Zoning Commission of the District of Columbia
Case No. 19-21
Office of Planning – Text amendment to Roof Top or Upper Floor Elements

Statement of Larry Hargrove for Kalorama Citizens Association

Chairman Hood and members of the Commission,

Kalorama Citizens Association was fully engaged in the deliberations that led to the adoption of Zoning Commission Order 14-11 in 2015, and we welcome the opportunity to comment, in light of the last five years of experience, on changes proposed by the Office of Planning to the regulations then put in place.

1. OP's proposal would seriously erode the existing prohibition against construction activities that remove or alter original roof top architectural elements. Under OP's proposal it would be possible to evade that prohibition in all cases by a Special Exception procedure conferring wide discretion on the BZA, rendering** an **essential element of the strong protections achieved for RF neighborhoods in 2015 in ZC Order 14-11 largely ineffectual. We urge that proposed provisions having this effect be removed, along with anomalies in the current regulations that have the effect of limiting the protection of original architectural elements in certain cases.

One of the underlying objectives of Zoning Order 14-11 (2015) was to make it likelier that redevelopment of rowhouses to add floor area or dwelling units – which the amended regulations would facilitate -- would be compatible with the architectural character of the building and hence that of the neighborhood. Thus one of its signature achievements was provisions

protecting original roof top architectural elements – defining features of a rowhouse -- against removal or significant alteration. That protection was quite strong: under the current regulations removal or alteration of an original roof top architectural element is flatly prohibited, and with only two exceptions it is not possible to evade this prohibition by special exception.[1] The two exceptions are projects that seek to increase building height above the 35-foot MOR limit, and projects that seek to convert a residential building to an apartment building. For each of these cases the Commission adopted a special provision allowing the BZA to waive the prohibition (E-5303.2 for height increase cases, and U-320.2(l) for residential conversion cases). The record does not indicate any reason why these two types of projects should not be subject to the same protective provisions as apply in all other cases.

What the Office of Planning is now proposing is to do away with *all* constraints on evading the prohibition by special exception. It would do this by replacing the provision that flatly rules out special exceptions to allow removal of architectural elements with a new provisions, §E-§5206, that would allow removal if it does not have a "substantially adverse effect on the use or enjoyment" of adjoining property in respect of light and air, privacy and visual intrusion upon "character, scale and pattern of nearby houses. This is typical Special Exception language, equipping each component part with its own verbal escape hatch -- "substantially" or "unduly" – that gives the BZA a wide discretion that is virtually unassailable

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[1] That is because a special exception from the provision setting out that prohibition -- §E-206.1 (p. 7 of the hearing notice) -- is required to meet the conditions of §E-5203.3 (p. 7-8 of the hearing notice), which require that the functioning of a chimney on adjacent property not be impeded, an adjacent solar system not be impeded, and an original architectural element not be removed or significantly altered.

in an appeal to the Court of Appeals because of the discretion that the Court is required to give to agency interpretations of their own governing rules.

We urge the Commission to undertake a comprehensive review of the regime adopted in ZC 14-11, in light of the experience of the last five years. In the course of such a review, anomalous *current* provisions that curtail protection of architectural elements in some cases – e.g. E-5203.2 and U-320.2(l) – should be set aside, as already proposed by OP, along with *proposed* provisions that would undermine existing protections – e.g. 5206.1. Current provisions that secure these protections but are proposed to be deleted -- e.g. E-5203.1 and E-5203.3 – should be retained.

2. Case records reveal that special exceptions to allow removal of original architectural elements under the regulations adopted in 2015 have been recommended by OP for approval and granted by the BZA in a number of cases either on the basis of a provision that is not legally applicable to those cases or without citation of any legal basis for granting such special exceptions.

At this point a brief look at how OP and the BZA have applied the existing regulations, enacted in ZC Order 14-11, in the five years since that Order was adopted would be instructive. Here the record reveals a number of cases that did not fall within either of the two exceptions mentioned above but in which removal or alteration of original architectural features was nevertheless supported by OP and allowed by the Board. How could that be possible? It was possible because in its Case reports OP improperly invoked E-5203.2 -- the provision allowing waiver of architectural elements protections in height increase cases, as noted above – as a basis for allowing waiver in projects that did not involve increasing height. Even worse, there are some cases – one of which was on the

BZA's agenda for hearing just yesterday[2] -- in which OP supported waiving those protections without even citing this waiver provision or any other legal basis for setting aside the prohibition on removing architectural elements.)[3]

Needless to say, this state of affairs is disturbing. We have not been able to do an exhaustive canvass of the record of such BZA cases, and do not know whether OP's position has been assessed by OAG. But it is clear to us that a number of rowhouses have had original architectural elements removed on this basis, and that what is now needed is not only a review of the adequacy of the current regulations on protection of original architectural elements, but assurance that any regulations on this subject are faithfully implemented.

3. Proposed *§E-206.1 sets out the existing prohibition on removal or alteration of original rooftop architectural elements in RF zones, but adds an exception for "properties subject to review by the Historic Preservation Review Board or their designee, or the U.S. Commission of Fine Arts." We strongly urge that this exception be deleted.* The protection afforded by §E-206.1, which turns on empirically verifiable physical conditions, is clear and strong: a cornice or turret is either removed, moved or significantly altered or it is not, with minimal if any room for dispute. There is no good reason why historically designated buildings or those subject to CFA scrutiny should have a lesser degree of

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[2] BZA Case No.20199, February 12,2020.

