

CASE NO. 14-13
Zoning Commission of the District of Columbia
Comments on Text Amendments to the Zoning Regulations
Penthouse Regulations
Marilyn J. Simon, Friendship Neighborhood Association

The proposed text amendments to the penthouse regulations are not required by the recent amendments to the Height Act, but would grant large increases in matter of right height and density citywide. As discussed below, the text amendments will, in many cases, result in matter-of-right heights and densities that are inconsistent with the Comprehensive Plan. Further, by providing very profitable increased density for any use allowed in the zone, the proposed regulations create the incentive and ability to have more massive penthouse structures.

The Proposed Rules are Inconsistent with the Comprehensive Plan:
The New Limits on Some Zoning Categories are Inconsistent with their Comprehensive Plan Designations

The proposed rules will increase the matter-of-right total floor area ratio, and the matter-of-right floor area ratio for non-residential uses in the commercial zones. In addition, by allowing an additional floor to house any use permitted in the zone [§411.4], with only a few exceptions, it effectively increases the matter-of-right height in each zone. In addition, it exempts habitable space in the penthouse with a floor area ratio of less than 0.4 from the floor area ratio calculation [§411.13(c)]. This effectively increases the allowable FAR for the building and provides the developer with an incentive to increase the size of the penthouse to include that bonus habitable space.

Low-Density Commercial Zones: Large portions of Wisconsin and Georgia Avenues are designated for low density commercial¹/moderate density residential on the Future Land Use Map ("FLUM") of the Comprehensive Plan. They are zoned C-2-A. When the Comprehensive Plan was approved, the C-2-A zone had a matter-of-right height limit of 50 feet and a FAR of 2.5, with no more than 1.5 for non-residential uses. With inclusionary zoning, the FAR was increased to 3.0. With this text amendment, the height limit would be 60 feet for habitable space, with an extra story and an additional 5 feet for mechanical equipment, and the FAR limit would be increased to 3.4, with no more than 1.9 FAR for non-residential uses.

This represents a 36% increase in the total FAR above what was anticipated in the Comprehensive Plan when the C-2-A zone was designated as a low-density commercial zone. It is a 27% increase in the non-residential FAR, and a 20% increase in height.

This increase in the matter-of-right height and density is not consistent with the low-density commercial designation in the Comprehensive Plan, which is described as primarily one- to three-story commercial buildings.

Moderate-Density Commercial Zones: The C-3-A zone is used in some areas that are designated for moderate-density commercial² use in the Future Land Use Map ("FLUM") of the Comprehensive Plan. See, for example, the "Whole Foods Block" in Tenleytown, which is zoned C-3-A and designated as moderate-density commercial/medium-density residential in the FLUM (Zoning and Comprehensive Plan maps, attached). When the Comprehensive Plan was approved, the C-3-A zone had a matter-of-right height limit of 65 feet and a FAR of 4.0, with no more than 2.5 for non-residential uses. With inclusionary zoning, the FAR was increased to 4.8. With this text amendment, the height limit would be 75 feet for

¹ See Comprehensive Plan, ¶225.8 for the description of the low-density commercial designation. "Their common feature is that they are comprised primarily of one- to three-story commercial buildings. The corresponding Zone districts are generally C-1 and C-2-A, although other districts may apply."

² See Comprehensive Plan, ¶225.9 for the description of the moderate-density commercial designation. "Buildings are larger and/or taller than those in low density commercial areas but generally do not exceed five stories in height. The corresponding Zone districts are generally C-2-A, C-2-B, and C-3-A, although other districts may apply."

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habitable space, with an extra story and an additional 8.5 feet for mechanical equipment. The FAR limit would be increased to 5.2, with no more than 2.9 FAR for non-residential uses.

This represents a 30% increase in the total FAR beyond what was anticipated in the Comprehensive Plan when the C-3-A zone was designated as a moderate-density commercial zone. It is a 16% increase in the non-residential FAR, and a 15% increase in height.

This increase in the matter-of-right height and density is not consistent with the moderate-density commercial designation in the Comprehensive Plan, which is described as generally not exceeding five stories in height.

