

Zoning Commission for the District of Columbia
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RE ZC #14-13 Penthouse Amendments

Written testimony of Suzette M. Hemberger



1. Congress's changes to the HBA have no relevance to zoning restrictions in areas where maximum allowable heights are below HBA limits. In cases where local zoning – not the HBA – is the binding constraint on building heights, the appropriate way to raise allowable heights/stories/FAR is to upzone. That's an honest and transparent approach and one that would alert residential property-owners to changes proposed for their neighborhoods. By contrast, using the feds as cover ("Congress made us do it!") and resorting to a legal fiction (those top two stories don't add "height" and the space within in them doesn't increase "FAR") is a fundamentally dishonest approach and one that will make a mockery of the zoning code. Don't go there. Limit your decision on penthouses to zones that max out the HBA limit.
2. As the federal submissions (NCPC and Secret Service) suggest, habitable penthouses raise a series of significant issues and challenges when planners look closely at how they would function in specific contexts. These submissions are a reminder not only that vital federal interests have been ignored, but that, in general, the penthouse regulations before you were not based on context-specific planning analyses. As the result of OP's failure to do this groundwork, the interests of DC citizens and neighborhoods have been left completely unprotected. As you know from other cases (and from how the penthouse issue has been discussed in other contexts), DC residents care about preserving viewsheds, neighborhood scale, activating streets, light and noise pollution, preventing teardowns, sustainability, recreational space, and a host of other issues that are closely related to rooftop structures. The current proposal accommodates developers' interests, but largely ignores residents'.

Again, one part of the solution is to take all zones that do not allow development up to the HBA limit out of the proposal. That's a necessary but not sufficient step toward protecting residents' interests. Residential interests downtown need to be considered, as do borders/edges/transitions between zones where maximum heights and densities are allowed and those where development is lower-scale. One approach might be to limit habitable penthouses to a specific part of downtown initially (avoiding the streets NCRC mentions and the areas the Secret Service discusses) and to require OP to do outreach to residents in and around that specific area. Rather than do a citywide rollout of an ill-conceived policy, insist that OP do the planning necessary to draft more nuanced regulations that respond to a broader range of interests and then see how those regulations work out in practice.

3. Do not adopt the proposed penthouse regulations unless/until OP obtains Comprehensive Plan amendments from the DC Council endorsing its policy proposal. The claim that the Director of the Office of Planning anticipated greater changes to the HBA when she promised that

Any relaxation by Congress of the current Height Act restrictions would still require further review, public participation, and decisions by the District and federal governments about whether, when and where any changes to building

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heights would actually occur. **The District would undertake amendments to its Comprehensive Plan and then initiate any zoning changes deemed appropriate through its normal processes, including substantial public input, to respond.¹**

is no rationale for absolving the Office of Planning from honoring that commitment, which was repeatedly made both to Congress and to the people of the District of Columbia. OP's language was categorical – not qualified. And what was being described was the appropriate legal process for implementing HBA changes – which remains the same regardless of the substance of the changes being proposed

Secondly, there are a variety of additional reasons why the Zoning Commission should not adopt these regulations unless/until the DC Council adopts supportive Comprehensive Plan amendments

- Commissioner May is, of course, right when he points out that the existing Comprehensive Plan never envisioned habitable penthouses, so it doesn't speak directly to the issues before the ZC. At the same time, the Committee of 100 is also right when it points out that there are numerous Comprehensive Plan provisions that appear to be inconsistent with the proposed regulations. In addition to those substantive provisions, adoption of these regulations would create additional inconsistencies as allowing/incentivizing an additional 20 feet of height and one or two extra stories would push matter-of-right development in many areas outside of downtown into density categories that are higher than the ones to which they are currently assigned. Deciding not to count the additional SF toward "FAR" or the additional stories toward "height" in applying zone-based restrictions doesn't eliminate this Comp Plan inconsistency.
- Lindsley Williams is right when he points out that deciding what the "price" (e.g. HPTF contributions or IZ requirements) of penthouse construction should be is beyond the ken of the Zoning Commission. These are decisions that need to be made by the Council – and the Zoning Commission should not be giving away commodifiable height and density before the Council has provided policy direction on where and under what circumstances this is desirable, and on what quid pro quo, if any, should be exacted in exchange for such lucrative upzoning. [Currently, with the highest floors in new residential projects like Cityline commanding \$1500 per SF and downtown office buildings have begun to sell for \$1000/SF (average of all floors) or more.] During the HBA debates, then-Director Tregoning repeatedly suggested that DC should consider auctioning off any additional space created by the loosening of HBA restrictions, both to control the pace/scale/location of additional development and to maximize the revenue generation associated with it. By contrast, the regulations before you represent a major giveaway of development rights. It's a windfall for developers and not in the public interest. As an unelected Commission with no expertise in this area, the ZC should not be making such a decision without Council authorization in the form of Comprehensive Plan amendments.
- Finally, the Office of Planning is on the verge of a Comprehensive Plan amendment cycle. There is no reason to rush these regulations when supportive amendments could be made in the near future (if OP is motivated – and has to votes-- to do so)². No matter when the ZC makes its decisions, there will always be some projects that just missed the window of opportunity to exploit the new changes. In other words, any zoning change that allows more development will always feel urgent to someone. But here we're in a situation where projects being cited (the Wharf, the WaPo building) were undertaken (and deemed economically viable) with no reasonable expectation that habitable penthouse space would be authorized. There's no inequity in refusing to adopt these regulations until the Council has adopted supportive Comp Plan amendments.

¹ Government of the District of Columbia, Height Master Plan for the District of Columbia: Final Evaluation and Recommendations, November 20, 2013, page 7 (emphasis mine)

²The motivation won't exist unless the ZC insists that the proper process be followed. And if the votes are lacking, that's a sign that ZC shouldn't be adopting the regulations in the first place.