

Case No. ZC 14-24

VIA IZIS AND HAND-DELIVERY

Mr. Anthony J. Hood, Chairman
Zoning Commission for the District of Columbia
One Judiciary Square
441 4th Street, N.W.
Second Floor
Washington, D.C. 20001

December 3, 2015

Dear Chairman Hood and Members of the Commission:

On behalf of the Kenyon Yes We Can Cooperative, Inc. please find the Prehearing statement for the above captioned case.

Sincerely,



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Cooperative

Before the Zoning Commission
District of Columbia

Prehearing Statement

**For
Kenyon Street Yes We Can Cooperative Inc.**

Zoning commission Case No. 14-24

**Request for Party Status for
Kenyon Street Yes We Can Cooperative, Inc.**

and

**Opposition to the Application
For a Map Amendment
From an R-4 District to a R-5 District
For Square 2848, Lots 39, 40, 838 and 72
And Variance from the Required Size of Parking Spaces**

Respectfully Submitted

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I. Introduction

This statement is submitted on behalf of the Kenyon Street Yes We Can Cooperative, Inc. (“Cooperative”). The Cooperative owns the four-story (4), 18 unit apartment building erected in 1910 and located at 1372 Kenyon Street, N.W (Lot 838, referred to herein as 1372 Kenyon Street). A valuable community asset, the Cooperative provides affordable home ownership to eighteen member families. As an entity, the Cooperative came into existence in 2010; however, the residents of 1372 Kenyon Street have had an ownership interest in the property since 1981, when the 1372 Kenyon Street Tenant Association acquired the property.

The Cooperative’s property sits adjacent to the site of the proposed development. Thus, its residents will be directly harmed by the proposed development’s maximum use of an R-5-B status, which will substantially diminish the quality of life for the Cooperative and its members as well as others in the community.

The Cooperative’s objections to the application are founded on key policy goals and objectives of the District of Columbia. The proposed rezoning from an R-4 District to an R-5-B District does not further key policy goals of the Comprehensive Plan and does not meet principal objectives articulated in the Land Use and Housing Elements and in other tenets applicable to the Mid- City Area and Neighborhood Conservation Areas. The proposed rezoning also appears to run counter to both long existing and recent changes in the zoning regulations, whereby the Zoning Commission has sought to minimize the impact of new construction and conversion on existing residences in moderate density zones. Such a rezoning would favor the profitability of one owner’s land while diminishing adequate light and air flow to Cooperative member’s units, creating privacy issues for the Cooperative, traffic and parking problems for neighboring properties, and disrupting the character of the existing neighborhood at the expense of the surrounding community.

At its meeting on November 12, 2015, in a divided vote, the ANC -1-A voted against supporting the application.

II Discussion

1. Party Status

The Cooperative's members, longstanding stewards of their property, are the most directly affected by the proposed change and should be awarded party status.

All of the Cooperative's members are shareholders who reside at 1372 Kenyon Street and most are long-time residents, some for over 30 years. Thus, as long standing owners and stewards of Lot 838, they deserve to have a substantial say in the decision to rezone their property and the neighboring property to a district that is unsuited for their R-4, moderate density community.

2. Proposed rezoning to R-5B: an inappropriate and destabilizing designation

a) 1372 Kenyon Street and 1361 Irving Street already provide an effective buffer

The Cooperative is opposed to the requested rezoning in large part because of the immediate negative impact the proposed development will have on the quality of life for the Cooperative's residents. However, just as importantly, the rezoning will remove the stabilizing effect of the Cooperative's R-4 designation on its neighbors.

The 1300 block of Kenyon Street is a row-house community, separated both aesthetically and physically from the 14th Street commercial corridor to the west. A fork and curve in the road visually narrows the perspective from 14th Street, and a wide alley separates 1372 Kenyon Street from the large buildings to its west. The Cooperative's property is the visual beginning of a distinctively well-settled residential R-4 zone. Looking east down Kenyon Street, one sees 1372 Kenyon Street, a pre-war multistory apartment, followed by a long row of attractive and compatible row-houses. As the first building after the alley that borders the R-4 zone, 1372 Kenyon Street's prewar structure is part of the neighborhood character and serves as an anchor protecting the remainder of the block.