OP's Response Does Not Adequately Address the Issue of Inconsistency with the Comp Plan

In its June 1, 2015 Supplemental Report, the Office of Planning addressed these concerns by stating: "Historically the additional floor area permitted for roof structure uses has not been included within floor area ratio calculations per §§ 411.7 and 411.8 (11 DCMR) therefore are not inconsistent with the Comprehensive Plan."³

This response does not address whether, in reality, the expansion in the uses allowed in the penthouse, as well as the increase in the permissible size of the penthouse, changes the basic parameters for these zones such that the zoning envelopes in the C-2-A zones which are designated as low-density commercial or the C-3-A zones which are designated as moderate-density commercial have increased beyond what was envisioned in the Comprehensive Plan for the areas mapped as low- or moderate-density commercial zones in the Future Land Use Map.

The Office of Planning's response simply notes that, in the past, the floor area which could only be used for mechanical equipment and other limited uses was not included in the floor area ratio calculations. It sheds no light on the issue of whether failing to include the floor area above the roof, which is used in exactly the same way as the floor area below the roof, in the floor area ratio calculations leads to actual increased matter-of-right heights and densities that are inconsistent with the Comprehensive Plan. Clearly, these large increases in the allowed habitable space can push the parameters for these zones out of the low- or moderate-density category.

Summary

The proposed text amendment would increase the dimension and uses of rooftop structures, while exempting this additional volume, height and intensity of use from the zone limits on height and FAR. This would result in heights and densities that are inconsistent with the Comprehensive Plan.

In order to address this concern, we ask that the Zoning Commission:

- (a) reject the provision [§411.13(c)] where habitable space within a penthouse with a floor area ratio of less than four-tenth (0.4) is not included in the floor area ratio calculation for the building; and
- (b) revise §770.6 to limit the maximum number of penthouse stories in the C-1, C-2-A, C-2-B and C-3-A zones to one story, and to limit the maximum penthouse height in those zones to 10 feet, except that a total height of 15 feet or 18.5 feet for mechanical equipment, stairway, and elevator overrides might be allowed if approved by the BZA.

³ ZC 14-13, Text Amendment to the Zoning Regulations: Rooftop Penthouses, Supplemental Report, Joel Lawson and Jennifer Steingasser, June 1, 2015, ZC 14-13, Exhibit 119, at page 8.

Marilyn Simon, Friendship Neighborhood Association, ZC 14-13, April 30, 2015

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Zoning Commission of the District of Columbia
Text Amendments to the Zoning Regulations
Rooftop Penthouse Regulations
Testimony of Marilyn J. Simon, Friendship Neighborhood Association
Thursday, April 30, 2015

My name is Marilyn Simon, and I am speaking on behalf of Friendship Neighborhood Association. The Office of Planning's proposed text amendments are not required by the recent amendments to the Height Act, but would grant large increases in matter of right height and density citywide.¹ It will, in many cases, result in matter of right heights and densities that are inconsistent with the Comprehensive Plan.

Amendments to the Height Act Do Not Necessitate the Proposed Text Amendment

The current zoning regulations on height, density, and rooftop structures serve a purpose in shaping our built environment. The loosening of federal regulations, which involves minor changes in limited locations, should not be used to justify major changes in the restrictions on rooftop structures across the District. Further, changes in the federal restrictions on rooftop structures in those limited locations don't trigger a requirement that the District change its regulations to match the new limits of the Height Act, and certainly don't trigger a massive upzoning outside those limited areas.

At most, the changes in the Height Act would trigger a process that might lead to the submission of new text that applies only to those areas that are currently constrained by the Height Act, and that text would only be submitted after a careful evaluation of the impact of the likely changes in uses and dimensions, including a full examination of the change in the incentive and ability to have taller structures with more intensive use.

Recommendations

After review of these proposals and based on the analysis below, we recommend to the Commission that:

- (1) No changes should be made to the allowable uses in penthouses in the areas that are not constrained by the Height of Buildings Act ("HBA").
- (2) Two stories should not be allowed in any penthouses in the areas that are not constrained by the HBA.
- (3) Changes in line with the minor changes in the HBA should be made only in the areas currently constrained by the HBA and only after there has been a careful analysis of the new incentives for larger penthouses and the changed zoning envelope, and then only after it is

¹ The proposed language would provide the incentive and ability to increase height and density except in low density residential zones.

