

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

NOTICE OF SECOND PROPOSED RULEMAKING

The Department of Housing and Community Development, pursuant to authority set forth in Section 2062 of the Tax Abatements for Affordable Housing in High-Needs Areas Amendment Act of 2020, (the “Act”), effective December 3, 2020 (D.C. Law 23-149; D.C. Official Code § 47-859.06), and Mayor’s Order 2021-040, dated March 24, 2021, hereby gives notice of the intent to adopt a new Chapter 64 (Tax Abatements For Affordable Housing In Areas With High Needs of Affordable Housing) of Subtitle B (Planning and Development) of Title 10 (Planning and Development) of the District of Columbia Municipal Regulations (“DCMR”) in not less than thirty (30) days after the date of publication of this notice in the *District of Columbia Register*.

The purpose of the rulemaking is to implement the provisions of the Act, which authorizes tax abatements as incentives for the production of new affordable housing in the Rock Creek West, Rock Creek East, Capitol Hill, and Upper Northeast planning areas, identified in the District’s Housing Equity Report, released in October 2019, as areas in high need for affordable housing.

Specifically, the rulemaking would establish the conditions precedent to receiving a tax abatement, the process for applying and receiving one, and requirements for on-going compliance. The rulemaking would amend Title 10-B DCMR by adding a new Chapter 64.

Comments on the Initial Notice of Proposed Rulemaking

An initial Notice of Proposed Rulemaking was published in the *District of Columbia Register* on April 9, 2021 at 68 DCR 003831. Multiple stakeholders requested an extension of the comment period, and the thirty (30) day comment period was extended to May 23, 2021 by written notice on the DHCD website. In response to comments received after the issuance of those notices, changes were determined necessary or desirable to implement the Act. The following summarizes the major comments received and changes made:

Household Income Levels Targeted:

- DHCD received comments recommending that the abatement be awarded to developments targeting the lowest income households or there be a strong preference for developments targeting the lowest income households.
 - o While the Act does not allow for such a change to the proposed rulemaking, through the competitive process, preference may be given for projects that exceed the statutory affordability requirements, provide accelerated project delivery timelines, or as otherwise and further described in the competitive process.

Applicability of Inclusionary Zoning:

- DHCD received comments opposing the applicability of inclusionary zoning requirements in addition to the Act’s requirement that one-third (1/3) of the units be affordable and rented, on average, by households earning at or below 80% of the Median Family Income.
 - o The rulemaking has been changed to have inclusionary zoning requirements included as part of the one-third (1/3) total unit affordability requirement.

Competitive Process:

- DHCD received comments recommending that the competitive process for the abatement occur prior to construction so that the abatement, if awarded, could be contemplated in underwriting a development.
 - o The rulemaking has been changed to incorporate a two-step process by which a development can reserve an allocation of tax abatement and, if successfully achieving certain milestones, can have that abatement certified.

Abatement Cap:

- DHCD received comments opposing the abatement cap or recommending more abatement be awarded to projects exceeding the Act’s minimum requirements.
 - o The rulemaking has been changed to remove the abatement cap. DHCD, through the competitive process or as otherwise detailed, may institute an abatement cap or preference for awarding abatement to projects.

CHAPTER 64 TAX ABATEMENTS FOR AFFORDABLE HOUSING IN AREAS WITH HIGH NEEDS OF AFFORDABLE HOUSING

Secs.

6400	General Provisions
6401	Abatement Cap and Availability
6402	Requirements for Tax Abatement
6403	Application; Competitive Process
6404	Application Review and Reservation Process
6405	Tax Abatement Certification Process
6406	Affordability Covenant
6407	Ongoing Affordable Housing Requirements
6408	Noncompliance
6499	Definitions

6400 GENERAL PROVISIONS

6400.1 The purpose of this chapter is to implement the Tax Abatement for Affordable Housing in High-Need Areas Amendment Act of 2020 (the “Act”), effective December 3, 2020 (D.C. Law 23-149; D.C. Official Code § 47-859.06), which provides for an abatement of the tax imposed by D.C. Official Code § 47-811 on certain real property developed with affordable housing in certain designated areas in high need of affordable housing.

