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

Written testimony of Suzette M. Hemberger

I'd like to start by offering 5 reasons why the Zoning Commission should defer decision on these text amendments until after they've been vetted through the Comprehensive Plan amendment process, scheduled to begin in early 2015.

1 The Office of Planning has previously acknowledged that the proper procedure in this situation is to seek Comp Plan amendments first and then, once public policy objectives have been endorsed through that process, to consider what changes, if any, would be necessary to render our zoning regulations consistent with newly adopted Comprehensive Plan mandates.

In fact, throughout the HBA debate, OP repeatedly promised both Congress and DC residents that a robust democratic process would precede any implementation of Congressionally-adopted HBA amendments. See, for example, this statement on page 7 of the Height Master Plan for the District of Columbia: Final Evaluation and Recommendations (November 20, 2013)

> The Height Act is a federal law that can be modified only through congressional action. 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 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] (emphasis mine)

Do not let OP short-circuit the process that we all know should govern policy-making on this issue. Tell them to start at the Council and seek guidance through Comp Plan amendments prior to proposing new regulations.

2. What OP is proposing is inconsistent with the existing Comprehensive Plan. Areas that are currently mapped for low density would be pushed up to medium density and areas slated for medium density are pushed up to high density based on current definitions. In many areas

1 Government of the District of Columbia, Height Master Plan for the District of Columbia Final Evaluation and Recommendations, November 20, 2013, page 7. See also pp. 2, 45-46 of that document as well as similar comments in the September 20, 2013 Draft Recommendations, pp 1, 10, 44 This is not an isolated comment – it was a continually repeated reassurance

outside of downtown, these proposals fail the "not inconsistent" test and should be rejected on that basis.

3. The Office of Planning has done no actual PLANNING to justify these amendments. Adding 20 additional feet and, typically, 2 stories of merchandisable space in virtually every commercial and multifamily zone regardless of location is the antithesis of planning. It's a one-size-fits all approach designed solely to benefit developers. There's no public policy or planning rationale for upzoning citywide. From a quality control standpoint, you should be asking for more. Otherwise what is the function of having a Zoning Commission?

4. As you've seen, the Office of Planning has failed to do the outreach necessary to produce an inclusive public discussion on this issue before the Zoning Commission. Not a single ANC Commissioner submitted testimony (written or oral) during the public hearing, but developers and their lawyers, consultants, and trade associations were all well-represented. We know from recent experience, that issues involving the Height Act are near and dear to the hearts of many Washingtonians in neighborhoods across the city and that good outreach on this issues leads to well-attended hearings with substantial, diverse, and informative public testimony. You haven't gotten that here. Instead, you've been treated to a very one-sided discussion which does not provide you with the information that you need to make well-informed and impartial decisions about how the regulations governing penthouses should be changed.

5. This is not a case where adopting OP's proposal means that you've deferred to the political branches Both the Gray Administration and the Office of Planning pursued Height Act changes against the wishes of 12 of the 13 members of the Council and contrary to the public opinion of over 60% of DC residents. The current Director of the Office of Planning is an unconfirmed interim appointee chosen by a lame-duck Mayor. If you want to defer to the political branches, rather than substitute your own judgment on this issue, then you need to make space for a public debate that will include DC's new leadership rather than allow a no longer accountable Administration to slip in major changes as it leaves office.

For all of these reasons, the only responsible decision for the Zoning Commission to make on this case at this time it to postpone voting on #14-13 until after the oft-promised planning and substantial public input on this issue actually happens.

To give you a sense of what a robust public discussion on this issue might look like, here are three basic questions that haven't been seriously discussed:

1. What do (and don't) we want happening on rooftops (and where)?

The Wall Street Journal suggests that what's at stake here is trophy party space[2] for out-of-town guests. The article establishes that this can be a very lucrative enterprise -- the Newseum charges $30,000 a night for rooftop rentals. But creating more such space is hardly the sort of emergency that justifies passing broad new regulations without any consideration (beyond revenue) of their implications. Nor do the proposed regulations limit uses -- restaurants, nightclubs, office space, luxury housing, or any other use allowed in a zone could be located on the penthouse level(s).

[2] http://online.wsj.com/articles/washington-power-brokers-battle-for-the-rooftops-1414173253

Are we truly indifferent as to what uses this space is put to? Does the answer depend on where the space is located? If we want to create a "living" downtown, how will rooftop party spaces and the noise, light, and privacy issues they create affect the residents of neighboring buildings? Are there safety and/or security issues affecting rooftop uses in some areas? In areas where our goal is to create more "vibrancy," what happens to street life if we move restaurants and clubs to the sky? Do we want rooftops to be shared (by building tenants), commercial (open to the public -- for a price), or private? What do we hope to accomplish by making this space more usable? At this point, "sold to the highest bidder" is the operant logic of the new regulations. To me, that's the opposite of planning.