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determined that there is adequate infrastructure to support the more intensive use and that the incentive to have larger penthouses will not change the character of the areas.

(4) All habitable gross floor area located within the penthouse must be included in the calculation of the building's permitted FAR, with the possible exception of communal recreation or support space serving the tenants of the building. [See 411.8. This is a modification of alternative 2].

(5) Limit the size of the penthouse to one-third of the roof area (or to a maximum FAR of 0.37 for zones where that is the current constraint), subject to the setback requirements.

(6) A request to add penthouse space or habitable uses to an approved PUD should not be treated as a minor modification and should not be placed on the consent calendar [411.20]

(7) If changes are made outside the areas constrained by the HBA:

(a) the penthouse uses for a one-family dwelling or flat or any building in a zone where the building height is limited to 50 feet or less by right should be limited to mechanical equipment or stairway and elevator overrides [See 411.2, modified, and additional uses not allowed by SE, per 411.11];

(b) for those zones where habitable uses would be allowed in the penthouse, nightclubs, bars, restaurants and lounges should only be allowed by special exception [411.2]; and

(c) retain the requirement that walls of an enclosed penthouse shall be of equal height [411.6].

(8) To the extent there are affordable housing requirements, and if habitable penthouse space is not fully included in the calculation of the buildings FAR, any habitable space in the penthouse that is not included in the calculation of the building's FAR should be treated as bonus density, triggering an affordable housing requirement of at least 40% or 50% of the bonus density depending on the zone.

The Proposed Text Amendment will not address concerns about the scale and aesthetics of rooftop structures.

In the past, this Commission has expressed concerns about the scale and aesthetics of rooftop structures on some projects. The proposed text amendment does nothing to limit oversized penthouse structures or to improve their appearance. In fact, by providing very profitable increased density for any use allowed in the zone, the proposed regulations create the incentive and ability to have more massive penthouse structures.

OP's Proposed Text Amendment Increases the Effective Height and Density Limits in Most Zones

The proposal before the Zoning Commission increases the dimensions and uses of rooftop structures, while exempting this additional volume, height and intensity of use from the zone limits on use, height and FAR. We concur with others who are speaking tonight, concerned about the impact of this text amendment on rooftop structures in areas that currently are not constrained by the Height Act as well as those areas currently constrained by

the Height Act, the treatment of increases in rooftop structures in existing PUDs, and the very weak affordable housing requirements.

At the last hearing, I focused on how these text amendments, if adopted would affect our C-2-A mixed use corridors, such as Wisconsin Avenue and Georgia Avenue, and demonstrated how the proposed change would result in heights and densities that are inconsistent with the Comprehensive Plan. OP has offered one alternative that would address the concern about the C-2-A zone, Alternative 2 for Sections 411.1 and 411.2 that would only allow habitable space within a penthouse for zones allowing a by-right building height of more than 50 feet. I do urge the Commission to choose Alternative 2 in this section over Alternative 1 if they proceed with any changes in zones that are not currently constrained by the Height Act.

The Proposed Text Amendment is Inconsistent with the Comprehensive Plan

In earlier testimony, C-2-A was chosen as an example, but similar issues arise in other zones. So, tonight I will discuss the C-3-A zone, which is in two locations on the upper Wisconsin Avenue corridor, the Whole Foods block in Tenleytown and the "Home Plate Lot" on Western Avenue across from Bloomingdales. The Whole Foods block in Tenleytown is designated for moderate density commercial/medium density residential in the Future Land Use Map of the Comprehensive Plan. The current limits for this zone are 65 feet in height with an FAR of 4.0, increased to 4.8 with inclusionary zoning.² Even under Alternative 2, in the C-3-A zone, the text amendment would allow a developer to include a 20 foot penthouse with any use allowed in that zone. This will provide the developer with a substantial increase in density, and a 20 foot increase in height, with a 10 foot setback for the first floor and another 10 foot setback for the second floor.

