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Zoning Commission for the District of Columbia
441 4th Street, NW
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Dear Chairman Hood and members of the Zoning Commission,

The Zoning Regulations Review (case 08-06A) has now been ongoing for over seven years, including six before the Zoning Commission in some form. Recently, the DC Office of Planning proposed a set of amendments based on resident and commissioner feedback. I would like to raise three points with you relating to the timeline and to the new OP amendments:

1. Delay is causing harm to neighborhoods as non-controversial yet important smaller proposals in the ZRR remain not part of the zoning code.
2. OP's recommendation to require a special exception for all accessory apartments in accessory buildings will hamper DC's ability to reduce the number of people being priced out of the city, and I urge you to reject that change.
3. OP's recommended change regarding theaters in residential zones is a welcome step, but is too narrow to not sufficiently address the problems that make a change necessary.

1. Delay is causing harm to neighborhoods as non-controversial yet important smaller proposals in the ZRR remain not part of the zoning code.

I would like to call your attention to one of many potentially negative consequences of the lengthy process (mostly before OP submitted the new code to the Commission, and also from the recent request from Mayor Gray) that has slowed the ZRR far beyond the original planned timetable.

11 DCMR 2200.5 currently states that "No additional loading berths, loading platforms, or service/delivery loading spaces shall be required for a historic landmark or a building or structure located in a historic district that is certified by the State Historic Preservation Officer as contributing to the character of that historic district."

The ZRR draft text, subtitle C section 2101.7, would replace this with the following new rule:

An addition to a historic resource shall be required to provide additional loading berths, loading platforms, and service/delivery spaces only for the addition's gross floor area and only when the

addition results in at least a fifty percent (50%) increase in gross floor area beyond the gross floor area existing on [enactment date of amendment].

This was one of several issues which was explicitly discussed during the 2007 and 2008 working group meetings. 2200.5 seems to have been intended to allow renovation and modification to historic resources without triggering a requirement to add a loading dock which could significantly mar the historic resource. But sometimes, property owners instead build large buildings that incorporate a small amount of a historic resource, and argue that 2200.5 exempts the entire new building from this loading requirement. So much new construction does not mean that a loading dock would damage historic neighborhood fabric, as there would be adequate space for loading in the new portions.

I applaud new construction in the District which adds to our housing, jobs, and retail, but our city has many small, historic streets, and loading docks are necessary to ensure that new construction does not lead to trucks blocking streets while loading and other such impacts. That is why OP's proposed rule in Subtitle C (and many others on numerous minor but important topics) is a good step.

A proposal has recently been released on the block where I live to build a new church and residential building upon a small church building and park space (which housed a church which burned down in 1970). Unfortunately, this proposal as submitted to ANC 2B currently does not incorporate loading facilities and uses 2200.5 as the justification. However, it would absolutely not qualify for an exemption under the new C 2101.7 as it is increasing gross floor area by far more than 50%.

I support the building being constructed in general, but do not support excluding the loading facilities which would be otherwise required if there had not been a small historic component or if the ZRR were already in effect.

I am hopeful that residents may be able to persuade the developer to add the loading berth, or that they may be asked to do so as a condition of other zoning relief. In the meantime, however, I wanted to call this situation to your attention as a general principle. As the ZRR stalls, development projects can and are being proposed which could be a little better for neighborhoods in a variety of small ways under the new code.

While the proposals for minimum parking requirements, accessory apartments, and corner stores have generated the bulk of testimony and controversy, they are far from the only elements of the ZRR. It is important for the ZRR to move to action and implementation soon, so that proposals such as these may become part of the zoning code and achieve beneficial effects as intended.

2. OP's recommendation to require a special exception for all accessory apartments in accessory buildings will hamper DC's ability to reduce the number of people being priced out of the city, and I urge you to reject that change.

The Office of Planning originally proposed allowing accessory apartments in external buildings where accessory apartments are legal. This Commission supported that direction in its initial review of the ZRR.

OP then came under political pressure by some individuals and groups who oppose the proposed new regulations. Many other individuals and groups do support it, and testified before this commission that they are a very reasonable way to add housing which the city needs while also minimizing the

OP acceded to a compromise with opponents a few years ago. Under that compromise, OP agreed to require a special exception if the property owner created an accessory apartment by building a new accessory building or substantially adding on to an existing one. That is because some people felt that the new rules would add an incentive to build new accessory buildings, which might be legal under current zoning but which people don't add today lacking the ability to earn income from them.