2. What's happening on rooftops now? If we introduce new uses, what gets displaced -- and to where?

In essence, the Office of Planning is proposing to commodify rooftop space. This is a major change Under current zoning regulations, the rooftop uses that are allowed in DC typically don't generate revenue -- at least not directly. Since the highest floors of a building typically command the highest rents and sales prices, adding one or two more inhabitable stories creates a strong incentive for every new building to maximize the built space above the roof. In lower-density zones, where two extra stories (even with setbacks) could represent a major increase in merchandizable square footage, there's a potential incentive for teardowns. And once roofs become a profit center, to what extent will beneficial but less lucrative uses survive?

Under the current zoning, rooftops typically house mechanicals -- elevator overrides, vents, HVAC equipment, antennas, and the like. If these necessary-but-less-than-aesthetic pieces of equipment don't go on the roof, where will they go? One developer's submission suggests that the top floor of the basement is the next-best location in commercial buildings -- in which case parking and/or storage space is likely to be displaced. If mechanicals stay on the roof, will they be located in ways that make them more objectionable? In addition to being ugly, such equipment can be noisy, hot, and/or smelly depending on its function.

More recently, rooftops have provided space for environmentally-friendly features like solar panels, green roofs, and stormwater management systems. In addition to helping meet sustainability goals or green building requirements, such features can lead to reduction in utility costs for building owners and/or residents. But, once these features are placed in competition with revenue-generating uses, they are unlikely to be given prime rooftop real estate. Solar panels, which need direct access to sunlight, face new constraints on height and orientation under the proposed guidelines as well as the likelihood of a shrinking footprint To what extent -- and where -- is it desirable to preserve rooftop space for uses that contribute more to sustainability than to profitability? New York, for example, has recently prioritized "green" rooftop uses in its zoning code.

Finally, some residential buildings have provided communal recreational space -- like swimming pools -- on their roofs. As you know, prior to 2007, on-site recreational space was required of multifamily residential projects. But once inclusionary zoning was contemplated, developers argued they couldn't be expected to do both. So, at their behest, recreational space requirements for new multifamily buildings were repealed in ZC #05-02 and additional flexibility for communal recreational space on rooftops was granted – presumably to incentivize such use. You're now being asked to undermine that incentive. Meanwhile, the downtown developers who pushed for this repeal subsequently proceeded to get themselves exempted from inclusionary zoning requirements as well. Which makes it pretty outrageous when they suggest that the usual IZ requirements should govern penthouse construction. For them, the usual = "none "

The absence of recreational space has been a real issue in NoMA, where thousands of units of housing came on line after the repeal of the requirement. The solution has been for DC government to spend $50 million to create parks in the neighborhood, but the available land is so expensive that these recreational facilities may end up located in freeway underpasses.

At any rate, we're now at a stage where, at least in some areas, there's a market incentive for new apartment buildings to provide rooftop pools (see, e.g. the Park Van Ness project in Chevy Chase). But that's likely to change once that same space could be turned into two floors of luxury penthouse units instead.

What can/should we do to incentivize the use of rooftops in a way that will benefit DC residents generally? Or do we plan to make our rooftop spaces the private preserve of a handful of super-wealthy owners of pied-a-terres?

<u>3. How should we regulate what happens on roofs?</u>

Setbacks aren't enough -- they address street-level views -- but view isn't the only issue and the street (much less the sidewalk immediately in front of the building) isn't the only relevant vantage point.

These amendments are being sold as ways to prettify our skyline -- but there are no requirements, no review, no design standards to achieve that end.

Serious thought needs to be given to what can and cannot be placed in the setback areas -- can it include outdoor seating and associated temporary structures (bars, tents, heaters), mechanicals that are no more than 4 feet tall, solar panels, or green roofs?

Shouldn't the relationships among different rooftops be considered? Can one building place its mechanicals in a way that spoils another's view? Or its penthouse in a way that undermines the efficacy of another's solar panels? On the ground, we pay attention to how the actions of one property owner affect the interests of neighbors -- don't we need to look at that issue in the air as well?

<u>The Bottom Line: We need to establish public priorities regarding rooftop uses and then to create an incentive structure that reinforces our policy objectives. That's not work you can do. But don't pre-empt it from happening by adopting these regulations before it's been done.</u>

"Maximize developer profits" is the only objective that can be deduced from OP's current proposal. And that's not public policy. That's a parting gift to developers (former contributors? future clients?) from government officials who are no longer accountable to the public they are supposed to serve.

Too much is at stake here -- both in the regulations themselves (20 extra feet of height in every commercial or multifamily zone citywide) and in the precedent they'll establish (that the interests and preferences of city residents can be ignored with impunity) -- to let this pass without vetting through a democratic process.

Substantively, what's wrong with the proposed amendments?

A. IN THE NEIGHBORHOODS

1. The rationale for these amendment is clearly pretextual -- Changes in federal Height of Buildings Act have ZERO relevance to what happens in zones that don't max out federal height limits. What happens below those limits is left to local regulation and there's nothing inconsistent about having zones in which less can be built than the maximum allowed by the feds.

2 The approach OP has proposed – adding 20 feet of height and up to two additional stories of built space to the matter of right zoning envelope in virtually all commercial and multifamily residential zones citywide, and doing so not by redefining the zones height and FAR limits, but by refusing to count anything above the "roof" as governed by those limit – makes a mockery of zoning law. Shouldn't we be striving for more transparency in our zoning code rather than less?