As noted in earlier testimony, the Office of Planning's estimates of the average increase in FAR do not capture the full increase in the rooftop structure since there is assumed to be only one-story in the 20-foot tall structure;³ and the proposed regulations would allow the lower floor of the structure to have a smaller setback (larger footprint) than the upper floor.

OP has not provided corrected estimates of the allowable increase in FAR. Without accurate estimates of the change in the zoning envelope, OP cannot evaluate the impact of this proposal, the adequacy of the infrastructure or whether it would be consistent with the Comprehensive Plan.

Using the adjusted estimates from my earlier testimony, for a mixed use commercial/residential building in a C-3-A zone, the average FAR limit would increase from 4.8

² For a C-3-A zone, the non-residential matter of right FAR is limited to 2.5.

³ See §411.18 of the Setdown Proposal, limiting the penthouse to two stories, except in certain zones, on one-family dwellings or a flat in any zone, or where any portion of the height or volume of the penthouse would be above the height limit established by the Height Act. Only in those cases would the penthouse be limited to a single story. See also §770.6(a) of the Proposal carrying this provision over to commercial zones. Some of the current proposals allow two stories of habitable space in some zones, and all of the current proposals have a smaller setback for a shorter penthouse.

to 5.45⁴ [with alternative 1 to section 411.8] or 5.2 [with alternative 2 to section 411.8⁵].

The amendment also provides an incentive and ability to build to a height of 85 feet⁶ and to expand the footprint of the rooftop structure far beyond the current limit⁷ to the maximum allowed with the required setbacks. This is substantially higher than the 4.0 FAR limit that was in place when C-3-A was used in the Comprehensive Plan description of a moderate-density commercial area.⁸

It is difficult to see how buildings with these new dimensions are consistent with the Comprehensive Plan designations for these C-3-A zones. If these proposals are accepted, and if consistency with the Comprehensive Plan is to be maintained, it would be necessary to downzone the C-3-A zones designated for moderate density commercial in the Comp Plan as well as many other zones where the increased height and density will make that zone inconsistent with its Comp Plan designation.

Conclusion

The OP proposal is inconsistent with the Comprehensive Plan, and should be rejected outright. Further, any change in the rules for rooftop structures related to the change in the federal regulations should be limited to those areas where the height is constrained by the Height Act, and the impact of those changes should be carefully studied prior to the adoption of any such proposal. If, after study, it is determined that it is in the public interest to liberalize the use and dimensions of rooftop structures in those areas currently constrained by the Height Act, OP can submit a proposal that focuses on those areas.

⁴ Matter-of-right buildings in C-3-A zones have a height limit over 50 feet by right and are not constrained by the Height Act. Therefore, the penthouse would not be limited to one story, but could have two stories. With Alternative Text #1 for Section 411.18, both levels could be habitable space, while with Alternative Text #2, the second story could only be used for mechanical equipment. The November 6, 2014 Friendship Neighborhood Association testimony includes calculations, based on data in the OP Report, for the estimated increased FAR.

⁵ See §411.8 of Public Hearing Notice. Alternative 1 is: "Gross floor area within a penthouse shall not be included in the calculation of a building's permitted FAR. Alternative 2 is: An increase of allowable floor area ratio of not more than 0.40 shall be permitted for habitable gross floor area located within a penthouse. Gross floor area within a penthouse devoted to mechanical uses, stair or elevator overrides or commercial recreation or support space shall not be included in the calculation of a building's permitted FAR." Note that if the project includes penthouse space for commercial recreation or support space, the actual FAR in Alternative 2 can average 5.45.

⁶ The proposed regulations would expand the uses for the rooftop structure to include all uses allowed in that zone. This means that it is likely to be in the developer's interest to maximize the volume of the rooftop structure, within the new constraints.

⁷ The current regulations limit the size of the penthouse to one-third of the total roof area in those districts where there is a limitation in the number of stories [Section 411.8], and to an FAR of 0.37 in other districts [Section 411.7]. For the C-3-A district, there is a by-right height limit of 65 feet, but no explicit limit on the number of stories.