[3] See, e.g., BZA Case No.19546, August 25, 2017. The limited number of cases since 2015 of which we are aware have lacked any opposing party. OP's report in these cases is likely to be the only source of information as to the legal basis asserted for granting the special exception, with the Board's "Summary Order" merely endorsing OP's recommendation of approval.

protection under zoning than other buildings, by leaving this determination to the unpredictable vagaries of deliberation before the HPRB or CFA.

4. *There is risk of unnecessary confusion in the proposed provisions regarding conversion of non-residential and residential buildings to apartment houses (U-301, p. 9 of the hearing notice, and U-320, p. 11 of the notice).* Here the descriptions of the conditions that the conversion must meet in each of these cases - -such as 900 square feet per unit, 10-foot rear extension limit, solar system protection, and protection of roof-top architectural elements in current U-301.2 and U-320.2 respectively -- would be dropped, in favor of saying instead that the project must meet "all applicable development standards, including E-201.4, 205.4 and 206". These three provisions cover some of those standards but fail to cover others (including especially the provisions on height for the RF zones in E-303; the requirement of 900 square feet per unit, which is covered by E-201.7; and possibly others). *All* "applicable development standards" should be enumerated, not just for the sake of reader-friendliness but because a partial enumeration may carry the implication that the enumeration is exhaustive, on the basis of the principle of statutory construction *inclusio unius est exclusio alterius.*

5. OP proposes without explanation to drop altogether the ostensibly useful prohibition on impeding the operation of a chimney or other external vent on an adjacent property, currently found in E-206.1(b) and E-5203.1(b). We would oppose this change unless a sufficient justification for it can be provided, and we would not regard the mere fact that DCRA is expected to police compliance with the Building Code at the permitting stage as sufficient.

6. We regard the extension of the protection of solar installations to the R zones, and the more precisely elaborated procedures and standards for determining when they apply (§D-208.1 and E-206.2) (pp. 2-3 and 5-7 of the hearing notice), as welcome steps forward, subject to further attention being given to three provisions:

(a) The phrase "(proposed construction)" in §D-208.1 appears redundant, and if so should be removed. If not, the meaning should be made clear.

(b) This section punts to the Zoning Administrator in the making of two critical determinations as to whether the criteria for a solar installation to be covered are met. The first of these, §D-208.1(c), is the determination of whether the amount of shading caused by the proposed abutting construction will "significantly interfere" with the solar system. It will do so only if it is "more than five percent (5%) above the amount of shading for the year preceding the time of application." This determination can be made either by a "weighted average calculation" or by "other method acceptable to the Zoning Administrator" – but in either case the determination must meet the 5% standard and so the Zoning Administrator is not given unlimited discretion.

That is not the case with the authority conferred on the Zoning Administrator by §D-208.1(d) (2) as to what counts as an acceptable shading study. This determination can be made *either* by showing that the study meets the somewhat onerous and precisely detailed criteria spelled out in this section, *or* "by an alternative minimum standard established by the Zoning Administrator". The Zoning Administrator is thus given unfettered discretion to compose such a standard out of whole cloth, which he or she would then be required to justify as rational in probably protracted controversies in future BZA hearings – on a matter that seems to us

manifestly outside the Zoning Administrator's presumed area of expertise. If there is some merit in including alternative methods for determining what is an acceptable shading study, OP should be asked to provide a second method that is subject to verification by precise and concrete evidence.

The shading study requirement is also dealt with in proposed §E-206.2(c), (p. 6 of the hearing notice) applicable in RF zones, by language identical to that of §D-208.1(d) (2) discussed in the preceding paragraph, consequently posing the same problem.

7. Finally, we raise an issue of process. This case as noticed for hearing contains substantive additions to and departures from the case proposed for setdown that are wholly unrelated to its originally stated purpose. These are of such significance that they cannot reasonably be justified on the basis of the standard permission given to OP to work with the OAG on the text for the public hearing notice.

The case OP requested to be set down proposed three substantive actions, each concerning the current solar system regulations now applicable in RF zones:;

a. Apply those regulations to semi-detached and row buildings in R zones;

b. Apply them to new constructions and additions; and

c. Modify the definition of "significantly interfere" [with the functioning of a solar energy system] to measure impact by shading rather than by a decrease in energy production.

The case actually set down for hearing, while it does do these three things, goes so far beyond them as to be hardly recognizable. Most significantly in this regard, it appears that the case morphed into a vehicle

for implementing an apparent policy decision to downgrade the existing protections against removal or alteration of original architectural elements on buildings in RF zones enacted in ZC Order 14-11 (2015), as outlined above. In the same vein, the Hearing Notice proposes to eliminate the existing prohibition on impeding the functionality of a chimney by construction activities on an adjacent property – which the Setdown Report incidentally proposed continuing in RF zones and extending to R zones.

Subsequent to filing the setdown report, OP requested and received permission from the Commission to include in its recommendations a provision making §E-206.1, relating to alteration of original architectural elements, inapplicable to properties subject to review by the HPRB or CFA. The request made no mention, however, of the extensive substantive proposals outlined above, which turned up later in the Public Hearing Notice without explanation.

Whether or not practice of this sort runs afoul of the relevant requirements of Subtitle Z of the Regulations, it certainly in our view does not comport with minimum standards of good order. Everyone concerned with land use regulation in DC is heavily dependent on the skill, expertise and hard work of our colleagues in OP. So we respectfully suggest that any case proposed to the Commission for setdown be fully ready for prime time and be fully explained in the Setdown Report and Public Hearing Notice, which in our view this one clearly wasn't.