The Committee of 100 on the Federal City

**ZONING COMMISSION OF THE DISTRICT OF COLUMBIA**

**CASE NO. 19-06 (Office of Planning – Revised Proposed Text Amendment to Subtitle X on Voluntary Design Review FAR Aggregation)**

**July 19, 2019**

The Zoning Commission ("Commission") held a hearing on May 30, 2019 on proposed amendments to the zoning regulations submitted by the Office of Planning ("OP") to permit the aggregation of Floor Area Ratio ("FAR") across a "project site" in connection with a Voluntary Design Review ("VDR") application. The Committee of 100 ("C100") submitted comments and testified in opposition to the initial proposed amendments, as did other organizations and individuals. No one submitted comments in support of the proposal.

As requested by the Commission on May 30, OP on June 17, 2019 provided a Supplemental Report with a revised proposal for consideration. At a meeting on June 24, 2019, the Commission voted to submit the revised proposal as a proposed rule for public comment.

C100's previous comments and testimony raised a number of issues, the principal one being that Design Review was never intended to be used to increase density. We pointed out that, if approved, the proposal would turn Design Review into a full-blown Planned Unit Development ("PUD") without the procedural protections, public benefits and amenities that are central to the PUD process. We also pointed out that "aggregation of density" never entered discussions about the Design Review process during consideration of ZR-16. Most of the concerns raised by C100 in our May 30, 2019 letter remain relevant. Rather than repeating them here, we've attached the letter for reference.

While we recognize that OP's revised submission makes several changes to the original proposal, the revised text amendment still would facilitate the aggregation of FAR and density, a result that was never contemplated when VDR was created. The analysis provided by OP in its Supplemental Report is extremely thin. In our view, OP has not made the case that the amendment is legally sufficient or that it is needed. The Supplemental Report creates a new construct – a "project lot" – that is undefined and was never discussed during the creation of Voluntary Design Review. There is no explanation of, or criteria for determining, what can be contained within the boundary of a project lot. How can a lot be included in a "project lot" if it is no part of a construction project?

The Commission should realize that the proposed amendments would allow for transfers or aggregation of density throughout the City. OP's analysis cites a section in the Comprehensive Plan that states that: "Key opportunities [for growth] include government lands, underused commercial and industrial sites, and vacant buildings. Other sites, including failed housing projects and ailing business districts, also present opportunities. There are also hundreds of small "infill" sites scattered throughout the city, especially in the northeast and southeast quadrants."[1]

[1] OP's Supplemental Report on Case 19-06, dated June 17, 2019, p. 6, quoting 205.5 of the Comprehensive Plan's Framework Element.

A simplified example of how VDR could be used should illustrate the concerns we have raised. Let's take a commercial building in any area of the City with an adjacent parking lot or low-density structure that will not be changed in any way. It would appear that, under OP's proposal, the owner or owners of the two properties could apply for a VDR under which the unused density of the parking lot or low density building could be used, subject to design considerations, to increase the density of the commercial building beyond that allowed for that building as a matter-of-right, including an increase in height to that permitted for a PUD and an increase in FAR (after taking into consideration the combined permitted FAR or density of the two lots). The example describes what in essence is a business transaction the intended consequence of which is to increase density on the lot with the commercial building. Is this what was intended for Design Review? We think not, as it results in an increase in density, which is not permitted in a VDR.

OP states that VDR is a process that is different from the "**much heavier lift** of a Planned Unit Development."[2] [emphasis added] Why would a developer undertake the heavier PUD lift if VDR were available, and all it needed to show was that there is no adverse impact? This example points out why the proposed amendment is much more than a "clarification." The text amendments would create a disincentive to providing community benefits.

In addition, OP states that a prime benefit of VDR is to "unlock 'stranded' density," a novel and imperfectly explained concept. OP affirmatively invites consolidating multiple lots for the purpose of increasing density on only one of them. This stands the idea of VDR on its head. VDR was intended for projects where additional density is not needed. These amendments have no purpose other than to allow project developers who need additional density to borrow it from an adjacent lot where no project activity will occur.[3]

We also note that the Supplemental Report notes that the text amendment prohibits relief from Inclusionary Zoning requirements, as C100 recommended. However, the language in the revised Section 605.1 could be construed as a way for an applicant nonetheless to request such relief, and thus might conflict with the prohibition.

At a minimum, C100 believes that a VDR project boundary must be limited to land on which substantial activity intrinsic to the proposed project will take place. The rules cannot reasonably allow property to be included in the VDR boundary solely for the purpose of additional density for a new project. Further,

C100 continues to believe that the proposed amendment constitutes a change of consequence that should be disapproved because it changes the fundamental nature of Design Review as originally proposed in 2010 and approved by the Commission in 2016. The proposed text amendment deserves further analysis and review and should not be rushed.

