The Committee of 100
on the Federal City

March 18, 2024

Comments Respecting Zoning Commission Case 22-25
Amendments to Titles X, Y and Z of the DC Zoning Regulations

The Committee of 100 submits the following comments on the Notice of Proposed Rulemaking ("NOPR") containing amendments to the operating rules of the Office of Zoning, the Zoning Commission and the Board of Zoning Adjustment:

Summary: The Zoning Commission is considering a NOPR containing amendments to the operating rules of the Office of Zoning, the Zoning Commission and the Board of Zoning Adjustment, including public notice requirements, allowed response times, provisions for modifying final orders and similar matters. The amendments also address important matters of substance, including allowing changes to be made to a Planned Unit Development's (PUD) intended use without a hearing after a final order has been issued. While making useful changes, the general thrust of the amendments is to make it harder for the public to participate in the zoning process while vesting additional discretion in zoning bodies, the Office of Planning (OP), and applicants and petitioners. Most disappointingly, the NOPR misses an opportunity to codify the Racial Equity Analysis Tool.

A. Racial Equity. Since February 2023, when the Commission's Racial Equity Analysis Tool (REAT) was posted on the Office of Zoning website (dcoz.dc.gov), its inherent weaknesses have become apparent. Principally, the REAT invites open-ended submissions that invite responders to wander through the Comprehensive Plan, cherry-picking policies. While the Comprehensive Plan provides that the Land Use Element shall be given the greatest weight in interpreting the rest of the Plan,[1] the REAT seems to give all policies equal weight, no matter how tangentially they affect a particular project or issue. The REAT's evaluation criteria contain no test to judge whether a REAT response is sufficient for a project, rule or map amendment to be approved.

[1] *See* Implementation Element Policy IM-1.3.4: Interpretation of the District Elements. Because the Land Use Element integrates the policies of all other District Elements, it should be given greater weight than the other elements. 2504.6

A well-crafted racial equity regulation containing standards for judging a response is necessary to make the racial equity analysis meaningful, rather than a box to be checked. Codification has multiple benefits, principally:

- Establishing a set of standards that have been adopted pursuant to the public hearing process;
- Establishing procedures for enforcing those standards;
- Creating a clear set of procedures for applying the standards, including any exceptions;
- Fostering development of a body of practice against which to consider each case;
- Assuring the right to appeal on racial equity grounds.[2]

At the Zoning Commission's September 2022 roundtable, the Committee of 100 and many others called for codified racial equity principles and the public was promised this would happen. We anticipated that the Commission would issue draft racial equity standards for comment. To our surprise, the Commission posted its Racial Equity Tool on the Office of Zoning website some time later, explaining that codification would deprive it of the needed flexibility to adjust the equity standards as it gained experience in applying them. The Commission did not otherwise explain its change of position.

In two of this year's most-watched cases, map amendments to allow new high-rises at 1617 U Street and the Takoma Metro Station,[3] OP's equity analysis *ignored the fact that the market rate housing planned for these sites will result in indirect displacement* although this inevitable outcome is well-known and has been extensively documented. The potential for indirect displacement is one of the REAT evaluation criteria.[4]

B. Uniform Filing Process. Earlier in this proceeding, the Office of the Attorney General (OAG) proposed a unified prehearing procedure that would require applications and petitions to be filed at the same time an applicant/petitioner gives notice of a proposed action. As currently written, a notice in the nature of a "heads-up" is issued to Advisory Neighborhood Commissions (ANCs) and nearby neighbors (if applicable), followed 45 days later by the application/petition. While the OAG's proposal is not the NOPR, we think it merits inclusion, assuming that the total time frame is not shortened. The unified procedure allows the public to start providing input immediately and creates a factual basis for public discussion.[5] In rejecting this proposal, the

[2] The Committee of 100 does not concede that the lack of codification forestalls a party from appealing on racial equity ground.

[3] See Zoning Commission Case No. 23-02, A Map Amendment Petition to Rezone Square 0157, Lot 826 (1617 U Street, NW) and Lot 827 (1620 V Street, NW) from the MU-4 Zone to the MU-10 Zone. OP Rep. at 20, Ex. 58 (June 16, 2023); and ZC Case No. 22-36, Map Amendment and PUD Application for Takoma Metro Station. OP Rep. at 10, Ex.12 (Jan. 30, 2023). OP's report in the Takoma case was issued under the Commission's interim racial equity guidance.