Under the compromise agreement, accessory apartments would not require a special exception if they complied with all of the other rules in the section and the accessory building:

- a. Was already in existence as of the date the ZRR became law, OR
- b. Had been constructed or renovated at least five years before the date of application for the accessory apartment, so that people who build garages in the future could one day convert them so long as enough time had gone by to separate the two actions.

While supporters of adding housing through accessory apartments would not have preferred to see a special exception required for any accessory apartments, many felt it was an acceptable compromise. You heard many people testify in support of this rule, or even ask for a less restrictive rule, and other people testified that they oppose matter of right accessory apartments entirely.

Unfortunately, OP has abandoned this compromise position and further limited the rule. This will significantly lower the amount of housing that can be created, since many individual homeowners will find it very burdensome to go through the BZA process, one which is can be very daunting to the individual and usually requires the help of a zoning attorney, significant time and expense.

In fact, the Office of Zoning has a Consumer Alert on its home page¹ urging homeowners with cases before the BZA to seek "competent representation" and verify the representative's expertise by checking references and watching hearing videos. This is a clear signal that a special exception would create a significant obstacle which homeowners should not try to navigate on their own.

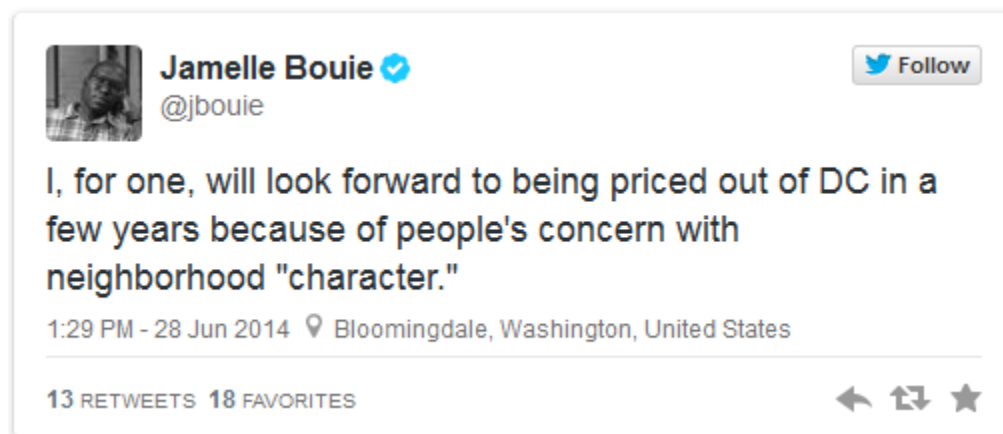
Renting apartments in one's basement or an external building works very well in parts of the city where it is already legal. It is a way to add housing without changing existing buildings. It is a way to help

¹ <http://dcoz.dc.gov/news/2012/news071912.shtm>

seniors age in place. It keeps people engaged in their neighborhoods because they are renting parts of their own property and have to continue living on the property.

By saying that it is reacting to resident opinion, OP is disregarding the significant fraction – likely a majority – of witnesses and residents who support this policy.

It is important for this Commission to understand the alarm that so many residents of DC, of all backgrounds and professions, feel about the rapidly-rising cost of housing that has arisen now that DC is a highly-desirable place to live yet supply of housing is very constrained. As one example, *Slate* writer Jamelle Bouie recently referred to his fear of being unable to live in DC in a message on Twitter which generated widespread discussion²:



While this Commission often hears from people who have invested in a neighborhood and feel that the status quo is fine for them, I urge it not to forget about the many people for whom the status quo is not fine. Inaction will lead to further loss of affordability. These people want to be the next generation of established residents in those neighborhoods, only they fear the opportunities that were available in the past will not be present any longer.

Accessory apartments are an important way to help neighborhoods grow while also preserving many important and valuable elements of them for longtime residents and future longtime residents alike. Young people are not the only ones harmed – empty nesters wishing to downsize and seniors trying to age in place are also affected.

I encourage the Commission to reject this proposed amendment and move forward with the original compromise position that OP submitted (or, better yet, the prior policy which OP had proposed to this Commission in 2008 and which had garnered support). There are also some drafting errors in 1606.4(f)(1) and (8) which should be corrected; they became moot with OP's change, but when it reinstates the original OP can easily fix this error with the modifications I listed in my original testimony.

