized by said this subchapter and subchapter V. The Zoning Commission may from time to time amend the regulations or any of them or the maps or any of them. Before putting into effect any amendment or amendments of said regulations, or of said map or maps, the Zoning Commission shall hold a public hearing thereon and provide notice of the hearing in accordance with the requirements of subchapter I of Chapter 5 of Title 2. Such published notice shall include a general summary of the proposed amendment or amendments of the regulation or regulations and the boundaries of the territory or territories included in the amendment or amendments of the map or maps, and the time and place of the hearing. The Zoning Commission shall give such additional notice of such hearing as it shall deem feasible and practicable. At such hearing it shall afford any person present a reasonable opportunity to be heard. Such public hearing may be adjourned from time to time and if the time and place of the adjourned meeting be publicly announced when the adjournment is had, no further notice of such adjourned meeting need be published.