The Committee of 100
on the Federal City

Before the District of Columbia City Council
Committee of the Whole
Oversight Hearing on Office of Zoning the

Statement of the Committee of 100 on the Federal City

March 18, 2021

Good morning and thank you for the opportunity to share these views, prepared by the Zoning Subcommittee of the Committee of 100 on the Federal City (C100). Our comments center on one key issue: the Zoning Commission's excessive reliance on the Office of Planning (OP) on substantive and procedural matters. This reliance threatens its actual independence and already has harmed its appearance of independence. OP is not structured or intended to be a neutral body. The Commission needs access to planners answerable only to it who can analyze and advise on pending cases. The Commission also needs to be more heedful of the Administrative Procedure Act, especially the distinction between technical and substantive rule amendments and the requirement that rulemaking decisions are consistent with the record. We recommend additional dedicated attorneys.

Comp Plan Letter to Council. The most serious instance of apparent loss of independence is the Commission's August 5 letter to the Council Chair urging swift passage of the pending Comprehensive Plan because, among other reasons, a number of cases were pending "in limbo" pending the Plan's completion. Upon learning of this letter in October, C100 protested and asked the Commission to withdraw his letter. We also advised the Council of our concern.[1] The letter is now the subject of several ethics complaints filed by another organization.

C100 contended that the Chairman's letter went beyond a status inquiry regarding the Plan and stated a policy preference for the Plan's contents, which the Commission cannot do. The cases

[1] A copy of Chairman Hood's letter and C100's protest are on our website at https://committeeof100.net/download/planning/comprehensive_plan/2020-10-13-C100-Letter-Zoning-Commission-Chair-Anthony-Hood.pdf.

"in limbo" could have been decided at any time under the existing Plan if the applicants had desired or the Commission had insisted. Several applicants filed cases and the Commission set them down for hearing, while acknowledging on the record that they did not comply with the existing Plan. *See, e.g.*, ZC 20-12 (Westminster Presbyterian). The letter from a powerful District adjudicatory body to the legislature urging particular legislative action shows an indifference to the separation of their functions that undermines confidence in government.[2]

Substantive rule changes mischaracterized as "technical." **a. ZC 20-02 (IZ Plus).** On more than one occasion, substantive rule changes were designated incorrectly as "technical" fixes with no substantive impact. A good example of this is shown in the Commission's recent action approving the Office of Planning's Inclusionary Zoning Plus (IZ Plus).

During that case, the Commission issued draft IZ Plus rules for public comment: the core of the rulemaking was the formula used to calculate the amount of affordable housing. On December 28, 2020, the last day for public comment, a building industry group proposed an alternative formula. OP incorporated the unadvertised formula into the draft rule it presented to the

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[2] The colloquy among Commission members at the public meeting at which they voted 4-1 to set down the Westminster Presbyterian case sheds light on its thinking that prompted the letter and also shows the extent to which the Commission goes outside the confines of the zoning regulations and the Comp Plan in exercising its function:

> I spent the better part of last year meeting with Council members and the Office of Planning, when the framework element [of the Comprehensive Plan] was pending before the [Council] which did provide a lot of helpful amendments, which are about to become effective one year later through the congressional Monroe Act approval process, in terms of encouraging affordable housing and giving even more weight in the existing Comprehensive Plan. Herein, [sic] and giving more flexibility to the Zoning Commission to consider the overall Comp Plan policies when there seems to be a potential inconsistency with the land use map or, in this case, both the land use map and the policy map. Tr. at 54-55 (remarks of Vice-Chair Miller). [S]o much of our City is designated incorrectly for what we want with the Mayor's Affordable Housing Policy. *Id.* at 56.
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> I do not like to zone for what the courts say …. [T]hat's not my job. My job is to do what's right for the City …. Tr. 59 (remarks of Chr. Hood). **** [E]verybody is talking about when is the Council going to act …. And I was going to ask OAG, I don't have a problem. Phil Mendelson is a friend of mine, I don't have a problem sending him a letter, because he didn't have a problem sending me one. I mean, I don't know if legally I can do that, but I have no problem sending Chairman Mendelson a letter and say get this done. *Id.* at 60. **** Now here's somebody [the church] who has done so much for the City … and they need some help. I've seen a lot of churches coming down … because of the funding drying up…. [B]ut back to the legal requirements of our Code." *Id.* 61.

