

April 23, 2006

Carol Mitten, Chairman, Zoning Commission
Care of Sharon Shellin, Acting Secretary
Zoning Commission
441 4th Street, NW. Suite 200-S
Washington, D.C. 20001

ZONING COMMISSION
District of Columbia

CASE NO. 04-33
EXHIBIT NO. 191

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**KALORAMA CITIZENS ASSOCIATION COMMENTS
on the Zoning Commission Proposed Rulemaking on ZC CASE NO. 04-33:
"New Chapter 26 Inclusionary Zoning"**

Dear Chairman Mitten:

The Kalorama Citizens Association has not taken a position on whether there should be mandatory or non-mandatory zoning in some form or another. Much of our neighborhood has subsidized housing in it—low yield coops, Jubilee housing units, and rehashed section 8 and other subsidized units, and the mix has worked. We have problems with this proposal, however, first, because of its potentially destabilizing and otherwise harmful effects on the housing stock itself in large areas of the city, and second, because certain provisions as presently drafted tend to undermine the intended purpose of the regulation. KCA offers the following comments.

1. The overlay zone must be mapped. While the Commission is not yet undertaking map cases, we assume from the proposal's introductory statement and the language of proposed §2602.1 (*"the requirements and incentives of this chapter shall apply to developments that (a) are mapped within the Inclusionary Zoning Overlay" . . .*) that the Commission will undertake to do so in the future. The point is fundamental, and we assume no longer in controversy so far as the Commission is concerned. In our view it would be unthinkable for the City to consider any other course, which would blatantly deprive citizens—whether proponents or opponents—of their rights under our zoning law to be heard on the question of the appropriateness of the application of the overlay to a particular location.

2. That said, however, the current text is defective in that it contains no criteria to determine eligibility for possible overlay application. Future mapping is not sustainable on the basis of the draft before us: an overlay cannot float without eligibility criteria established under which it would be eligible to "land" on a particular area through a mapping case. This is seen in other DC zoning overlays, which are tailored to an individual neighborhood, as with the Reed-Cooke overlay, or either contain eligibility criteria for their potential application to particular areas, as with the "Neighborhood Commercial Overlay". Otherwise, such an overlay could be created in many areas with many types of land use characteristics and zoning districts and would thereby be devoid of any nexus between the underlying zone and its land use characteristics involved and the bonus entailed, as well as lacking compliance with the uniformity requirements of zone districts under our zoning code. This seems to us to raise serious questions of compliance with the Zoning Act itself, which requires *uniformity "for each class or kind of building throughout each district"* (D.C. Code §6-641.01) and that regulations be *"made with reasonable consideration, among other things, of the character of the respective districts and their suitability for the uses provided in the regulations, and with a view to encouraging stability of districts and of land values therein"*. How would this proposal assure stability of zoning districts? What are the unifying characteristics? Until eligibility criteria are established, it appears to us that the text cannot be put forward, for so-called "purposes" are not

synonymous with eligibility criteria and cannot substitute for them. They may serve as a rationale for the importance of having such an overlay, but they don't serve as standards or criteria for the establishment of the overlay in a particular location. Mapping cases can rationally be undertaken only on the basis of eligibility criteria, especially so in the case of an overlay potentially applicable to such a disparate grouping of zones and locations that would not be possible without a mapping case, which in turn assured its compliance with eligibility criteria. Proponents and opponents alike must have the opportunity to see whether such an overlay is warranted in accordance with the criteria developed in relation to the localized land use and zoning.

3. In the absence of applicability criteria, the proposal as currently drafted must be evaluated on the basis of its potential effects on any and all of the zone districts to which it might in fact be intended to be applied. Seen in this light, the draft poses several serious problems.

a. Applicability of, and consistency with, the existing statutorily enacted Comprehensive Plan is lacking:

(1. An example in relation to the enacted version of the Comprehensive Plan:

In the current and legally binding Comprehensive Plan version, to pick an important example, there is not even a hint of a suggestion that a half-mile radius from existing Metro stations is appropriate for additional bonus zoning of any kind, or that zoning beyond the corridor on which the METRO stop is situated should necessarily or always be part of such a bonus overlay. While as just indicated no such criterion is included in the proposed text, it is found in the *Office of Planning Report of May 9, 2005, a part of the regulatory history of this case*. The report's introductory chart indicated that higher density was indicated for most METRO stations and in Housing Opportunity Areas, Development Opportunity Areas, several Special Treatment Areas, and, in the case of a location outside the overlay area, through PUDs. In our view this reference to METRO stops needs reexamination just in common sense terms alone, but also in relation to other Comprehensive Plan directives, including especially those related to protection of built-up existing neighborhoods and historic districts especially.