Respectfully submitted,

S A Hansen

Stephen A. Hansen, Chair
Committee of 100 on the Federal City

Attachment

[2] OP's Supplemental Report on Case 19-06, dated June 17, 2019, p. 2.

[3] This result is underscored by OP's addition of language to allow multiple owners to submit a VDR application. C100 opposes this change and continues to believe that the Commission should require that all property included in a VDR project have common ownership.

The Committee of 100
on the Federal City

**ZONING COMMISSION OF THE DISTRICT OF COLUMBIA**

**Public Hearing on CASE NO. 19-06 (Office of Planning – Proposed Text Amendment to Subtitle X on Voluntary Design Review FAR Aggregation)**

May 30, 2019

The Committee of 100 ("C100") advocates for responsible planning and land use in Washington, DC. Our work is guided by the values inherited from the L'Enfant Plan and McMillan Commission, which give Washington its historic distinction and natural beauty, while responding to the special challenges of 21st century development. We have advocated on behalf of intelligent and smart planning and land use in Washington, DC since our founding in 1923.

The Zoning Commission ("Commission") has scheduled a hearing for May 30, 2019 on a proposal from the Office of Planning ("OP") for a public hearing on proposed amendments to the zoning regulations to permit the aggregation of Floor Area Ratio ("FAR") across a "project site" in connection with a Voluntary Design Review application. If approved, this proposal would turn Design Review into a full-blown Planned Unit Development ("PUD") without the procedural protections, public benefits and amenities that are central to the PUD process. For this reason alone, OP's requested revisions should be opposed. Also, if the proposed amendments were approved, the distinctions between Design Review and the PUD process would fade, creating an inconsistency with Section 600.2 of the Zoning Regulations.[4] That Section makes a point of distinguishing the Design Review and PUD processes, stating: "The design review process is intended to be shorter and less intensive than the PUD process and allow less deviation from matter-of-right zone standards."

**Design Review Was Never Intended to Be Used to Increase Density**

As noted in the Background provided by OP, Design Review was initially considered by the Zoning Commission as a type of PUD with no density increase or map amendment. Ultimately, in finalizing that regulation under ZR-16, the Commission declined to make Design Review a PUD type, electing instead to establish Design Review as a separate chapter of the Zoning Regulations. As previously noted, Section 600.2 makes clear that *Design Review is intended to provide an expedited process for consideration of projects that need approval of minor dimensional flexibility*. However, the Design Review Chapter contains the fundamental restriction that no increase in density would be permitted. Under the final regulations approved in 2016, the purpose of Design Review is to *"[p]ermit some projects to voluntarily submit themselves for design review under this chapter in exchange for flexibility because the project is superior in design but does not need extra density*." Section 600.1(c).

[4] Unless otherwise noted, all citations to the Zoning Regulations are to Subtitle X of Title 11.

The prohibition on increasing density is also found in three other sections of the Design Review regulations: Sections 600.1(e), 600.5, and 603.1. The Commission's intent and directive could not be more clear – an increase in density is not permitted. By allowing for the aggregation of FAR through lot

consolidation within a project boundary, OP's proposal would allow for an increase in density over what is available as a matter of right for a specific lot within that boundary, defeating a fundamental purpose and restriction in the Design Review regulations.

**The Proposed Amendments Would Permit Increases in Density, Contrary to the Intent of Design Review**

Density is defined in Subtitle B of Tile 11 of the Zoning Regulations as: "*In other than residential zones, the density is calculated by FAR*."[5] Herein lies the link between density and FAR. The borrowing of FAR through aggregation of FAR as proposed by OP should thus be understood to allow an increase in density, contrary to the intent of Design Review.

**ZRR Task Force PUD Working Group**

OP held five (5) ZRR Task Force meetings on PUDs. The fifth session (May 26, 2010) addressed "Issues and Recommendations." The first item under Issues was: Develop different types of processes for different applications. Three separate processes were recommended. Type 1, referred to as "Design Review Only" provided for:

- No additional density above matter-of-right
- No map amendment
- Dimensional flexibility available, including
  Height (to existing PUD limits)
  Yards
  Lot occupancy
- Optional except where required by zone

Types 2 and 3 on the worksheet mention design review to reinforce the need for superior design, but in both cases tie increases in density to public benefits. There was no reference to public benefits in the context of Type 1. Thus, it does not appear that the ability to increase density for Type 1 (Design Review) was ever envisioned as there is no linkage to public benefits. The five ZRR Task Force meetings framed the recommendations brought forward to the Commission for discussion on November 8, 2010. [6]

To recap, as far back as 2010, it can be documented that Design Review was developed as a process different from PUDs and the criteria for the process have been in the Zoning Regulations for nine years. No increase in density through Aggregation of FAR was ever anticipated in the Design Review criteria. It is without foundation for OP to come along at this late date and state, "In separating the Design Review and PUD requirement into two chapters, some of the procedural aspects were inadvertently not copied into the Design Review chapter. Therefore, it is appropriate to conclude that FAR aggregation would continue to be available to the Design Review." The two processes were separated in order to make clear that no increase in FAR or density was to be allowed in Design Review. Further, the term

[5] Section 301.2 of Subtitle B of Title 11.