6400.2 An agency’s failure to act within a timeframe established in this chapter shall not constitute a default by the agency and shall not permit any person to take or refuse to take any action governed by the Act or any other law or regulation.

6400.3 No tax abatements granted pursuant to this chapter shall begin before October 1, 2023.

6401 ABATEMENT CAP AND AVAILABILITY

6401.1 Abatements granted pursuant to this chapter shall be subject to the availability of funding. When funds are available for the purpose of granting the abatements, the total amount of tax abatements awarded to all developments in a given fiscal year shall not exceed two hundred thousand dollars (\$200,000) in Fiscal Year 2024, four million dollars (\$4,000,000) in Fiscal Year 2025, four million one hundred sixty thousand dollars (\$4,160,000) in Fiscal Year 2026, or the prior fiscal year's cap increased by four percent (4%) in each fiscal year thereafter.

6402 REQUIREMENTS FOR TAX ABATEMENT

6402.1 To be eligible to be granted a tax abatement under this chapter, the following requirements must be satisfied:

- (a) The real property on which the development is located shall be in an eligible area;
- (b) At least one third (1/3) of the housing units developed or redeveloped on the real property shall be affordable to and rented by households earning no more than one hundred percent (100%) of Median Family Income. Housing units included in the development as part of the Inclusionary Zoning ("IZ") Program shall be counted toward the one third (1/3) requirement;
- (c) The average Median Family Income of the households that occupy the one third (1/3) of the housing units described in paragraph (b) of this subsection shall be no greater than eighty percent (80%) of Median Family Income.
- (d) The developer shall file an affordability covenant in the land records, as described in section 6406 of this chapter;
- (e) The developer shall enter into an agreement with the District that requires the developer to, at a minimum, contract with certified business enterprises for at least thirty-five percent (35%) of the contract dollar volume of the construction and operations of the development, in accordance with section 2346 of the CBE Act (D.C. Official Code § 2-218.46), to the extent section 2346 is applicable;
- (f) The developer shall enter into a First Source Agreement for the operations of the development;

- (g) The developer shall enter into an abatement agreement with DHCD setting forth the requirements of this chapter and such other terms and conditions as DHCD deems appropriate; and
- (h) The developer and development shall satisfy the other requirements of this chapter, as applicable.

6402.2 As provided in D.C. Official Code § 47-859.06(f), the requirements of the First Source Act shall not apply to the construction or development of a development granted a tax abatement under this chapter.

6403 APPLICATION; COMPETITIVE PROCESS

6403.1 In order to be considered for the award of a tax abatement under this chapter, a developer shall submit an application to DHCD. The application shall be in such a form and include such information as may be required by DHCD.

6403.2 An application for a tax abatement under this chapter may be submitted by a developer only in response to a competitive process initiated by DHCD. The competitive process shall set forth the requirements of an application and the standards by which applications will be reviewed and tax abatement reservations granted.

6403.3 Each application shall include:

- (a) The name of the owner of the development;
- (b) The eligible area in which the development is located;
- (c) The address or addresses of the development;
- (d) The square and lot number(s) of the development;
- (e) The total number of residential units that have been or will be developed or redeveloped as part of the development;
- (f) The total number of affordable residential units that have been or will be developed or redeveloped as part of the development;
- (g) For each such affordable residential unit, the number of bedrooms in the unit and the Median Family Income level of affordability for the unit;
- (h) An acknowledgment that the affordable residential units shall be administered in the same manner as, and pursuant to the same rules and standards of, Inclusionary Units for the term of the tax abatement;

- (i) A statement that the attachments required by section 6403.4 of this chapter have been submitted as part of the application; and
- (j) The annual dollar amount of tax abatement requested.