(2. Lack of rationale for bonus density: There is no rationale anywhere in the Plan, for example, indicating the desirability of piling additional density through bonuses of any kind into neighborhood historic districts that are predominantly built up with so-called "contributing" buildings and in most instances listed as "moderate density" on the Comprehensive Land Use map. The land-use element in the Plan has pre-eminence over the other elements (Section 112.1(c)). *"Since the Land Use element integrates the policies and objectives of all other district elements, it should be given greater weight than the other elements."* Language in that element, while suggesting the desirability of a multiplicity of housing and other options, nonetheless affords major credence to the stabilizing of existing neighborhoods. In the case of Adams Morgan, the current historic districts, Strivers Row and the Kalorama Triangle, are built up areas with few non-contributing buildings, and there is great likelihood that shortly there will be a third historic district, the Washington Heights Historic District, of which its residential portion has no available sites for development—either because of its many contributing buildings, developments underway, or developments built in recent years. One of the OP 2005 maps included part of the Kalorama Triangle Historic District as an eligible area, and it has only one small vacant lot, and that lot is attached to an adjacent rowhouse.

At a minimum, action on any IZ proposal should await enactment of a revised and approved Comprehensive Plan now in process.

b. Effect on built-up areas, including long-standing and developed residential areas, with little or no vacant land, many of which have a density that contributes already to Metro use yet preserves some open space, and are historic districts and thereby designated as worthy of protection against defacement or demolition: *Leaving these neighborhoods without mooring and protection could mean that the assemblage of two adjoining rowhouses on lots as narrow as 15 feet for demolition or defacement could readily yield 10 units (by adding floors on top, by not counting basement FAR through employing the notoriously permissive (and legally doubtful) “perimeter method” of calculating basement space versus cellar space, adding a further floor labeled as a so-called attic just under the human habitation height limit, or simply taking advantage of the bonus FAR to encroach onto lot area. Any of these results in defacement and demolition of salient features, loss of valuable open space, and lack of respect for the restrictions and requirements of the underlying zone itself that is designed to afford stability and to assure that certain limits are not abridged*

c. The “purposes” section of the draft, and lack of criteria, contrasted with PUD requirements. The proposal contrasts unfavorably with PUD requirements in Chapter 24 of the Zoning Regulations, which speaks, for example, of “high quality developments”, and asserts (in §2400 4) that “ . . . the PUD process shall not be used to circumvent the intent and purposes of the Zoning Regulations, nor to result in action that is inconsistent with the Comprehensive Plan.” There is no reason that this proposal, of such sweeping potential applicability, should not be subject to similar strictures, and they should be made explicit in the text beyond its mere introductory paragraph.

(1. Substantial standards: There are further problems in relation to PUDs The basic PUD regulations contain an elaborate set of conditions that must be met in order to go through first stage or second stage, with numerous evaluation standards, including *“The Commission shall find that the proposed PUD is not inconsistent with the Comprehensive Plan and with other adopted public policies and active programs related to the subject site” (2403.4)* Affordable housing is an amenity or benefit under PUDs For PUDs to obtain the additional density, will the area and other requirements be intentionally waived as a feature of the inclusionary zoning proposal? How will this new provision work in relation to the linkage requirements of Section 24? Is it anticipated that underlying zoning would be changed or variances given as is sometimes done with PUDs? Would transferable density under PUDs be slated explicitly for inclusionary areas?

(2. Minimum Area Standard: Of great importance is the following In all instances in which PUDs are allowed, there is a minimum area standard, as distinguished from simply indicating that there is a building or collection of buildings that may yield a minimum of 10 units or be eligible for the bonus for off-site inclusionary units. **We believe the applicability standards for inclusionary zoning should be in terms of the zoning category involved and area of land assembled, for there can be very major problems if additional density is allowed to destabilize an area’s underlying land use and zoning. Not establishing an eligible area limit is a departure from DC zoning past practice that better assures avoidance of spot zoning. This would be an issue for both the original as well as the possible receiving area**