Although compatible with the neighborhood, 1372 Kenyon Street is a historical, non-conforming use under the R-4 zone, and the Cooperative's owners cannot change its nature or its effect on the neighborhood. Its unchanging presence under the R-4 district protects Kenyon Street and the neighboring properties from incompatible development, and its presence is consistent with the intent of the R-4 district, of which 1372 Kenyon Street is an integral part.¹ There is no value in changing its status and there is no need for creating a different buffer zone designation.

The Applicant argues that rezoning lots 838, 39, 40, and 72 from R-4 to R-5-B will create an appropriate transition from the existing and adjacent C-3-A and R-5-B zones. However, 1372 Kenyon and 1361 Irving Street (Irving Station Condominium) are contiguous to the eastern border of the 14th Street moderate density commercial area on the Comprehensive Plan Future Land Use map. The established buildings on lots 838 and 72 provide the existing transitional structures from the moderate density commercial area to the moderate density residential areas (R-4) on Kenyon Street Northwest and Irving Street Northwest.

On the other hand, the proposed rezoning to the R-5-B adds nothing by way of transition. In actuality, the imposition of the R-5-B zone will have efficacy only for two lots (39 and 40), the site of the proposed construction, neither of which is located at the boundary of the R-4 Zone. Moreover, the proposed development will be constructed directly against the wall of the row house to the east, which will maintain its R-4 designation. Consequently, the proposed building will be the only structure on the South side of Kenyon Street that was not originally in the R-4 zone. Although there are a number of R-5-B districts in the Columbia Heights area that border the 14th Street Commercial corridor, this proposed R-5-B designation, which is relatively small and jumps over the natural border of the alleyway, will appear as something of an anomaly on the map.²

¹1372 Kenyon is non-conforming under R-4 and would be non-conforming under R5B as well, which means that its there is no good reason for altering its status.

² See Ward 1 Map, "pending zoning" marks near intersection of 14th and Kenyon Streets, http://dcoz.dc.gov/info/maps/Ward1_Map_040115.pdf. Another small R-5-B District on the north side of Kenyon

b) R-5-B is an inappropriate designation for the moderate density residential neighborhood that begins at 1372 Kenyon Street and Runs Eastward.

The 1300 block of Kenyon Street is predominantly populated with three story row houses and three story apartment buildings and for that reason it is not a neighborhood that would be deemed to be generally consistent with medium density zone designations. The Future Land Use Plan Map, which is part of the Comprehensive Plan, places the four lots in question in a moderate density area.³ And, it is the moderate density designation that triggers certain public policy considerations for the area.⁴ The Comprehensive Plan defines moderate density residential as neighborhood characterized by “a mix of single family homes, 2-4 unit buildings, row houses, and low-rise apartment buildings, and in some older inner city neighborhood existing multi-story apartments, many built decades ago.”⁵ Medium density neighborhoods on the other hand are characterized by mid-rise (4-7 stories) apartment buildings as the predominant use; some neighborhoods may contain pockets of low and moderate density housing.⁶ R-3, R-4, and R-5-A zone districts are deemed to be generally consistent with the moderate density residential category,⁷ and the R-5-B and R-5-C Zone districts are deemed to be generally consistent with a medium density designation.⁸

Although R-5-B may be compatible in some moderate density locations,⁹ it should only be imposed where the designation will not cause disruption. The Applicant has not specifically described what about the location of the two vacant lots warrants an R-5-B designation, but proposes that a medium-density structure in a moderate-density neighborhood is consistent with

Street encompasses a single larger apartment complex on Kenyon, and runs through to commercial uses to its rear that face Park Road.

³ See Future Land Use Map,

<http://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/FutureLandUse4.pdf>

⁴ 10 DCMR 225.4. See discussion infra accompanying fn 10-16. .

⁵ 10 DCMR 225.4

⁶ 10 DCMR 225.5. The Medium Density Residential designation also may apply to taller residential buildings surrounded by large areas of permanent open space.

⁷ Id.

⁸ Id.

⁹ 10DCMR 222.4

section 302.1 of the Comprehensive Plan, i.e., “efficient use of land resources to meet...long-term goals.” However, a structure conforming to R-4 or R-5-A zoning requirements would likewise meet the goals of section 302.1 and would not be disruptive of the neighborhood’s character.¹⁰

c) The development of lots 39 and 40 are properly considered as infill in the R-4 zone and should be limited accordingly in terms of size and character befitting the R-4 Zone.

