Before the Committee of the Whole
Oversight Hearing on the Office of Zoning

Statement of the Committee of 100 on the Federal City
February 28, 2018

The statement of the Committee of 100 on the Federal City centers on the need to rebuild public trust in the District's zoning function among rank and file residents. There exists a widespread perception that the playing field is tilted toward development at any cost, with little or no consideration for either the wishes of affected residents or the guidance contained in the D.C. Comprehensive Plan.

The Zoning Commission has not voted to reject a Planned Unit Development since 2010.

As we noted in testimony last year,[1] the Zoning Commission rarely is persuaded by the arguments of persons who oppose a development project. Indeed, the Commission has not voted to deny a Planned Unit Development (PUD) since 2010. If opponents never prevail under any circumstances, the perception necessarily arises that the hearing process is an empty exercise. The unbroken stream of approvals does not mean that all stakeholders are happy and that all the kinks have been worked out before the hearing. Many proceedings are hotly contested and at least 16 Commission decisions have been appealed.

The Zoning Commission asked a developer to write the Commission's decision and later changed its mind.

The trust problem was exacerbated at a meeting last fall, at which the Commission invited the developer to write the Commission's decision in the McMillan Reservoir case.[2] The following exchange took place at the September 14, 2017 meeting, after the Commission voted to approve the McMillan Reservoir PUD.

> ZC: I am going to ask that the applicant [developer] work with our Office of Attorney General [OAG] in developing a proposed order.
>
> OAG: Just to clarify, they should provide a proposed order but ... you're giving them and me the authority to discuss things.

[1] PR22-278, Zoning Commission for the District of Columbia Robert Miller Confirmation Resolution of 2017 (June 12, 2017).

[2] The Case, ZC 13-14 (Vision McMillan Partners LLC), was before the Commission on remand from the D.C. Court of Appeals.

ZC: Exactly.... I'm giving OAG and the applicant the authority to be able to discuss and work with our counsel.

Meeting Tr. at 39 (Sep. 14, 2017).

Four days later, the Commission issued an order explaining this unusual instruction to collaborate, stating that OAG lacked sufficient staff to produce an order promptly and that the applicant was being asked to step in and help "to provide an order consistent with the Commission's deliberations." ZC Order (Sep. 18, 2017). Two days later, the Zoning Commission issued an additional order taking back its request for assistance and stating that OAG would write the decision by itself.[4] ZC Order (Sep. 20, 2017).

There is nothing wrong with a tribunal's asking parties to submit proposed findings of fact and conclusions of law. In fact, the Zoning Regulations *require* the prevailing and *allow* the losing party to do so. Submitting findings and conclusions and producing draft orders are customary requirements of parties in judicial proceedings.

What was unusual in this instance -- and highly improper -- was the Commission's instruction to the developer and OAG to "work with" each other to produce the order: in short, to engage in prohibited ex parte communications. Communications must be on paper served on all parties or made orally in the presence of all parties, in person or by telephone. Also, decisional tribunals *never* deliberate with parties.

It took the Commission two tries and six days to fix this error, which was apparent to everybody in the room when it occurred. This is the sort of incident that feeds the perception that the Commission gives undue deference to developers and their attorneys. Moreover, a single law firm represents applicants in the vast majority of PUD cases. This circumstance gives rise to the concern that the Commission's jurisprudence -- its analysis of the Zoning Regulations and the Comprehensive Plan -- is being shaped by a single entity that has an interest in seeing that the rules are applied as broadly and flexibly as possible.

[4] The September 20 Order states:

> Upon further review, the Office of the Attorney General ("OAG") has advised the Zoning Commission for the District of Columbia ("Commission") that newly added resources will in fact permit OAG to provide the Commission with a draft order for this case in an expeditious fashion. The Commission, therefore, withdraws its request that Vision McMillan Partners, LLC and the Office of the Deputy Mayor for Planning and Economic Development, the Applicant in this case, provide a proposed order.

Request for action by the Committee of the Whole. Accordingly, C100 asks the Committee of the Whole to inquire closely as to how ZC decisions are produced and, if necessary, to provide additional resources to OAG and/or to the Office of Zoning.