d. Making buildings with 10 or even less units eligible for additional density: As indicated above, in rowhouse areas, merely demolishing or defacing two tiny rowhouses can entail bonus density eligibility—this is in contrast with the minimum square footage standards entailed for PUDs. In the case of two adjacent lots perhaps rolled into one, of, say, 15 to 18

feet widths and 30 feet depths, bonus density in the midst of rowhouse areas could be considered not only destabilizing but also spot zoning. The effects of this proposal, unless accompanied by certain area limits and limits on density, such as is reflected in the initial proposal for an Adams Morgan commercial district overlay that the Adams Morgan ANC is undertaking, could be extremely destructive in rowhouse neighborhoods. While PUDs can have the production of lower income housing units as an amenity, either on or off-site in certain situations, presumably if off-site, there is always a question of whether the units relate to the underlying zoning. It is the bonus density that is the problem in land use terms, not the issue of mandatory inclusionary units in larger buildings built as larger buildings because the underlying zoning allows it.

e. Accordingly, there should be criteria designed specifically to prevent destabilization of predominantly rowhouse areas. These would include, especially, those areas that are designated as historic districts or in which buildings could be receivers of bonus density from developments elsewhere. Bonus density should not be steered toward established rowhouse or small, low-rise apartment areas, whether they are historic districts or not, excluding only the R-1 and R-2 areas as the present proposal does. Rowhouses by any measure are one of the most important, significant, and desirable landuse types in an urban setting, and certainly so in Washington. These established areas do not take kindly to expansions upward or outward, and officially encouraging the assemblage of say, two houses for their demolition or for their bastardization (see attached pictures of how historic rowhouses look with additions added on their tops) in order to get to 10 units, and the possibility that even a smaller number would be granted as though it were a use or area variance—which really has nothing to do with the fundamental issue of whether these neighborhoods are suitable for this density—is to us unthinkable. We would be hard pressed to devise a land use policy more inappropriate and harmful for the rowhouse residential areas of this city. In fact, the Comprehensive Plan recognizes this issue in the form of suggesting revisions to the R-4 zone as well as zoning revisions in predominantly rowhouse areas, such as the interior stretches of Adams Morgan.

It is important in these areas to retain open space as an antidote to greater density than that afforded single-family areas and to recognize how readily small buildings can have their design ruined by topknot additions. In some instances, the lower commercial areas, such as C1, C-2-A, and C-2-B predominate in low-rise profiles although they may well extend largely or completely over their lots. These buildings, where they exist in historic districts, should not be eligible for bonus density beyond that afforded under their current zoning.

Therefore, the yet to be developed applicability criteria for the inclusionary zoning overlay should include the following:

No residential zones lower than R-5-D or R-5-E shall be eligible for inclusionary zoning overlays or as receivers of extra bonus density unless a “development opportunity area” or an eligible “special treatment area” as defined in the Comprehensive Plan, or an area defined in a small area plan pursuant to Comprehensive Plan directives entailing eligibility for increased density. (There are substantial areas in the city that have R-5-B zoning, and some few with R-5-C zoning—most of the latter was arbitrarily rezoned R-5-D by the Zoning Commission some years ago. Many of the now R-5-D zones actually cover rowhouses and should be rezoned. R-5-B is extensively mapped through Columbia Heights, Dupont Circle and Adams Morgan, with pieces of it in other areas as well. Where it covers rowhouses, the rowhouses are inadequately protected from defacement and possible demolition.) Larger buildings are more suited to inclusionary zoning.

No neighborhood residential historic district that predominate in existing attached, semi-detached, or non-detached structures of four stories or less that predominantly “contribute” to a historic district shall be eligible for inclusionary zoning. (To have a policy otherwise would be in contradiction to the basic tenet of that law—protection against demolition and defacement of facades.)

It shall be understood that overlay eligibility shall not only not be determined in advance of the date of the enactment of inclusionary zoning overlays through the Zoning Commission and the time of enactment of related provisions through the DC Council, but that the designation of eligible overlay areas may change in accordance with possible historic district designation and/or adoption of more restrictive zoning category amendments that may occur thereafter. (In Adams Morgan, there are two areas improperly zoned R-5-D, and one improperly zoned C-2-B, for which zoning changes are being sought. In addition, there are anticipated additional designated historic preservation areas.) Similarly, KCA and others are reviewing possible text amendments to the R-4 zone, entailing sub-categories for possible recommendations to the Office of Planning and the Zoning Commission. Something must be done to assure that lower level rowhouses and apartment houses are not ruined by bonuses through PUDS or otherwise and improperly generous zoning that is destructive to a built-up environment of high quality rowhouses

