

Testimony for ZC case #08-06A, Zoning Regulations Review
September 8, 2014 hearing on Office of Planning proposed amendments
David Alpert, Greater Greater Washington

Dear Chairman Hood and members of the Zoning Commission,

Thank you for your continued detailed attention to the zoning update process. Here is my testimony for Greater Greater Washington on the proposed amendments to the ZRR by the DC Office of Planning.

Here is a brief summary of my recommendations for the proposed amendments:

Subtitle C

Priority Bus Corridors parking minimum: Retain previous language as advertised in the alternative.

D-5 zone (West End) parking minimum: Retain previous language as advertised in the alternative.

Subtitles D, E, and F

Minimum lot size and house size: Accept OP amendment.

Accessory apartments in accessory buildings: Retain previous language as advertised in the alternative.

Alley width: Accept OP amendment. Further, ensure that relief from 24-foot alley width is available in RF zones (subtitle E) as well as R zones (subtitle D).

Side yard width for access to accessory apartments: Accept the OP amendment to reduce the required width to 8 feet (or, ideally, fewer). Also, make the same change in RF zones (subtitle E) as was made in R zones (subtitle D).

Maximum number of persons: Accept the alternative of a cap only on the number of persons in the accessory apartment, or alternatively, make the limit 6 persons total OR 2 in the accessory apartment.

Theaters in residential zones: Further modify OP amendment to delete new 1602(a) and further make this applicable in A zones (subtitle F) as well.

Priority Bus Corridors

The proposal to apply reduced parking minimums to priority bus corridors is an important element that should be retained. Bus service is an important transit mode that can be the best way to offer mobility in many parts of the city. It already enables many residents to live without reliance on owning a private car and indeed makes it possible for new buildings to sometimes have less parking than is otherwise required without harming the residents of that building or neighbors.

For the zoning code to say that only rail service can bring a parking reduction would send an incorrect message that only rail service is “good” transit or only rail service can enable car-lite or car-free living. This could have unfortunate consequences of reducing property owner support for improving bus service and push officials to build streetcar lines even when they are not the appropriate mode. They are right in some areas while high-frequency buses are best in other areas. The zoning code should offer a parking reduction when transit service is available at a certain capacity and frequency, not be tied to a particular technology.

This was also a compromise of a compromise of a compromise already. Originally, OP was planning to recommend reducing parking minimums citywide. Based on some pushback from some people, they modified it to only apply near transit. This then led to a campaign with some demagoguery around the idea of “transit zones,” so OP modified it to not have any explicit, different transit zone but rather to apply automatically only when the transit reaches a set threshold. Even later, OP reduced the amount of the reduction further. Therefore, OP has more than sufficiently responded to community pushback. Unfortunately, some residents have made it clear that they will oppose any level of reduction, and this reduction is both unnecessary and unwise.

Therefore, I encourage the Commission to adopt the text advertised in the alternative, the original text as set down in September 2013.

D-5 zone (West End) parking

OP had convincing evidence that parking minimums are not necessary in dense downtown zones. There is ample transit service, very congested roadways, and many existing commercial garages, which often have excess capacity.

This justification remains appropriate and applies as well to the West End as other downtown areas with a mix of residential and commercial. It appears that more people have complained about this change in the West End, and OP should listen to input, but only insofar as it makes a convincing case; the fact that there are larger numbers of opponents is not in itself a justification to abandon a policy. This case has not been made.

Therefore, I encourage the Commission to adopt the text advertised in the alternative, the original text as set down in September 2013.

Minimum lot and house size for accessory dwellings

I want to thank the Commission for asking OP to revise these minimums. The minimums unnecessarily restricted the amount of new housing that can be created by the accessory apartment proposals. The new language will ensure that many more people can find places to live in neighborhoods, and existing homeowners can supplement incomes by renting out unused space, without fundamentally changing the appearance of these neighborhoods.

Accessory apartments in accessory buildings

OP has not demonstrated any compelling justification for reversing its original proposal to allow accessory apartments in existing accessory buildings as of right. These buildings already exist and the language ensures that people cannot expand them just to add an apartment without a special exception hearing.

Such a hearing 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 page 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 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 supported this policy at the original hearings.

Therefore, I encourage the Commission to adopt the text advertised in the alternative, the original text as set down in September 2013.

Further, there was a provision in the original text which provided that a new or renovated accessory building, if built or renovated after the ZRR became law but not for the purpose of being an accessory apartment, could then ultimately be converted into one as of right after five years. The purpose of this provision was to ensure that if one homeowner builds or adds to a garage, then sells the property to another many years later, that later homeowner is not punished just because the garage happened to be built in 2015 as opposed to 2005.

Unfortunately, OP drafted this language incorrectly and it could likely be interpreted to mean the opposite of what it is intended to mean. The original setdown text read:

An accessory building that houses an accessory apartment shall comply with the following conditions:

- (1) The accessory building was in existence on January 1, 2013;
...
- (8) An accessory building constructed as a by right accessory building after January 1, 2013 shall not be used as, or converted to, an accessory apartment except by special exception for a period of five years after the approval of the building permit for the accessory building;

Instead, these two should be combined to read something like:

- (1) The accessory building was in existence on January 1, 2013, or for a building constructed as a by right accessory building, at least five years have elapsed since the approval of the building permit for the accessory building.

A parallel change would need to be made in E 1101.1 (a) and (f).

Alley width

I appreciate the Commission's asking OP to reevaluate the wide 24-foot alley widths which would also have made accessory apartments in accessory buildings illegal in most historic parts of DC. The new proposal allows for special exception relief from alley width in Subtitle D, but OP did not also place similar language in Subtitle E.

According to an email from Joel Lawson, OP intends to do this, and I encourage the Commission to ensure that it is part of any final technical amendments if the change has not already been made.

Side yard width for access to accessory apartments

OP made a good change in allowing access to accessory apartments through side yards of up to 8 feet. Commissioner May made an excellent point at the July meeting that even 8 feet may be unnecessary, and I support further reductions to increase the amount of housing that can be created.

Also, as in the alley width section, OP still needs to copy this change into Subtitle E and I encourage the Commission to ensure that this happens.

Maximum number of persons

The current text caps the total number of persons at 6. Commissioner May pointed out that this means a family of 5 in a main house could not rent an accessory apartment to a couple, and suggested a cap on persons in the accessory unit.

This would be fine. Another option to consider might be a hybrid which provides, for example, that an accessory apartment is permitted if the aggregate number of persons is 6 or fewer, OR if there are 2 or fewer persons in the accessory apartment. In other words, allow a family of any size to rent to 2 people, but a family of only 3 could then rent to 3 people, a couple could rent to a family of 4, and so on.

Theaters in residential zones

As I explained in my July 1 letter (exhibit 728), 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 homes 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).

Finally, this rule as currently written applies only to subtitles D and E. Yet the Keegan is in an R-5 zone, where the justification for allowing theaters is equally strong. Therefore, this rule should apply to Subtitle F as well as to D and E.

Thank you for your time and attention to these issues.

Sincerely,

A handwritten signature in black ink that reads "David Alpert". The script is cursive and fluid, with the first letter of each word being capitalized and prominent.

David Alpert