

Practice Update

D.C. Government Publishes Proposed Rules on Tax Abatements for Residential Conversions

February 22, 2024

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Washington D.C.'s Office of the Deputy Mayor for Planning and Economic Development (DMPED) released its proposed rules establishing how the D.C. government will implement the Housing in Downtown Tax Abatement program. A refresher on the law is below, but in general, the new proposed rules (1) expand the boundaries of the eligible area; (2) establish the conditions to receive a tax abatement; (3) explain the process for applying and receiving a tax abatement; and (4) set the requirements to remain eligible to receive the tax abatement during the abatement period. Importantly, however, the proposed rules do not provide any bright-line rule for calculating the amount of a property's tax abatement. Instead, that is left to DMPED's subjective judgment as to a project's financial feasibility and need.

As background, the Housing in Downtown Tax Abatement program was signed into law in July 2022 and offers tax abatements to commercial property owners who convert their non-residential properties (or portions of them) into residential housing (*see D.C. Code §§ 47-860.01 - 47-860.04*). Under the program, an abatement of real property taxes may be available to property owners for a period of 20 years, as long as certain qualifying conditions are met, including the following:

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- There is a change in use resulting in the development of at least 10 housing units.
- At least 10 percent of the housing units developed or redeveloped are affordable to households earning 60 percent or less of the median family income for a period of at least 20 years, or at least 18 percent of the units are affordable to households earning 80 percent or less of the median family income for at least 20 years.
- The owner must file a covenant in the land records, binding the owner and all successors to comply with the first two requirements.
- The affordable housing units are designed and administered in accordance with the requirements of the Inclusionary Zoning Program.
- The owner must contract with certified business enterprises for at least 35 percent of the construction and operations costs of the project.
- The owner must execute a First Source Agreement for the construction and operation of the project.
- The mayor provides a letter stating that the proposed project is eligible for the tax abatement and setting forth the expected amount of the abatement.
- The property must be within a defined “eligible area” covering parts of downtown Washington, D.C.

The tax abatement is capped at:

- FY24-26: \$2.5 million
- FY27: \$6.8 million
- FY28: \$41 million
- Each year after: 104 percent of the prior year’s cap

The tax benefits begin in the tax year in which a certificate of occupancy is issued, and expire at the end of the 20th tax year thereafter. The tax

abatement amount is generally supposed to be based on residential floor area ratio (FAR) square foot of real property, multiplied by the property's total residential FAR square footage. However, the law does not provide sufficient detail on how this amount will be calculated, and left open numerous other questions surrounding how the District would implement the law. Instead, the mayor delegated responsibility for rulemaking to DMPED.

DMPED's proposed rules include the following additional guidance:

Applying for the Tax Abatement

- An application may be submitted only in response to a competitive process initiated by DMPED. This contemplates that additional requirements may be included in a specific request for applications.
- Section 6603.3 of the proposed rules set forth the specific information that must be included in an application, including (but not limited to):
 - The total number of housing units that will be constructed;
 - The total number of affordable housing units that will be constructed;
 - For each affordable housing unit, the number of bedrooms in the unit and the median family income level of affordability for the unit;
 - An area map showing the boundaries of the eligible area for the program, with the parcel identified by a location arrow;
 - Anticipated entitlement and construction milestones, including certificate of occupancy;
 - The years for which the tax abatement is requested and the annual dollar amount of tax abatement; and
 - Pro formas and other financial analyses justifying the development's financial need for the tax abatement.

- In reviewing applications, DMPED will give preference to applications based on the benefit of the proposed development to the surrounding area and the District.
- DMPED must within 30 days of receipt of an application either approve or deny it, request additional information, or notify the applicant that additional time is needed.
- DMPED will determine the amount of a tax abatement based on a project's financial feasibility and need. This is critically important, as the rules do not provide any bright-line guidance for calculating the amount of a property's tax abatement. Instead, that is left to DMPED's subjective judgment.

Eligible Area

Notably, the proposed rules expand the “eligible area” within which a development must be in order to qualify for the tax abatements. The expanded eligible area would be defined as:

The geographic area beginning at the intersection of Florida Avenue, N.W., and 20th Street, N.W.; continuing south along 20th Street, N.W., to Connecticut Avenue, N.W.; continuing southeast along Connecticut Avenue, N.W., to Dupont Circle, N.W.; continuing clockwise around Dupont Circle, N.W., to Massachusetts Avenue, N.W.; continuing southeast along Massachusetts Avenue, N.W., to Scott Circle, N.W.; continuing clockwise around Scott Circle, N.W., to Massachusetts Avenue, N.W.; continuing southeast along Massachusetts Avenue, N.W., to Thomas Circle, N.W.; continuing clockwise around Thomas Circle, N.W., to Massachusetts Avenue, N.W.; continuing southeast along Massachusetts Avenue, N.W., to Mount Vernon Place, N.W.; continuing east along Allen Y. Lew Place (formerly Mount Vernon Place), N.W., to 7th Street, N.W.; continuing south along 7th Street, N.W., to Massachusetts Avenue, N.W.; continuing southeast along Massachusetts Avenue, N.W., to North Capitol Street; continuing south along North Capitol Street to

Louisiana Avenue, N.W.; continuing southwest along Louisiana Avenue, N.W., to Constitution Avenue, N.W.; continuing west along Constitution Avenue, N.W., through the intersection with Pennsylvania Avenue, N.W., to 15th Street, N.W.; continuing north along 15th Street, N.W., to H Street, N.W.; continuing west along H Street, N.W., to 17th Street, N.W.; continuing south along 17th Street, N.W., to Constitution Avenue, N.W.; continuing west along Constitution Avenue, N.W., to Virginia Avenue, N.W.; continuing northwest along Virginia Avenue, N.W., to D Street, N.W.; continuing west along D Street, N.W., to 23rd Street, N.W.; continuing north along 23rd Street N.W., to Washington Circle, N.W.; continuing clockwise around Washington Circle, N.W., to Pennsylvania Avenue, N.W.; continuing northwest along Pennsylvania Avenue, N.W., to 25th Street, N.W.; continuing north along 25th Street, N.W., to N Street, N.W.; continuing east along N Street, N.W., to 22nd Street, N.W.; continuing north along 22nd Street, N.W., to Florida Avenue, N.W.; continue northeast along Florida Avenue, N.W., to 20th Street, N.W. (the starting point).

Miscellaneous Requirements

- Housing units included as part of the Inclusionary Zoning Program will be counted towards the affordability minimums listed above.
- Each property approved for a tax abatement is exempted from the requirement to enter into a First Source Agreement for the construction and development phases of the development.
- Each property approved for a tax abatement is exempted from the requirements of the Tenant Opportunity to Purchase Act (TOPA) for the first sale within 10 years after the certificate of occupancy has been issued.

Keep in mind that DMPED's proposed rules are not yet final and in effect. Interested parties have until **February 25, 2024**, to comment on the proposed rules. Instructions for submitting comments appear in the proposed rulemaking.

The foregoing is not intended to constitute legal advice, and only provides a summary of certain elements of the Housing in Downtown Tax Abatement program and DMPED's proposed rules. Akerman attorneys can assist with understanding the program's full requirements and with navigating the application process.

This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.