4. Additional text issues

a. Off-site compliance (§2607): Other than the essentially vacuous requirement that the offsite development be “at a location that is suitable for residential development”, this set of standards does not in any way address impact on the receiving area. They are somewhat similar to variance standards that are designed for projects that cannot meet the zoning standards for a particular zone in a particular location, but do not address the suitability of the additional bonus for a particular site. Therefore this whole section should be modified to take this major deficiency issue into account.

b. Achievable bonus density (§2601.1): By the phrase “notwithstanding constraints resulting from the physical characteristics of the land or restrictions imposed by District or federal laws and agencies”, the text would have awards of bonus density override all District and federal laws and then, in §2604.1, backpedals as to the Height Act. The phrase in §2601.1 is clearly incorrect—zoning regulations cannot trump District or Federal laws. It should be struck. We assume that what is intended is not that the Council accomplish this objective legislatively—the Council is equally unable to so as to federal law, and any proposal to override all District law including historic preservation law we believe would be met with the strongest opposition from a wide range of sources.

c. R-5-B and R-5-C: While as stated above we think R-5-B and R-5-c should not be included in this proposal at all, we are confused about the fact that they do not appear in the table under §2604.2.

d. Section 2602.4: provides that the inclusionary units must remain affordable for so long as the inclusionary development exists, but with the exception of sections 2602.5 and 2608 1(c). Section 2602.5 provides that the owner/occupant of the unit may sell (or rent?) it at a price greater than the Mayor’s purchase/rental schedule if the price is offered by the Mayor. What this means is not clear to us. If all the property is in private hands, how would the Mayor be offering a price for it? Is the provision intended to empower the city to purchase such units? Or is it referring to the case where the Mayor himself is the owner, under section 2603.5? In any event, we do not understand why this exception should exist and would recommend against it.

e. Section 1605.2: states that upon conversion of an inclusionary rental development to for-sale, the inclusionary units “may” be sold to eligible households. We believe this should say that the units shall be sold only to eligible households, or else the inclusionary units can be

permanently lost, thus providing a loophole to the rule that the units be affordable for the duration of the development's existence. However, this point calls attention to the fact that there seems to be no recognition in the proposed text of the reality that buildings eventually may need major repairs or rehabilitation, and left unanswered is how this will be managed by an existing owner or tenant of limited means. Surely this must be addressed. We also urge inclusion of a requirement that if eligible tenants or owners have rising incomes, their units must be made available to those who are clearly eligible. (This became a major problem in New York City, where "Mitchell Lama" moderate income tenants had rising incomes that in theory made them ineligible for the benefit.)

f. Section 2606.1(b): appears to exempt compliance to the extent that District or federal government agencies impose development restrictions on the property. We assume that this includes historic preservation, and we ask that this provision be clarified to make clear that it does. That could be done by inserting, at the end of the sentence, *"or by the requirements of historic preservation law"*

g. Section 2607.5 requires that a recorded covenant be used to ensure construction of off-site set-asides, although it should also apply to on-site set-asides. While we disagree with off-site set-asides as drafted, we suggest that another section be added to the text to also require that every inclusionary development be subject to a covenant binding the property owner to abide by the affordability requirements—not just construction, but also covering the sales and rentals. Otherwise, there appears to be no enforcement mechanism to make sure the units remain affordable. For example, in the case of individual sale units, the owner of the unit might try to resell the unit to the highest bidder regardless of income and not inform the purchaser of the affordability restriction. If there were a recorded covenant running with the land (providing for the Mayor's remedy upon breach), an ineligible resale purchaser will be on official notice of the restriction and would think twice about buying the unit. Without a recorded covenant, resale purchasers might not even know about the restriction, and will therefore not be bound by it, thus acquiring good title to the property, and the affordable inventory ultimately will be lost. We recognize that the Commission intends to leave to the Council "the establishment of enforcement mechanisms such as covenants" (see the draft's introductory paragraph), but we think it would be appropriate for the Commission's text contain language explicitly anticipating such action by the Council.

Thank you for your attention



**Ann Hughes Hargrove, Zoning and Historic Preservation Chairman,
Kalorama Citizens Association**

Illustrative examples of bastardization of historic row houses in Adams Morgan's hyperactive real estate market under *current* zoning