The proposed building for lots 39 and 40 will be infill construction to the east side of lot 838 (1372 Kenyon Street). Therefore, lots 39 and 40 will not be primary transitional lots. These two narrow and vacant lots, which are the primary reason for this requested rezoning, are internal – not external— to the R-4 zone, sharing the same stretch of unbroken sidewalk and the same alley way that runs through the R-4 Zone and frames the R-4 Zone at its western edge.

The District of Columbia government strongly supports infill development on vacant lots “provided that such development is compatible in scale with its surroundings and consistent with environmental protection and public safety objectives.”¹¹ The District also contemplates that infill development in residential settings, such as Kenyon Street, “must be sensitive to [the] neighborhood context. High quality design standards should be required, the privacy of neighboring structures should be respected, and density and scale should reflect the desired character of the surrounding area.”¹²

Special consideration should be given to both the density and height of infill construction in the R-4 zone. With an R-4 designation and with a variance of 2.67 feet, the combined lots would support four units in adjoining three-story row house structures.¹³ It is notable that if this proposal were for an R-5-A designation, a new construction apartment building would be permissible as a special exception, limited to three (3) stories and a maximum 40 foot height, as opposed to 5 stories and a 50 foot height, as allowed by right under an R-5-B zone as of right.¹⁴

¹⁰ See discussion *infra* at

¹¹ 10-A DCMR § 307.2

¹² 10-A DCMR § 307.3

¹³ 11 DCMR §§ 330.5; 400.1.

¹⁴ 11 DCMR §§ 350.4; 400.1.

Although the proposed structure is not a conversion, it is also worth noting that under the present zoning, the lot size (a combined of 4,942 square feet) would permit a conversion by special exception of not more than 5 units with a height limit of 40 feet.¹⁵ In other words, the R-4 and the R-5-A designations provide for similar density and size buildings in new construction and conversions and are the most consistent with the 1300 block of Kenyon.

Although the Cooperative questions the necessity for a zoning change, the limitations in the R-5-A zone would be the most appropriate if a change in zoning designation were to be granted. The Cooperative's position is that the limitations imposed in the R-4 Zone, or at a minimum in the R-5-A zone, are reasonable and necessary for any infill development on two narrow lots in the midst of this well-established neighborhood of row dwellings and compatible structures. And, in keeping with District policy, where a zone change is imposed to support infill, the zone designation should not support unfettered as of right construction. An R-5-A designation, which affords protection to neighboring properties through regulatory oversight would be a more appropriate choice.¹⁶

d) Neighborhood Conservation of the Row House Neighborhood

The proposed new construction will disrupt the neighborhood's cohesive architectural style and the preservation of the Columbia Heights neighborhood character. Policy MC-1.1.1 of the Comprehensive Plan refers to the need for the Mid-City Area to prioritize neighborhood conservation and to "retain and reinforce the historic character of Mid-City neighborhoods, particularly its row houses, older apartment houses, historic districts, and walkable neighborhood shopping districts. The area's rich architectural heritage and cultural history should be protected and enhanced." Similarly, Policy MC-1.1.5 provides that planning should "recognize the value and importance of Mid-City's row house neighborhoods as an essential part of the fabric of the local community...[and]...insure that the Comprehensive Plan and zoning designations for these neighborhoods reflect the desire to retain the row house pattern."¹⁷

¹⁵ 11 DCMR §§336;400.1, .2, .23

¹⁶ 11 DCMR §353

¹⁷ 10 DCMR § 2008

The Applicant proposes to construct a five-story residential building as infill development that does not cohere to the predominant style of the neighboring architecture. The brick row-house is the principal structure of the Mid-City Area, counting for 70% of structures; of these structures the predominant architectural styles are Victorian and Federal, with a mix of pre-World War II apartment houses. The proposed construction will fill a vacant lot between two existing residential buildings, one of which is a Victorian row house and the other is a pre-War apartment building.

The modernist design of the proposed construction will create a “sharp change” in the pattern and character of the 1300 block of Kenyon Street. Under 10 DCMR § 307.5, this type of change is not to be encouraged. The zoning of infill development should be compatible with the existing pattern of the surrounding neighborhood per 10 DCMR §307.7. Additionally, policy MC-1.1.1, 10 DCMR §2008.2, requires that the architectural character of Mid-City neighborhoods be “protected and enhanced.” MC-1.1.5 provides that “zoning designations for these neighborhoods reflect the desire to retain the row house pattern.”¹⁸ The proposed zoning change fails to retain this row house pattern.