[6] The Zoning Commission history is referenced in footnote 1 to the March 15, 2019 Setdown and Pre-Hearing Report for a Proposed Zoning Text Amendment to Subtitle X to Clarify Voluntary Design Review FAR Aggregation. Look in particular at the November 8, 2010 transcript, including the Summary Worksheet, where the Zoning Commission provided guidance to OP on the draft text for the three types of PUD.

"aggregation of FAR" never entered into discussions of the Design Review Process at Task Force meetings or hearings before the Zoning Commission because an increase in density was expressly prohibited under Design Review.

**The Proposal would Create a Dangerous Expansion of Provisions Authorizing the Transfer of Development Rights**

The 1989 Transfer Development Rights (TDR) program limited the Zoning Commission's authority to transfer/aggregate unused physical density to specific downtown (or "D") zones. The Combined Lot Development (CLD) program that replaced the old TDRs was meant to incentivize the development of these areas for residential, arts, or other preferred uses. Instead of transferring unused physical density, the CLD program offered credits that enable developers to trade property uses rather than to add additional density to developments. The ZR-16 combined these two programs, but still limited this new program to "D zones." The transfers are carefully regulated. It appears that OP's proposed amendments would allow transfers of density in all sections of the City – no longer limiting this practice to certain downtown zones where some predictability is maintained through site-specific provisions in the zoning regulations and development standards for each zone. The Commission should make clear that there is no authority to approve a transfer or aggregation of FAR outside the "D receiving zones," as that would be contrary to the existing regulations.

Given the implications of aggregation of FAR, the Commission must be very clear in its deliberations. It is not at all clear that an increase in density through FAR Aggregation is appropriate in all areas of the city, nor has OP made that case. Given the five PUD working group meetings it can be said that substantial discussion occurred regarding allowable density and that there was a conscious decision made by the Commission to set Design Review apart from PUDS; give the process its own chapter in the Zoning Regulations; and, to not permit an increase in FAR or density in Design Review.

**OP's Proposed Amendment Conflicts with the Surrounding Text of the Design Review Regulations**

Section 603.1 of the Design Review regulations states that the Zoning Commission "may grant relief from the design standards ... of *a specific zone*." (Emphasis added). OP proposes adding as the very next sentence a new provision that contemplates projects including more than one zone and authorizes relief from the aggregate FAR requirements of those zones. This would directly conflict with the preceding sentence's requirement that relief applies to a specific zone. Aggregating FAR across zones contradicts Design Review's explicit purpose of creating a streamlined procedure where no additional density is required. This proposed amendment also ignores the prohibition placed on the Commission in Section 603.1 which states: "*The design review process shall not be used to vary other building development standards including FAR, Inclusionary Zoning, or Green Area Ratio*."

**OP's Analysis Defies Common Sense and Principles of Regulatory Construction**

OP's March 15, 2019 Setdown and Pre-Hearing Report submitted with the proposed amendments states: "In separating the Design Review and the PUD requirements into two chapters, some of the procedural aspects were inadvertently not copied into the Design Review chapter. Therefore, it is appropriate to conclude that FAR aggregation would continue to be available to the Design Review."[7] As addressed previously, there is no evidence in the regulatory history that the Commission created the Design Review authority casually and without careful thought, as suggested by OP. It is far more likely that the provisions applicable to Design Review were replicated and inapplicable provisions were left

[7] Office of Planning's March 15, 2019 Memorandum, p. 1.

out. Since the attributes of Design Review in the material for the May 26, 2010 Task Force Meeting and the November 10, 2010 Worksheet referenced in OP's March 15, 2019 Setdown and Pre-Hearing Report follow the Design Review requirements in ZR-16, it is clear that there was no inadvertent removal of

procedural aspects. Design Review was given its own Subtitle in ZR 16 to distinguish it from PUDs and to recognize that this development process was not meant to bring with it the density and bulk included in a PUD process.

The Design Review procedure, aimed at circumstances where "no additional density" is needed and where relief is granted "within a specific zone," very naturally omitted provisions that govern increased density across more than one zone, as the regulatory text states. That, coupled with the fact the regulations and Final Rulemaking are silent on the subject, would be the conclusion using normal principles of regulatory and statutory construction. The phrase "aggregation of FAR" never entered into discussions of the Design Review Process at Task Force meetings or hearings before the Zoning Commission, and to attempt to introduce new language under these circumstances is indefensible.