[4] In the 1617 U Street case, OP said only: "To the extent the potentially affected buildings [two- and three-story houses immediately across the street from the site in question] have been historically occupied by Black residents, it is possible that some residents may view the impact of a taller building in a context of past discrimination." Ex. 58 at 20.

[5] In some cases, community engagement begins long before a zoning action is filed. Small area plans intended to lead to zoning changes may have been developed over several months, or a developer may have announced plans for a particular site. Initiation of a zoning action moves a project or a plan policy from the potential to the concrete.

Commission said that it had employed a similar procedure in the past and found it inefficient, in part because once applicants prepared documents, they were reluctant to alter them based on community input.

We suggest that technological advances have made it easier for applicants to engage in a dialogue with the public. If objections are made to density, for instance, current software allows the applicant to present an alternate view. We are not saying that an applicant must tailor its design to each commenter in finished form. It can, however, offer rough, electronic "notes" and sketches embodying different ideas. The District is staking its comeback on being a technology hub and its zoning function is as good a place as any to reflect that emphasis.

C. Earlier Property Posting of Notice. The Committee of 100 agrees with the OAG that applicants and petitioners should be required to post public notice on the property that is the subject of a zoning application/petition at the time of the filing of the application/petition. The Commission's justification for rejecting this posting requirement, namely, that early posting on the property "would be unnecessarily burdensome and complex since there already exists various other means of providing notice to the public," ignores the public's right to meaningful notice and opportunity to be heard — the essence of the fundamental right to procedural due process. As the OAG explains in its comments, this posting requirement would not result in additional administrative burdens. However, even if the Commission's "additional burdens" concerns were true, such a burden on government is what procedural due process requires. As the OAG notes, posting provides "earlier and more direct and easily understandable notice [that] is essential to ensuring that all District residents are equitably informed of zoning matters."

D. Pre-Setdown Meetings with ANCs. For the same reasons that early airing of an application/petition is desirable, an applicant/petitioner should be required to meet with affected ANCs prior to setdown. A pre-setdown meeting allows the ANC to ask questions to form a position on whether a case should go forward at a particular time. Setdown is not intended to be automatic, and while oral public testimony is not allowed, ANC written statements are expressly permitted and written statements from the public are accepted. When a process contemplates public participation, that input helps the Commission most when it rests on a sound base of knowledge, and a meeting promotes that.

The NOPR rejects this idea as likely to delay scheduling setdown meetings if an applicant cannot get on an ANC's schedule, which can be difficult. Delay may be avoided by allowing an ANC to waive a pre-setdown meeting (in writing), which may well happen in cases of minor consequence. If a case is important to a community, any delay is justified.

The concern for avoiding applicant delay is a symptom of the larger problem with the zoning function, namely, the tendency to see the public as a nuisance to be worked around, not as stakeholders with a legally protected right to participate.

E. Tenants. Throughout the NOPR process, extensive debate addressed the status of tenants, who may be as invested in a neighborhood as resident owners and are no less entitled to due process. Debate concerned tenants of a property that is the subject of a zoning action, and tenants who live in the surrounding community. In addition to potential rights under various housing laws (e.g., Tenant Opportunity to Purchase Act (TOPA)), resident tenants should have

automatic party status if they wish to participate in a zoning action affecting their homes. The OAG has comprehensively identified the barriers tenants may face in articulating the legal standard for party status at the same time they are contesting the zoning action on substantive grounds.

As to tenants living without 200 feet of the subject property, individual notice would be ideal but may not be feasible. There is no reliable, publicly available list of tenants; and some buildings have 100 or more units. Instead of individual notice to these 200-foot tenants, we suggest that notice be posted at the apartment buildings at the same time notice is given to owners.

F. Allow Non-Parties to File Motions for Reconsideration and Rehearing. Non-parties should be allowed to seek reconsideration. Parties have the right to do so but the standard for obtaining relief is so rigorous that it is rarely requested. Non-parties, with a steeper hill to climb, are unlikely to resort to reconsideration for frivolous reasons.