It would be far more fitting with District policy if the infill housing were to meet the need for low-density housing. The Comprehensive Plan strongly considers “infill sites [as] present[ing] some of the best opportunities in the city for ‘family’ housing and low- to moderate-density development.”¹⁹ In this regard, it is instructive that the Mid-City Area Element did not recommend that zoning of row house neighborhoods be up-scaled; instead the element calls for protection of row house neighborhoods and recommends that areas between 16th and 14th Street zoned for higher density be considered for selective rezoning to match their low density character.²⁰

¹⁸ *Id.*

¹⁹ 10-A DCM §307.3

²⁰ Action MC-1.1.A: Rezoning Of Row House Blocks, 10-A DCMR §2008.6, 11

3. The Direct Impact of the Rezoning on the Cooperative

The Cooperative's primary objection to the applicant's proposed rezoning is that the uses permitted as a matter of right in the R-5-B zone will cause substantial harm to the health and well-being of its member families.

A critical concern for the Cooperative is the substantial and dramatic loss of light and air to residents living on the east side of the Cooperative. The rezoning will also exacerbate density issues, impact privacy, and create traffic and parking conditions that would not be permitted as of right in the R-4 zone. Another significant concern is that the designation of an R-5-B zone deprives the Cooperative of any governmental scrutiny whatsoever as to the impact that the proposed project will have on the health and well-being of its members, a result that is antithetical to the underlying intent and tenets of the District's zoning law.²¹

a) Light and air

The proposed development, which is designed to maximize the floor area ratio available under an R-5-B designation, will cause a substantial loss of light and air to the Cooperative's families who live on the east side of the building. A Clearance and Natural Lighting Impact, commissioned by the Cooperative, measured the effect that the proposed design would have on light during the hours of 8AM and 12 PM. Currently, all units receive direct light during these hours. After construction, of all the units on the east side, only two units on the fourth floor would not be impacted. In descending order, the third floor units would lose one hour of direct light, the second floor units would lose two hours, and the first floor units would lose three hours of light. The study did not measure loss to one unit below grade.

No one disputes that the proposed structure will result in a significant loss of natural light for the cooperative. Instead, in pre-hearing submissions, the Applicant justifies the inevitable loss of light and air on the theory that a matter-of-right use under the current R-4 designation would permit the same harm. In support of this argument, the Applicant has prepared an analysis comparing a hypothetical building under R-4 with the proposed building; the analysis

²¹ See discussion *infra* at 12.

indicates that the hypothetical building would have a slightly greater negative impact on natural light than the proposed building.

There are two problems with the Applicant's comparison analysis. The Applicant is seeking to build an eight unit apartment building, not a row house, so the hypothetical comparison to an R-4 is not germane to the Applicant's request. In addition, the lots are nonconforming in lot width under R-4, and any new construction on the lots will require a variance. Because the needed variance of 1.67 ft. exceeds 2% of the required width, the Zone Administrator cannot exercise his or her authority to permit minor deviations in the lot width.²² This means that a hypothetical developer operating within R-4 rules would need to seek a variance through the board of zoning adjustment, and air and light concerns are matters that would be considered in determining whether a variance is warranted.²³ That being the case, one might question whether the comparison of a development that requires a variance to the present request for rezoning is a useful exercise, since prior to deliberation on the variance, the comparison would rest on imperfect information.

A more appropriate question is whether there is a better solution to the potential harm that will become a reality if the Applicant is granted its rezoning request.²⁴

b) Density

²² 11DCMR 407.

²³ See, *Draude v DCZA*, 527 A 2d 1242, 1251-53 (D.C.1986). See also, 11 DCMR 101.1, which provides:

In their interpretation and application, the provisions of this title shall be held to be the minimum requirements adopted for the promotion of the public health, safety, morals, convenience, order, prosperity, and general welfare to:

- (a) Provide adequate light and air;
- (b) Prevent undue concentration of population and the overcrowding of land; and
- (c) Provide distribution of population, business and industry, and use of land that will tend to create conditions favorable to transportation, protection of property, civic activity, and recreational, educational, and cultural opportunities; and that will tend to further economy and efficiency in the supply of public services.

²⁴ See discussion *infra* at fn. 20-22 and accompanying text.

The change to an R-5-B designation will permit the Applicant to build eight units on the two nonconforming and narrow lots, double the number of units that could be built on two conforming and wider lots in the R-4 zone. This density will substantially increase the number of occupants, with an accompanying increase in refuse and refuse collection services in the alley way and the ever increasing scarcity of curb side parking.