6403.4 The application shall also include the following attachments:

- (a) The documents required by section 6403.3 of this chapter;
- (b) Three (3) dated photographs of the development taken within the thirty (30) day period that precedes the date of submission of the developer's application;
- (c) If applicable, a copy of the agreement the developer executed, or will execute, with DSLBD requiring the developer to, at a minimum, contract with certified business enterprises for at least thirty-five percent (35%) of the contract dollar volume of the construction and operations of the development, in accordance with section 2346 of the Certified Business Enterprise Act (D.C. Official Code § 2-218.46), and a certification from DSLBD that the developer met the requirements of the CBE agreement.
- (d) An area map showing the boundaries of the eligible area with the development identified by a location arrow;
- (e) A copy of the certificate of occupancy for the development or the estimated date a certificate of occupancy for the development will be issued;
- (f) A copy of the First Source Agreement for the operations of the development executed, or that will be executed, with DOES and a certification from DOES that the developer is in compliance with the requirements of that agreement, as applicable;
- (g) A calculation of the annual dollar amount of tax abatement being requested supported by a pro forma or other financial analysis; and
- (h) A copy of the deed evidencing fee simple ownership, the applicable lease, or the contract of sale.

6404 APPLICATION REVIEW AND RESERVATION PROCESS

6404.1 DHCD shall review each application submitted in accordance with the standards of the competitive process and this chapter.

6404.2 Within thirty (30) business days after receiving an application, DHCD shall review the application and approve the application, deny the application, or request additional information from the applicant.

6404.3 If DHCD approves an application, DHCD shall transmit a reservation letter to the developer that:

- (a) Confirms the development is eligible for the applicable tax abatement and that DHCD has reserved a tax abatement for the project;
- (b) States the annual dollar amount of the abatement;
- (c) Lists the project development milestones that must be met by dates certain to not forfeit the tax abatement reservation; and
- (d) Details the information required and process to request a tax abatement certification.

6404.4 If an application is submitted that is not complete, DHCD shall transmit to the developer a request for the additional information required for consideration of the application.

6404.5 If DHCD denies an application, DHCD shall transmit to the developer a denial letter which shall state the reason for the denial.

6404.6 DHCD shall deny an application if:

- (a) The amount of the tax abatement requested exceeds the maximum amount set forth in Section 6401.1;
- (b) The development is ineligible for the abatement; or
- (c) The development is not approved for the tax abatement based on the competitive process.

6405 TAX ABATEMENT CERTIFICATION PROCESS

6405.1 If a development meets the milestones listed by DHCD pursuant to subsection 6404.3(c), the developer shall request a tax abatement certification and provide any outstanding information, documents, or attachments, including a copy of the certificate of occupancy if not previously provided.

6405.2 Within thirty (30) business days after receiving a complete request for tax abatement certification:

- (a) DHCD and the developer shall execute an abatement agreement and the affordability covenant described in section 6406 of this chapter;
- (b) The developer shall file the affordability covenant in the land records of the District, as required by section 6406 of this chapter;

- (c) DHCD shall certify to OTR the development’s eligibility for the tax abatement, and that certification shall include:
 - (1) The street address, square, suffix, and lot of the real property on which the development is located;
 - (2) The date the certificate of occupancy was issued for the final housing unit counted toward satisfying the affordability requirements of the Act and this chapter;
 - (3) The dates the tax abatement begins and ends;
 - (4) The annual dollar amount of the tax abatement and the schedule of the tax abatement dollar amounts to be reflected on the development’s real property tax bills; and
 - (5) A statement that the conditions required by D.C. Official Code § 47-859.06(a) and this chapter have been satisfied; and
- (d) DHCD shall provide the developer a copy of the certification DHCD provided to OTR.