⁸ See Comprehensive Plan, Citywide Elements, Chapter 2, Section 225.9.

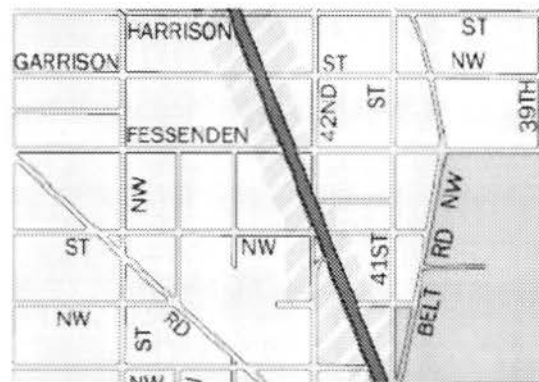
Upper Wisconsin Avenue: Zoning Map and the Future Land Use Map of the Comprehensive Plan

The areas zoned C-2-A are designated for low-density commercial and moderate density residential on the FLUM, while the surround areas, largely zoned R-2, are designated for low-density residential uses on the FLUM. With some of the alternatives under consideration, the effective height can increase to 60 feet, with an average maximum FAR of 3.39.

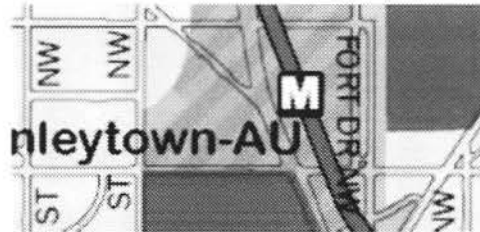
Zoning Map:



Comprehensive Plan, Future Land Use Map:



The area zoned C-3-A is designated for moderate density commercial and medium density residential in the FLUM. With some of the alternatives under consideration, the effective height can increase to 85 feet, with an average maximum FAR of 5.45.



Comprehensive Plan: Future Land Use Map: Legend

LEGEND

Residential Land Use Categories

- Low Density Residential**
Suits the desire to create family neighborhoods. These areas are characterized by single detached houses, small lots, and low-rise buildings.
- Moderate Density Residential**
Suits the desire to create family neighborhoods as well as to allow for greater density. These areas are characterized by a mix of single detached houses, townhouses, and small apartment buildings. In some cases, these areas may also include medium-density multi-story detached houses.
- Medium Density Residential**
Suits the desire to create family neighborhoods as well as to allow for greater density. These areas are characterized by a mix of single detached houses, townhouses, and small apartment buildings. In some cases, these areas may also include medium-density multi-story detached houses.
- High Density Residential**
Suits the desire to create family neighborhoods as well as to allow for greater density. These areas are characterized by a mix of single detached houses, townhouses, and small apartment buildings. In some cases, these areas may also include medium-density multi-story detached houses.
- Parks, Recreation, and Open Space**
Includes the future and existing park areas, including the National Mall, the Mall, and various other park areas. These areas are characterized by open space, recreational facilities, and other amenities.

Commercial Land Use Categories

- Low Density Commercial**
Suits the desire to create family neighborhoods as well as to allow for greater density. These areas are characterized by a mix of single detached houses, townhouses, and small apartment buildings. In some cases, these areas may also include medium-density multi-story detached houses.
- Moderate Density Commercial**
Suits the desire to create family neighborhoods as well as to allow for greater density. These areas are characterized by a mix of single detached houses, townhouses, and small apartment buildings. In some cases, these areas may also include medium-density multi-story detached houses.
- Medium Density Commercial**
Suits the desire to create family neighborhoods as well as to allow for greater density. These areas are characterized by a mix of single detached houses, townhouses, and small apartment buildings. In some cases, these areas may also include medium-density multi-story detached houses.
- High Density Commercial**
Suits the desire to create family neighborhoods as well as to allow for greater density. These areas are characterized by a mix of single detached houses, townhouses, and small apartment buildings. In some cases, these areas may also include medium-density multi-story detached houses.