**The Proposal Would Turn Design Review into a PUD Process without the PUD Protections**

If the Commission were to approve this proposal and allow the aggregation of density in Design Review, the benefit of Design Review for a developer would be comparable to that of a PUD. Lacking, however, would be the extensive PUD requirements for public benefits set forth in Section 305 of the PUD regulations. The Design Review regulations require that there be no adverse impact resulting from a Design Review Project. (Section 601(a)). This is far from the higher standard required of a PUD, where enumerated benefits are required. Also lacking are the procedural protections and public review requirements set forth in Section 308 of the PUD regulations. The Design Review regulations have no comparable section.

**Turning Design Review Into a PUD-like Process Would Undermine the Rationale of Design Review**

The public record reveals that some members of the Commission have expressed reservations about the very existence of Design Review. While those reservations may be justified, C100 is not taking a position on whether Design Review has merit. However, if the OP proposal were approved, there would be little rationale for keeping Design Review other than to provide a streamlined vehicle for approval of density increases without concomitant community benefits, something the Committee of 100 and many others would oppose. In that case, C100 would likely recommend repealing the entire Design Review authority.

**The Proposal Could Undermine Guidance Provided by the Comprehensive Plan**

The District's Comprehensive Plan includes a detailed set of principles and polices that guide development in the City. Through its various Elements (including the Land Use Element) and the Future Land Use Map, the Comprehensive Plan sets forth a comprehensive set of expectations on how the City is to maintain its character and grow. OP's proposed Design Review amendments could be leveraged to justify projects that are inconsistent and incompatible with those expectations. The aggregation of density could allow for development that would be larger and denser than would be allowed for an individual lot, creating the likely potential that the development would be inconsistent with the Comprehensive Plan because it would be incompatible with the scale, density, and character of the surrounding residential and commercial neighborhood.

**The Commission Should Not Allow the Approval of Design Review Where There Are Multiple Lots with Multiple Owners**

The current Design Review regulations state that the Design Review Chapter applies "when a property owner voluntarily seeks design review development." (Section 601.2; emphasis added). While perhaps not perfectly clear, this would seem to mean that all the property included in the project must be owned by the same person or persons. To provide clarity of the regulation, the Committee of 100 recommends that this restriction (common ownership) be written into the existing rule as well as any revision.

**Other Concerns**

Section 605.1 of OP's proposed amendment would grant the Commission the authority to approve relief from Inclusionary Zoning requirements. This appears in conflict with Section 603.1 of the Design Review Regulations, which strictly prohibits a variation of the Inclusionary Zoning standards in a Design Review case. While we recognize that Section 310.1 of the PUD regulations contains a similar provision, we question whether this constitutes wise policy in the PUD context as Inclusionary Zoning and PUD requirements are closely linked. However, the justification for such a provision is even weaker in the Design Review context because of Design Review's expedited approval process with its more limited opportunity for public participation.

OP's proposed section provides that a covenant be recorded in the District's land records which binds the owners and all successors in title to construct on and use the property only in accordance with the adopted orders of the Commission. If some version of OP's amendment is to move forward, we recommend that this proposed section be revised to make clear that the covenant referred to in this proposed section binds all owners of the lots included in the project boundary to limit all construction on and use of the lots in accordance with an approved Design Review order.

As set forth in OP's May 20, 2019 Hearing Report, Section 605.2 of the proposed text amendment specifically references a PUD and a PUD site. These references do not belong in the Design Review regulations, as Design Review is a totally separate process. Inclusion of these references, if intentional, would seem to constitute a back-door attempt to change or broaden the scope of the Design Review regulations and a return to the "PUD Lite of 2010." The references should be stricken to ensure elimination of any confusion or ambiguity between the two processes.

We also question whether OP's distribution of the text amendment meet the Commission's expectations. While OP's May 20 Hearing Report states that the Public Hearing Notice was published on April 4, 2019, followed by notices to the ANC's and the Council, it also says that the Public Hearing Notice was not distributed to civic groups until May 15, 2019, just two weeks before the May 30 hearing.

**This Proposal Constitutes a Substantial Change to the Zoning Regulations**

OP characterizes the proposed amendment as a clarification of the current zoning regulations. Nothing could be further from the truth. The amendment constitutes a change of consequence that should be disapproved because it changes the fundamental nature of Design Review as originally proposed in 2010 and approved by the Commission in 2016.

**Conclusion**

The C100 opposes the proposed text amendment to Subtitle X on FAR aggregation in a Design Review case.

C100 wishes to reemphasize, the phrase “aggregation of FAR” never entered into discussions of the Design Review Process at Task Force meetings or hearings before the Zoning Commission, and the

proposed text amendments should not be used as a means to circumvent the purposes and intent of the Zoning Regulations, or to result in action that is inconsistent with the Comprehensive Plan.

Stephen A. Hansen, Chair
Committee of 100 on the Federal City