6405.3 An approved tax abatement shall begin in the tax year immediately following the tax year during which the certificate of occupancy was issued for the final housing unit counted toward satisfying the affordability requirement of the Act and shall continue for a period of thirty (30) tax years; provided that the abatement is not earlier terminated;

6405.4 Notwithstanding section 6405.3, DHCD may approve a tax abatement to continue for forty (40) tax years after the tax year during which the certificate of occupancy is issued for the final housing unit counted toward satisfying the affordability requirement of the Act if the developer provided in its application information showing a need for a tax abatement of forty (40) tax years for the development and DHCD determines that it is in the interests of the District to award a tax abatement of forty (40) tax years for the development.

6406 AFFORDABILITY COVENANT

6406.1 Prior to the issuance of the tax abatement certification by DHCD, the developer shall file an affordability covenant in the land records, which shall be binding on the developer and all of its successors, including assigns in interest with respect to the development, covenanting to comply with the requirements of D.C. Official Code § 47-859.06(a)(3).

6406.2 The affordability covenant shall include the following:

- (a) The affordable residential units shall be administered in the same manner as, and pursuant to the same rules and standards that apply to, Inclusionary Units, including Title 14 Chapter 22 of the DCMR;
- (b) The affordable residential units shall meet the square footage requirements in the Inclusionary Zoning Regulations;
- (c) The affordable residential units shall be identical in exterior design, materials, and finishes to the market-rate units in the development;
- (d) The interior amenities of the affordable residential units, such as finishes and appliances, shall be identical to the interior amenities of the market-rate units in the development;
- (e) The time period during which each affordable residential unit must be maintained as an affordable residential unit;
- (f) The number of affordable residential units required to be included and maintained as part of the development;
- (g) The method by which the income of a household residing in an affordable residential unit will be calculated;
- (h) The maximum allowable Median Family Income level for each affordable residential unit, and that the maximum allowable rents and maximum allowable incomes will be determined by the then-current Inclusionary Zoning price schedule;
- (i) Requirements for annual re-certification of household income and size for each affordable residential unit;
- (j) Initial designation of the affordable residential units; and
- (k) The process for redesignating affordable residential units if a household's income exceeds the maximum allowable income for the unit upon lease renewal.

6407

ONGOING AFFORDABLE HOUSING REQUIREMENTS

6407.1

To continue to be eligible to receive the tax abatement provided by this chapter and the Act:

- (a) At least one third (1/3) of the housing units in the development shall, for the duration of the tax abatement period, be affordable to and rented by

households that earn one hundred percent (100%) of the Median Family Income;

- (b) The average Median Family Income of these households that occupy the one third (1/3) of the housing units described in paragraph (a) of this subsection shall be no greater than eighty percent (80%) of the Median Family Income.

6407.2 At the time of each lease execution for an affordable residential unit, the developer shall calculate the average household income for all housing units considered under the one-third (1/3) requirement described in section 6402.1(b). If such average household income exceeds eighty percent (80%) of the Median Family Income, the real property on which the development is located shall become ineligible to receive a tax abatement under this chapter.

6407.3 Operation of the affordable residential units, including calculation of incomes, maximum allowable rents, renewals, and re-certifications of income and household size, shall follow the rules and standards of the Inclusionary Zoning Program, including re-designation of units if a household's income exceeds the maximum allowable income upon lease renewal.

6408 NONCOMPLIANCE

6408.1 If at any time during the term of the tax abatement DHCD determines that the development has become ineligible for the tax abatement by not complying with the recorded covenant or the abatement agreement or section 6407, DHCD shall:

- (a) Notify OTR of the ineligibility, specifying the date the development became ineligible; and
- (b) Notify the developer that OTR has been notified.

6408.2 The entire development shall be ineligible for the abatement on the first day of the tax year following the date when the ineligibility occurred.

6499 DEFINITIONS

When used in this chapter, the following terms and phrases shall have the meanings ascribed:

Act - the Tax Abatements for Affordable Housing in High-Need Areas Amendment Act of 2020, effective December 3, 2020 (D.C. Law 23-149; D.C. Official Code § 47-859.06).

Affordable residential unit – a housing unit that is income and rent restricted.