The D.C. Department of Transportation has issued a report, which, although supportive of the application, also recognizes the direct effect of this increased density on the Cooperative and neighboring properties that share the same alley and curb space. The DDOT report does not refer to any direct observations of studies, and it is not clear what information DDOT relied on for its conclusion. However, the report recognizes that the proposed eight unit apartment building has the potential to generate minor impacts on street parking and to induce a higher level of parking utilization in the immediate area. This may appear as a minor problem in the face of the travel conditions of the greater transportation network. However, even the slightest pressure for additional parking on Kenyon Street will exacerbate an already critical problem for individuals in the immediate vicinity who require cars to travel to work that is not reasonably accessible by public transportation and can find no place to leave their cars upon coming home.

4. The Request for Variance

The Applicant has the burden to show that the lots could not be developed in accordance with the regulations without a variance.

The size, bulk and density of the Applicant's proposed structure is driving the Applicant's request for an area variance with respect to parking spaces. In other words, the Applicant requires a variance to accommodate sufficient parking spaces for eight units, a number which is double the number of units allowed for two conforming lots in an R-4 zone. Moreover, the problem in locating conforming parking spaces on the property and difficulty in placement of the rear exterior egress stairs is likely related to the Applicant's plan to maximize the floor area ratio on two narrow lots, resulting in a tight fit.²⁵ If the building's length were to be shortened,

²⁵ Applicants Prehearing Statement in Support of an Application For a Map Amendment at 17.

the property could accommodate a drive isle with four conforming spaces aligned in an east-west direction.

The Applicant will need to provide adequate information at the hearing to support the Applicant's statement that a reduction in the project's size would be economically impractical.²⁶ Whether the Applicant had knowledge of the impracticability of developing the property to accommodate eight oversized units upon acquiring the property is a factor that may be taken into consideration.²⁷

5. The proposed rezoning creates an imbalance in protections afforded property owners.

a) The proposed change to R-5-B merely serves to assist one lot owner's desire to maximize the profitability of his land at the expense of the Cooperative and surrounding community.

As mentioned earlier, the 1300 block of Kenyon Street is predominantly populated with three story row houses and three story apartment buildings. The south side of the street, except for the cooperative, contains only row houses, and contains no vacant property other than the two narrow lots, with a total width of 33 feet. The other two lots that are swept up in this request (838 and 72) are added to this request only to justify the creation of a new zone. As a matter of public policy, the Zoning Commission should deny the proposed zoning map amendment change since it largely serves to benefit the economic interests of one property owner, the Applicant, at the expense of longstanding neighbors to the east and west. Moreover, since the Applicant is, essentially, requesting special permission to rezone in order to benefit construction that will benefit only one property, consideration should be given to the question of whether the proposed map amendment change will further the District's policy goals—particularly regarding the need for moderate density housing and sensitivity to the neighborhood context.

²⁶ See, e.g., *Gilmartin v. D.C. Board of Zoning Adjustment*, 579 A 2d 1164 , 1170-7 (D.C. 1990).

²⁷ *Id.*

b) The proposed rezoning change provides the Cooperative and adjoining property orders no redress with respect to this proposed project or future uses.

Perhaps most concerning is that the Cooperative and neighboring properties will be left without effective redress should the R-5-B zone be imposed. Once this property is rezoned to R-5-B, no holds will be barred with respect to the number of units or buildings heights up to 50 feet, the arrangement of buildings on the lot, lot dimensions, or the ability to demand a side yard.²⁸ However, if the application were for an R-5-A zone designation, the Cooperative would be entitled to appear before the BZA in a special exception hearing, which would examine, among other things, a proposed development's effect on neighboring properties, including light and air, parking, landscaping, and the arrangement of building and structures, and impact on neighboring properties.²⁹ Similar redress would be available if this proposal were for a conversion of an existing property.³⁰ It is somewhat out of kilter that a lesser and negligible standard of protection would be available to the neighboring property owners of an infill development that potentially poses a far greater impact.

For all of these reasons, we ask that the Commission to not support the proposed rezoning of lots 39, 40, 72, and 838 from an R-4 District to an R-5-B District.

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²⁸ 11DCMR 400, 401.3, 405

²⁹ 11 DCMR 353

³⁰ 11 DCMR 336, 337.