The public will benefit if zoning decisions contain more reasoning and analysis, especially as regards interpreting the Comprehensive Plan. A recitation or laundry list of Comp Plan policies is not a substitute for analysis. Additional resources may allow further elucidation of the Commission's reasoning.

Deference to the Office of Planning

The Office of Planning plays dual and incompatible roles. On one hand, it acts as professional staff to the Zoning Commission and on the other, it functions in many cases as the *de facto* advocate for the applicant. This is a structural problem – one of many resulting from placing the Office of Planning under the Deputy Mayor for Planning & Economic Development. "Development" seems to trump "planning" at every turn. One solution is to create a firewall by housing the planning function under a Planning Commission. C100 obtained a legal opinion on this issue about 10 years ago, when several groups mounted a serious efforts to establish such a commission. That opinion concluded that because the Home Rule Act vests planning authority in the executive, the mayor would have to appoint the members. Nevertheless, the planning and economic development functions, even if both housed in the executive branch, could operate as a team of rivals, or as a check and balance on each other, rather than the current development-driven structure.

In this environment, it is incumbent upon the Zoning Commission to maintain an arms-length relationship with the Office of Planning, and to exercise its independent judgment visibly. This should be no problem, inasmuch as two of the mayoral appointees have longstanding experience in District zoning and planning matters and the third has a comparable depth of experience in a neighboring jurisdiction.

The Zoning Commission states that it can waive any rule it chooses.

During deliberations on at least two recent cases, the Commission repeatedly claimed broad authority to waive any of its rules. The Commission's expansive view of its waiver authority means that individuals coming before the Commission don't know what rules will apply. The zoning regulations will cease to perform their principal function of providing certainty and predictability as to the use of real property.

In ZC 08-06F, a rulemaking case concerning minimum lot sizes for PUDs, members of the Commission repeatedly asserted their ability to waive minimum lot size requirements contained in the zoning regulations. "[W]e can make our rules and you know, we can waive our rules at

any time. We've always been granted that authority, and we deal with it on a case-by-case basis." Tr. at 30 (Dec. 19, 2016) (remarks of Chr. Hood); *id.* at 23 ("We ... have the ability to waive any rule that we make") (remarks of Cmm'r May); *id.* at 29 ("let's just give up [i.e., not go forward with the rulemaking] and, you know, we can waive whatever we want whenever we want") (remarks of Cmm'r May). The Commission's decision in a related case, ZC 15-18 (Initio LP), also turned on the Commission's view that it could waive substantive PUD rules.

C100 has not been able to identify any source of such broad waiver power in the Zoning Regulations. The Commission is authorized to waive *procedural* rules, such as deadlines for submitting documents, for good cause and in the absence of prejudice to other parties. That authority does not extend to substantive rules. Indeed, a cardinal principle of administrative law is that an agency must follow its rules. Where the substantive zoning rules contain waivers or other forms of leeway or flexibility -- such as PUD bonus densities -- they are sharply circumscribed. In instances that inherently require case by case relief, such as area variances heard by the Board of Zoning Adjustment, the regulations establish a rigorous, fact-specific standard for relief. The entire structure of the regulations militates against the ad hoc rewriting of the rules that the Commission claims it can do.

Request for action by the Committee of the Whole. C100 asks the Committee of the Whole to have the Office of Zoning state clearly on the record its understanding of the Zoning Commission's waiver authority, what it is based on and how it is exercised. The rank and file public does not know what to make of a proceeding in which the decision makers announce that the rules can be changed at will.

Significant barriers exist to citizen participation in zoning proceedings.

Many lay participants do not know the ins and outs of zoning procedures and some come away feeling bullied and unheard. While C100 does not believe that Office of Zoning staff or Commission members ever act intentionally in an untoward manner, it is undeniable that some participants perceive that they have been subject to disrespectful treatment. We believe this stems from the sometimes highly technical nature of the proceeding. The Office of Zoning's homepage cautions that applicants should obtain representation. www.dcoz.dc.gov Not only applicants, but witnesses and opponents as well, may need representation, although many/most participants can't afford legal counsel or other specialists, as the Office of Zoning is aware. Affected laypersons should not be barred from full participation or from receiving the level of assistance they need.[7]

[7] The Office of Zoning provides a translation service, available with notice, for non-English proficient and limited-English proficient residents. The Zoning Glossary has been translated into several languages, available on the website.