What's the difference between a "penthouse" and any other story if the uses are all the same? It made sense to exempt mechanical penthouses from FAR restrictions because they don't contribute to density. But it was their use – not their location that justified this policy If uses change and penthouses become more office or residential or retail/entertainment space, then they should count toward height and FAR limits.

3. The biggest increases are proposed for neighborhoods -- not downtown. As you know, from all the requests for customization, neighborhood conservation, and elimination of pop-ups, height is a controversial issue in neighborhoods.

> Downtown, the move from 130 to 150 feet (or 160 from 180 feet) at HBA limits amounts to a 12-15% increase – and even less when we're talking about building that already have or would otherwise have substantial mechanical penthouses. And, of course, federally-imposed one-story limit plus setbacks keep increases in FAR to less than 1 in these buildings
>
> By contrast, the move from 50 -70 feet (MOR) and up to 85 (with a PUD and no map amendments) would represent a 40 - 70% increase in height in lower-density areas abutting residential neighborhoods where the scale is even lower (40 FT max) and PHs in areas where HBA doesn't control get more than double the SF out of the 20 feet increase in height (2 stories rather than one, and lower story may be setback 10 rather than 20 feet) that HBA-controlled buildings would.

4. Commercial/apartment zones adjacent to residential neighborhoods are areas where negative impacts are greatest. Issues included noise, privacy, lights, smells, shade (gardens, solar panels, natural lighting within homes).

5. Treating PHs as minor modifications of PUDs is really unfair in this context. Neighborhoods negotiate the terms and then OP steps in afterward and give developers a significant increase in height and density with no quid pro quo.

6. No planning behind any of this and where is the need for such increases outside of downtown?

7. Adding 20 feet in height and 2 stories of FAR (even with setbacks) is significant enough upzoning to render these amendments inconsistent with Comp Plan in many areas. This is not just a problem in C-1 – if these amendments are passed, other low/moderate zones like C-2-A, R-5-A, R-5-B would routinely allow medium density, while medium-density zones like R-5-C, C-2-B, C-3-A, and C-3-B will be pushed into the high density category.

B. **DOWNTOWN/at the HBA limit**

In addition to the basic questions I laid out earlier, I think it's important to think critically about the claims that these amendments will provide substantial additional tax revenue for the city. In general, it's not a good sign when the only "study" in the record is one bought and paid for by people who stand to profit from the proposal. More specifically, here are 4 reasons to believe that the revenue claims are inflated.

1. Inconsistent claims: On the one hand, developers claim that any additional affordable housing requirement associated with penthouses will be so burdensome that it will prevent them from being developed. On the other hand, they suggest that the tax revenue (pennies or fractions of pennies on the dollar) associated with this new space will be quite significant. Developers will reap a windfall from PH space, especially in new construction, and there should be a quid pro quo in exchange for granting such a highly-profitable new entitlement.

Upper floor condos at City Center are selling for $1500/SF. Newseum rents PH party space for $30K a night. We're starting to see office buildings resold for > $1000 per SF (and that's for every SF -- not specifically PH space). Commissioner May's proposed 1:1 formula for HPTF contributions works out (by OP's calculation) to $144 per SF. Not unreasonable in context.

If Lindsley Williams is right and this is tax policy to be left to the Council, then upzoning needs to wait until the Council has decided the terms on which penthouse construction should be allowed

2. Cannibalization: Developer study/rhetoric ignores the fact that new penthouses will cannibalize the revenue associated with existing alternatives Demand for trophy party space (and/or hotels with rooftop bars/restaurants/pools) isn't infinite. Basically, what new PH construction will do is shift revenue from one building to another. The most prestigious view will attract the highest price. But increasing the height or changing the location of the most prestigious view doesn't necessarily mean higher (or all new) revenue -- it means substitution. We're already experiencing this phenomenon wrt hotels. More/new/glitzier rooms aren't increasing net hotel tax revenue.

3. HBA changes were justified based on the claim that current height limits were constraining DC's growth. Yet since that debate, the downtown BID has pointed out that we're facing a glut of office space downtown, with anticipated vacancies of 20-25% in the CBD for the next decade. Demand for downtown office space isn't unlimited. It's more a game of musical chairs than an "if you build it, they will come" scenario these days as both public and private sectors are decreasing office space demand per worker and as the feds send more offices out to the burbs

4. Can't assume that the corporate profits associated with development/sale/rental of this space or the personal income of future tenants/owners will be taxed locally. Many developers are incorporated elsewhere – note the absence, for example, of a return address on Trammell Crow's submission and MD and VA addresses on others'. Don't count on income tax either -- people who rent/buy trophy residences often do so as pied-a-terres.

Long story short, these are really ill-conceived amendments. there's no need for haste in adopting them, and there's every reason to believe that we'll end up with better public policy if we follow the appropriate process – planning about whether, where, and when changes to heights should be made; followed by the introduction of Comprehensive Plan amendments to set policy, and THEN new regulations to implement the resulting Comprehensive Plan mandates. OP repeatedly promised that this is the process they would follow. Hold them to that promise.

Sue Hemberger