² <https://twitter.com/jbouie/status/482938922041749504>

3. OP's recommended change regarding theaters in residential zones is a welcome step, but is too narrow to not sufficiently address the problems that make a change necessary.

In my original testimony, I pointed to the case of Spooky Action Theater, BZA case #18471, as one example of a situation where a nonprofit theatrical company wants to locate in a residential area, has the overwhelming support of neighbors, yet

OP wrote a very narrow rule that would indeed account for the Spooky Action case, but not others:

1602. Entertainment, Assembly, and Performing Arts uses shall be permitted as a special exception subject to the following conditions:

- (a) Live theatrical performance use of an existing theater or performance space in an institutional, educational, or performing arts building by a group otherwise not related to the building owner or tenant;*
- (b) The use shall not be organized for profit; and*
- (c) The use shall not likely become objectionable in a R zone because of noise hours of events, traffic, parking or other objectionable conditions.*

I have no objection to (b) or (c). For (a), I have two concerns.

First, the rule that the arts organization must be “otherwise not related to the building owner or tenant” is unnecessarily narrow. This will specifically deal with the Spooky Action case (#18471), where a church rented out some of its space to a theater company, but not case #18722, a similar case involving the Andrew Keegan Theatre Company on the block where I live.

In that case, the Keegan purchased its current building believing it had a Certificate of Occupancy for theatrical performance, but later discovered that it actually was for theater education. The Keegan then had to apply for a variance. There was again overwhelming neighborhood support for this applicant.

However, BZA Chairman Jordan argued in the hearing that the applicant had not demonstrated a financial hardship. Fortunately, OP representative Steve Cochran was able to identify an argument which some might call something of a loophole, where the BZA case years prior which granted the theater education variance had already found the building unsuitable for residential use.

The BZA was willing to grant the application, though Jordan was at best very uncomfortable and stated that he did not want this to become a precedent. While I am glad this view prevailed, it seemed clear that it may not have under a slightly different set of facts and may not in any future, similar case.

At the hearing, Commissioner Miller noted something to the effect that soon this type of case would be a special exception and not a variance because of the ZRR, as another reason for the board to interpret the rules liberally on behalf of Keegan.

Unfortunately, however, this turned out not to quite be the case as OP wrote a narrower rule than perhaps this Commission anticipated.

Second, I am concerned that “an existing theater or performance space” and “in an institutional, educational, or performing arts building” are not well-defined terms. Spooky Action was operating in a church basement which had at times been used for performance, but was not solely a performance space. Nor is a building, per se, an institutional, educational, or performing arts building; rather, those may be permitted uses in a zone, or a building may have a variance granting such a use.

I understand what OP is trying to achieve, though doing so with language that may not be legally sound. It is possible that the language could be fixed, though I am also not convinced it is necessary. Part (c) would ensure that nobody could simply propose to run a theater out of his or her own home if it impacted neighbors in virtually any way. And if it did not impact them, what is the harm? The special exception hearing is an ideal venue to make that determination.

The Capitol Hill Arts Workshop operates out of a building at 545 7th Street SE which is in an R-4 zone and, while it is a corner building, appears to have been originally constructed as a residence. It is a performing arts building now, but only by tautology: it is one because a theater operates there. This rule would not appear to allow CHAW to begin operating if it were not, even if neighbors supported that.

Many nonprofit arts groups are finding it difficult to find homes³ as rents downtown and in commercial areas rise. Allowing them to locate in moderate- and medium-density zones *with neighborhood support* would give them an opportunity to find spaces where they are not bidding against all other commercial uses such as far more profitable restaurants.

I hope the Commission will ensure this rule is not overly narrow. The simplest change would be to just strike the new 1602(a); alternately, OP could revisit the rule.

In any event, I also hope that this change does not slow down the overall adoption of the ZRR. Simply removing 1602(a) would not seem to require any further delay. If the Commission wants OP to write a more complex rule which would take more time, then perhaps they can work on that as a separate zoning case in parallel. This is what they are doing with the R-4 “pop-up” rules (Case 14-11), whose merits I will discuss further if and when the Commission sets that down for hearings.

Thank you for your time and attention to these issues.

Sincerely,

A handwritten signature in black ink that reads "David Alpert". The script is fluid and cursive, with the first name "David" and last name "Alpert" clearly legible.

David Alpert

³ http://www.washingtonpost.com/entertainment/theater_dance/dc-theaters-scramble-to-find-new-homes/2013/06/13/a6d83bf6-d215-11e2-9577-df9f1c3348f5_story_1.html