Reconsideration by a nonparty is appropriate when a Commission or BZA order rests on novel theories that were not raised below and could not be anticipated, or when an Order contains a facial error that could be rectified on reconsideration. In one case, the Committee of 100 appealed to the D.C. Court of Appeals from an order in which the Commission asserted excessive authority to waive zoning regulations. We engaged in negotiations aimed at resolving the appeal through an amended order, and sought reconsideration when the amended order was issued containing a new error. *Initio*, 15-18A, Order (Jan. 28, 2018) and Order Denying Reconsideration (Dec. 20, 2018). In a rulemaking case, the Committee of 100 and the Kalorama Citizens Association sought reconsideration to rules rolling back pop-up and pop-back protections. The organizations acted when the final order eliminated rules prohibiting undue impact on residents' light and air in special exception cases. ZC 19-21, text amendments to Subtitles D, E, U and X (Sept. 24, 2020). Several witnesses had contended throughout the hearing that this would be the result of the complex reordering of the rules and were repeatedly told they were misreading the amendments and that the light and air protections would remain intact. Even though the objecting witnesses were proved right, reconsideration was denied. As a rulemaking case, there were no actual parties.

Reconsideration by a nonparty is appropriate when a party is unable or unwilling to engage in post-hearing proceedings before zoning authorities or in court. In *Vitis Investments*, BZA 20290 (Jan, 28, 2022), the BZA granted a special exception to which multiple neighbors objected. The next-door neighbor who was most immediately affected was granted party status. but after losing before the BZA, that neighbor sold his house and moved. A similarly aggrieved nonparty neighbor filed an appeal. *Fay v. BZA*, 22-AA-0114 (D.C. Ct. App. Jun 22, 2023) (per curiam). While *Fay* involved a judicial appeal, the same consideration applies to nonparties seeking reconsideration before the Commission. The zoning authorities actively discourage multiple opponents with similar claims from seeking party status and urge them to appear as witnesses. That is a reasonable position that enables the Office of Zoning to manage its docket efficiently. However, such nonparty opponents should be able to pursue a case in post-hearing proceedings if no party can or will do so.

G. Modifications of Final Orders. Subtitle Z, section 703. The NOPR streamlines the process for seeking changes to final orders, creating two kinds of modifications: modification with a hearing and modification without a hearing. The standard for determining whether a hearing will be held is subjective – whether the requested modification "can be understood

without witness testimony," a decision solely within the Commission's discretion. While the modification process needed simplifying, the effect of this new standard is to convert many significant changes, which require a hearing under the existing rules, to summary proceedings that may be decided on the consent calendar. The scope of modifications that may be sought after the order is issued can substantially reshape the design and uses of a project, no matter how much painstaking negotiation was involved in determining those features. The NOPR states that architectural features may be relocated and that open space may be reconfigured, but expressly leaves the door open for other changes, which could include a change of use, change of proffered benefits, altered covenants, or changes in the kind or amount of flexibility granted from compliance with development standards. The District's shifting economic outlook has resulted in numerous departures from final orders or delays in implementing them, and more may be expected.[6]

The standard in the revised modification procedure, however, is so broad that it allows projects to be essentially redesigned without public input after a final order is issued, an outcome totally at odds with principles of administrative procedure. The standard must be substantially narrowed to allow a limited set of modifications to be made without a hearing. The standard should include a rationale for seeking the change. Anything short of these requirements reduces "final" orders to advisory opinions.

The NOPR also proposes that requests for modifications be noticed only to the ANC with current jurisdiction even if another ANC considered the original zoning case and was subsequently replaced through redistricting. The ANC of original jurisdiction knows the case and should be involved. The omission of the first ANC is at odds with the frequent practice of allowing more than one ANC to participate in a major case that affected both communities.[7]

H. Allowing Use Changes in a PUD Proceeding. The NOPR authorizes PUD applicants to request uses not permitted in the underlying zone as part of the PUD relief an applicant seeks. Until now, PUDs were used to allow changes in height, density and other physical development standards.[8] Now, the NOPR proposes allowing an applicant to seek approval for a use not contemplated in the zone so long as the use is "compatible" with the PUD. This language suggests that the PUD will have a manifest principal purpose or purposes, comprising uses specified for the underlying zone; and the additional use for which relief is sought will be an ancillary to the principal purpose of the PUD -- for example, a child care center that serves the