Request for action from the Committee of the Whole. We ask the Committee of the Whole to fund two staff positions for participant advocates to affirmatively assist public participants,

Party Status Issues

The new zoning code implements new processes that that make it more difficult to participate as a party in a proceeding (other than an applicant or an automatic party such as the ANC). In practice, it has been observed or experienced that persons or groups seeking party status to support an application face less red tape than those seeking party status to oppose. Some C100 members report experiencing this in neighborhood zoning cases.

For example, there have been instances when "neighborhood" groups, who are in support of projects have not had to abide by all the procedural requirements to get party status. Opposing groups have been held to a standard of strict compliance, required to submit membership lists, resolutions designating individuals to act for the group and bylaws. Some groups form for the express purpose of opposing an application and don't have bylaws. In ZC 16-26 (Wisconsin Owner LLC, the Tenleytown Neighbors Association (TNA) had to submit a sworn affidavit and a resolution, attesting that the TNA members who attended the hearing were authorized by TNA to do so and that one person was duly authorized to bind TNA. Ward 3 Vision, a party is support, was not required to do any of these things. This practice is discriminatory and pure and simple harassment. Lastly, the current zoning regulation requirements under Subtitle Z § 404 for party status do not align with the current laws and practices for unincorporated associations and loosely formed groups or coalitions. Such groups are recognized as legal entities for other purposes without bylaws and other formalities. The regulations must be revised to ensure that all types of organizations and legal entities under DC law are able to participate without undue burdens.

Errors in IZ Calculations

C100 member Marilyn J. Simon identified errors in the Applicant's Inclusionary Zoning (IZ) calculations in ZC 16-23, Valor Development LLC. The applicant substantially understated the amount of IZ space it had to provide, based on the amount of bonus density it claimed. Ms. Simon explained in her written testimony:

> The [IZ] requirement depends on the construction type. For each construction type, the requirement is a percentage (8% or 10%) of the habitable penthouse space plus the greater of:
>
> (1) a requirement based on a percentage (8% or 10%) of the gross floor area dedicated to residential use; or (2) a percentage (50% or 75%) of the achievable bonus density.

> In all its filings, Valor described the calculation as being based only on the habitable penthouse space and the gross residential floor area. In these filings, Valor did not refer to the calculation based on achievable bonus density.

Record , Exh. 166. Ms. Simon's statement identified two other cases containing similar errors and one case where the calculation was correct. Her chart below illustrate the shortfall:

	IZ Set-aside: Valor proposal	Required IZ Set-aside	Shortfall
If §1003.1 applies (does not employ Type I Construction)	28,320 SF	62,856 SF	34,536 SF
If §1003.2 applies (employs Type I Construction)	28,320 SF	42,246 SF	13,926 SF

This issue merits being raised here because IZ miscalculations appear not to be an isolated error. Also, IZ can solve only a tiny portion of the District's affordable housing shortage, so the District should get the full benefit of the bonus density it is granting.

ANCs and "great weight"

Although court decisions have diluted the "great weight" standard, it has not been eviscerated altogether. Zoning decisions typically recite the ANC's position and state that "great weight" was according to it, but analysis of the ANC's views may not be provided. Given the status of ANCs as representative bodies, additional explanation of ANC views, where possible, would be appreciated. If the ANC submission is perfunctory and not susceptible to analysis, that should be noted.

Community benefits

The Commission has recognized on more than one occasion that promised community benefits in PUD projects often fail to materialize and frequently are unenforceable. The Commission should consider an applicant's prior record of compliance with benefits agreements and reject new applications for prior performance failures. PUDs are, after all, discretionary. In particular, the Commission should take into account noncompliance with First Source agreements and undertakings to hire or grant contracts to District residents.

Restoring public confidence and trust

C100 is confident that attention to the points raised herein will go far toward restoring public trust in this signally important body.

Committee of 100 on the Federal City

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