Commission for final action at its January 28, 2021meeting, describing the industry group's amendments as "minor revisions." C100 protested that final action could not be taken without further opportunity for comment. At its January 28 meeting, the Commission started to adopt the rule before wisely deciding to reissue the revised formula for further public comment. The case never should have been allowed to come up for final action. Both OP and the Office of the Attorney General (OAG) failed in their obligation properly to advise the Commission. [3]

b. ZC 19-21 (Removal of rooftop elements). This was a multi-faceted rulemaking, a principal element of which allowed removal of distinctive rooftop elements in rowhouse neighborhoods, thereby enabling upward and outward expansion of such structures (pop-ups and pop-backs). OP insisted throughout the proceeding that the rulemaking was part of a technical reorganization of the D.C. Zoning Regulations, and that while *duplicative* elements were removed, no substantive provisions were changed. Numerous witnesses protested the proposal at the setdown and hearing stages, contending that important longstanding safeguards against unsightly pop-ups were at stake.

OP submitted a Supplemental Memorandum after the record was closed, which mis-stated the zoning code and mispresented the public comments. OP failed to provide an accurate assessment of public comments, except for those raised by the Ward 1 council representative, thereby suggesting that authoritative figures merit attention well beyond that afforded organizations and untitled residents. OP said the opposition consisted of "several letters." Of the 25 comments submitted after publication of the Notice of Proposed Rulemaking, 20 expressly opposed relaxing the rules and one was supportive. The opposition letters were a mix of duplicative comments based on a model and originally drafted submissions. The remaining individual letters and Councilmember Nadeau's comments were limited to the solar issue. Three organizations with longstanding interests in zoning and historic preservation issues opposed the rooftop feature amendments; two were supportive.

In addition to comments filed in response to the NPR, 19 individuals and organizations submitted comments for the setdown hearing, only one of which supported the rooftop changes. While precedents regarding how administrative agencies are to weigh rulemaking records do not require a headcount of pro and cons, there is no colorable way that these amendments can be said to be supported by substantial or a preponderance of the evidence of record.

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[3] After further comment, the Commission unanimously adopted the rules on March 22, 2021, despite acknowledging credible comments in the record arguing that the changes weakened and in some cases reduced the affordable housing requirement. At the March 11 meeting, the Chair asked OP to respond to the adverse comments. OP said there was no way the proposal could lead to less affordable housing, ignoring among other points the comment that elimination of the alternative bonus density arm of the IZ formula could result in less affordable housing in cases where bonus density would otherwise apply. The Commission also asked OP to respond to a particular example cited in the comments and ultimately asked OP to provide a written rebuttal. Nevertheless, the Commission unanimously approved the rule. The point is not that the Commission was obliged to accept the comments, but that the Commission acted without resolving an acknowledged dispute that went to the core of the rulemaking. The rule fairly may be said not to reflect the preponderance of the evidence.

Notwithstanding OP's insistence that nothing was lost under the amendments promulgated in 19-21, in BZA 20290, one of the first cases brought under the revised rules, it became clear that in removing "duplicative" provisions, the Commission had excised certain bedrock protections from section U-320. The BZA case involved conversion of a three-story residence to a 7-unit apartment. Pursuant to 19-21, the applicant was no longer required to show that the altered property would not have a substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling or property; the light, air and privacy available to neighboring properties would not be unduly affected; and the conversion would not pose a substantial visual intrusion.

The new code is complex, even after its reorganization, and mistakes will happen, but this case is galling because of the number of voices in opposition that received such short shrift.

c. 14-13E (Penthouse regulation amendments). This is another case in which substantive changes that removed a large class of buildings from protections against visually intrusive neighboring penthouses were characterized as minor or technical. In this matter, the Commission did assure that opposing views got a full and fair hearing. This must be the norm going forward.

Other matters. To increase transparency in map amendment cases, C100 asks that the Office of Zoning be given additional funds to expand its 3D map capacity to show before-and-after simulations when addressing proposed map amendments. The proposed land use changes in the draft Comprehensive Plan may result in a flood of map cases embodying dramatic changes, so we view this as an urgent need.

Conclusion. Based on the foregoing, it is evident that the Commission needs dedicated professional staff to advise it on pending matters. OP is not a disinterested party and was not intended to be. Dedicated planners can interface with government agencies and in some instances with parties in a way that Commission and BZA members cannot. The workload warrants more dedicated attorneys as well. Such staff would function in same manner as staff and counsel to various other multi-member agencies do. This is a modest first step toward restoring the appearance of independence to an agency whose decisions bear more and more heavily on our lives. To be respected, the deliberations of an adjudicatory and rulemaking body must be viewed as being fair." We believe our suggestions will help rebuild public trust.

s/ Kirby Vining, Chair
Committee of 100 on the Federal City

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