[6] In C100's own recent observation, the Bridge District (formerly Corinthinan Quarter) development in Poplar Point has deferred its commercial element while moving forward with housing; similarly, housing at the McMillan Reservoir site is moving forward ahead of the planned anchor health care facilities; Skyland, in Ward 7, is reimagining the use of its anchor space for the fourth time; and the Vitis project in Georgetown, disucussed above in a separate context, was approved in 2018 and has yet to break ground.
[7] In the Bridge District project, formerly Columbian Quarter, the applicant interfaced with ANCs 8A and 8C, and sought to enter into community benefits agreements with both.
[8] The proposed language reads: "The Commission may permit one or more specific uses within a PUD that are not otherwise permitted by the PUD-related zone after a determination by the Commission that the use(s) are compatible with the PUD, which shall be considered a type of development flexibility against which the Zoning Commission shall weigh the benefits of the PUD …." 11 DCMR X-303.1(b) (NEW).

workforce of a principal use. We think the language needs to be tightened to reflect that understanding, i.e.:

> The Commission may permit one or more specific uses within a PUD that are not otherwise permitted by the PUD-related zone after a determination by the Commission that:
>
> the principal use or uses of the PUD are permitted in the underlying zone; any use for which relief is sought is ancillary to a principal use; and that any ancillary use is compatible with the PUD,
>
> which shall be considered a type of development flexibility against which the Zoning Commission shall weigh the benefits of the PUD supportive use.

The underlined language is C100's suggested revision to the NOPR's draft Section X-303.1(b). Our revision reflects C100's ongoing concern that the District's zoning function has become untethered from order and predictability and is devolving into a free-for-all where "flexibility" is a code word for anything goes.[9]

I. Small Area Plans (SAPs). The NOPR suggests that Small Area Plans (SAPs) are already incorporated into the Comprehensive Plan and therefore need not be weighed as a specific factor in evaluating a PUD application for Comprenhensive Plan consistency. That misstates the plain language of the Plan and judicial precedent. The Implementation Element explains:

> Small Area Plans cover defined geographic areas that require more focused direction than can be provided by the Comprehensive Plan. The intent of such plans is to guide long-range development, improve neighborhoods, achieve District-wide goals, and attain economic and community benefits…. A Small Area Plan provides supplemental guidance to the Comprehensive Plan, unless incorporated into the Comprehensive Plan by a D.C. Council act…. Advisory Neighborhood Commissions (ANCs) and public involvement in the development of Small Area Plans is desired and expected.

10-A DCMR 2503.1 (emphasis added).

Completed SAPs are approved by a D.C. Council resolution, which gives them standing to be consulted under Section 2503.1. SAP provisions may be incorporated into the Comprehensive Plan as part of the next amendment cycle, but unless that happens, they must be addressed on their terms. That should be clarified in the final rule. *See, e.g. Durant v. D.C. Zoning Commission*, 65 A.3d 1161, 1164-65 (D.C. 2013) *(Durant I)* (the Court, describing proceedings below, set forth the Commission's separate consideration of the SAP; two maps, the Future Land Use Map and the Generalized Policy Map; and the Plan itself). *See also id*. at 1172 (with the Court instructing the Commission which Comprehensive Plan and map provisions should be addressed on remand*).* The Court found that the Commission had provided an adequate discussion of the SAP. 65 A.3d at 1172n.19.

[9] The late Barbara Zartman, a former C100 chair, deemed zoning "a social contract" between the government and the governed, a forum where one could count on precision and predictability.

Conclusion. We respectfully submit these comments on the proposed procedural and substantive amendments to the operating rules of the Office of Zoning, the Zoning Commission and the Board of Zoning Adjustment in the NOPR. Without the changes we recommend, it is our belief that the proposed rules will have a significant negative impact upon the public's right and opportunity to participate in the zoning process. We are equally concerned that the Commission is unwilling to take this opportunity to begin the process of codifying meaningful standards and procedures for Racial Equity Analysis.

We hope that our comments will lead to appropriate revisions in the Final Rule as adopted.

Sincerely,

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