Annual income – annual income as defined in section 2299.1 of the Inclusionary Zoning Regulations (14 DCMR 2299.1).

Bedroom – a room in a development, with immediate access to an exterior window and a closet, that is designated as a “bedroom” or “sleeping room” on construction plans submitted with an application for a building permit for the development.

CBE Act - the Small and Certified Business Enterprise Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33; D.C. Official Code § 2-218.01 *et seq.*).

Certified business enterprise - a business enterprise certified pursuant to the CBE Act.

Competitive process - a request for applications (“RFA”) or similar process by which applications for tax abatements under this chapter are solicited or accepted by DHCD.

DCMR– the District of Columbia Municipal Regulations.

DCRA– the Department of Consumer and Regulatory Affairs

Developer– the owner or owner’s agent of a development.

Development – the buildings or improvements that include affordable residential units on real property.

DHCD– the Department of Housing and Community Development.

DOES – the Department of Employment Services.

DSLBD– the Department of Small and Local Business Development.

Eligible area– each area defined as a “high-need affordable housing area” in the Act, which includes the Rock Creek West, Rock Creek East, Capitol Hill, and Upper Northeast planning areas identified in the District’s Housing Equity Report, (available from <https://housing.dc.gov>) published in October 2019, plus one thousand feet (1,000 ft.) in any direction beyond any boundary of these planning areas.

Final certificate of occupancy - a document issued by DCRA certifying a building’s compliance with applicable building codes and other laws, and indicating it to be in a condition suitable for occupancy.

First Source Act–the First Source Employment Agreement Act of 1984, effective June 29, 1984 (D.C. Law 5-93; D.C. Official Code § 2-219.01 *et seq.*).

First Source Agreement - an agreement with the District governing certain obligations of the developer regarding job creation and employment, pursuant to section 4 of the First Source Act (D.C. Official Code § 2-219.03) and Mayor's Order 83-265, dated November 9, 1983.

Household – all persons who will occupy an affordable residential unit, which may, subject to occupancy standards contained in Title 14 Chapter 22 of the DCMR, be:

- (a) A single family;
- (b) One (1) person living alone;
- (c) Two (2) or more families living together; or
- (d) Any other group of related or unrelated persons who share living arrangements.

HUD – the United States Department of Housing and Urban Development.

Inclusionary Unit – a dwelling unit set aside for sale or rental as required by the Inclusionary Zoning Program.

Inclusionary Zoning Program – all of the provisions of the Inclusionary Zoning Regulations and the Inclusionary Zoning Implementation Amendment Act of 2006, effective March 14, 2007 (D.C. Law 16-275; D. C. Official Code § 6-1041.01 *et seq.*).

Inclusionary Zoning Regulations – the regulations published at Title 14, Chapter 22 of the District of Columbia Municipal Regulations and at Title 11-C, Chapter 10 of the District of Columbia Municipal Regulations.

Land records – the land records of the Office of the Recorder of Deeds.

Median Family Income - the median family income for a household in the Washington Metropolitan Statistical Area as set forth in the periodic calculation provided by HUD, adjusted for household size without regard to any adjustments made by HUD for the purposes of the programs it administers.

Operations –all property maintenance, resident services, and related functions necessary to operate and maintain a development.

OTR– the Office of Tax and Revenue.

All persons desiring to comment on the proposed regulations should file comments in writing no later than thirty (30) days after the publication of this notice in the *District of Columbia Register*.

Comments should identify the commenter and be clearly marked “Comments for Rules on Tax Abatement for Affordable Housing in High-Needs for Affordable Housing Areas Rules.” Comments may be (1) mailed or hand-delivered to DHCD, 1800 Martin Luther King, Jr., Ave, SE, Washington, D.C. 20020, Attention: DHCD HANTA Proposed Rule Comments, Director’s Office or (2) sent by e-mail to regs.dhcd@dc.gov with the subject indicated as “Comments on HANTA Proposed Rules.”