The Committee of 100
on the Federal City

Before the Zoning Commission of the District of Columbia
Case No. 19-21 – Text amendment to Roof Top Elements

Statement of the Committee of 100 on the Federal City
July 25, 2020

The Committee of 100 on the Federal City (C100) has reviewed the proposed text amendments in this case and finds the concerns we raised at February 13, 2020 hearing to be completely undiminished.

Loss of protections for unique rowhouse elements

The amendments gut the protections for the distinctive character of the RF rowhouse neighborhoods and offer no colorable basis for doing so. The key offending passage is deletion of the 11 DCMR 5203.3 with proposed E-5207. Existing Sec. 5203.3 flatly prohibits removal of rooftop architectural with two limited exceptions. Proposed Sec. 5207 lets RF property owners remove rooftop elements through a special exception proceeding upon a showing that removal will not result in a "substantially adverse effect" on adjoining owners' use of their property in respect of light and air and privacy" or "substantially visually intrude upon the character, scale and pattern of houses along the subject street or alley ...."

ZC Case 14-11, the "pop-up" case which resulted in an Order embodying the protections now sought to be gutted, was no ordinary proceeding. The case followed citywide public outrage at the mutilation of the classic District of Columbia neighborhoods that had attracted the influx of young newcomers. The pop-up frenzy drew the attention of the D.C. City Council and the local media, and spawned a grassroots coalition to oppose them. The file in Case 14-11 – some 360 exhibits, almost all in support of reform – is testimony to the intensity of interest. The case responded to citizen demand for public action.

The highly flexible, highly discretionary standard of "substantial visual intrusion" essentially gives owners free reign to treat their rooftops as they see fit without fear of judicial review, in view of the deference courts accord to legislative bodies. The Council acted similarly in issuing the new Comprehensive Plan Framework Element: it replaced a four-part standard for determining a Planned Unit Development's consistency with the Plan with a wishy-washy statement that a proposed PUD "should not result in unacceptable project impacts on the surrounding area." Comprehensive Plan Framework Amendment Act of 2019, sec. 227.2. The Council and the Executive branch stated openly and often that the intent of the watered-down language was to forestall litigation. The Commission's rationale for weakening the 14-11 standard is less clear, inasmuch as there has been no flood of judicial appeals on this element of the Zoning Regulations. Indeed, the pop-up rules enjoy broad support. The only complaints are that they are lightly enforced as written and that they need to be

further strengthened. Instead, the Commission proposed to move in the opposite direction. Why?

Statements in the record of this case from the D.C. Preservation League and the Kalorama Citizens Association give examples of failures under the existing rule, demonstrating the need for its enhancement, notably Application No. 19425 of William Gowin, (Mar. 22, 2017). That case allowed a turret to be removed where no height increase was involved. The case revealed a misapplication of the regulations, inasmuch as special exception relief was not available in this instance. Worse, the decision revealed an insensitivity to the intent of 14-11, which was to protect the rowhouse neighborhood character. This rulemaking underscores that insensitivity.

In addition to our grave concerns with the loss of protection for rooftop elements, the C100 objects to the deletion of standards and procedures for mitigating adverse effects on a property from conversion of a neighboring property (residential or otherwise) to an apartment building. Here again, the Commission proposes to delete the blanket prohibition against some forms of special exception relief with a floating standard of "no substantial adverse effect. 11 DCMR U-320.3(a), which imposed the blanket prohibition from the requirements of section 301.2(a), is deleted in its entirety. Section 301.2(a) established development standards for conversions of rowhouses to apartmements: maximum height, minimum unit size, and protection of rooftop elements and solar installations. Most have been relocated, but they now may be avoided under the loose standard of "no substantial impact."

Flawed Procedure.

A signal element of this rulemaking proceeding is the insistence throughout that no substantive changes are being made: that it seeks merely to reorganize the rules by removing duplicative elements and providing various clarifications. Altering a legal standard from a mandatory prohibition to a broad grant of discretion is facially a major substantive change and the Commission's failure to advertise it as such is itself an arbitrary act subject to review. The NPR fails the Administrative Procedure Act' requirement for meaningful notice. Furthermore, given the widespread public engagement with the issuance of 14-11, promulgating these amendments without more public process is dismissive of District residents. These are not normal times – the District remains in Covid lockdown – and the usual channels of outreach and engagement are not available. While the essential aspects of public business must and are going forward, there is no need to proceed with this rulemaking at this time without more affirmative public outreach.

Moreover, the NPR in this case does not reflect the state of the record upon which it was developed. Of the 15 statements submitted from non -governmental witnesses, only one, from ANC 6C, supported the amendments. Of the 7 witnesses who appears, only one – ANC 6C – supported the amendments. The NPR uses three times as much space praising and discussing ANC 6C's comments as it does on the other witnesses combined, none of which are identified by name or affiliation. Their testimony is described collectively as "concerns" instead of the full-throated opposition that was expressed. The written statements in opposition are ignored.

OP attempts to provide cover for its outsize reliance on the sole witness supporting its position by citing a judicial precedent that OP says requires it to give "great weight" to an ANC's recommendations.

The NPR states in relevant part: "Great Weight" to the Recommendations of OP
The Commission must give "great weight" to the recommendations of OP pursuant to § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163; D.C. Official Code § 6-623.04 (2018 Repl.) and Subtitle Z § 405.8. Metropole Condo. Ass'n v. D.C. Bd. of Zoning Adjustment, 141 A.3d 1079, 1087 (D.C. 2016). NPR at p.3.

OP, however, misstates the court's opinion, which says explicitly that an ANC's "recommendation" is not entitled to great weight. The Court said:

> We briefly address petitioners' remaining claim on appeal. Petitioners argue that the BZA improperly gave "great weight" to the OP and ANC. Because D.C. Code § 6–623.04 (2012 Repl.) requires that the BZA give "great weight to the recommendation of the Office of Planning," the BZA properly considered the recommendation of the OP in reaching its decision. As for the recommendation of the ANC supporting the application, we note that the statute does not require the BZA to give "great weight" to the ANC's recommendation but requires the BZA to give great weight to any issues and concerns raised by the ANC in reaching its decision. See D.C.Code 1–309 .10(d)(3)(A) (2012 Repl.). We have interpreted the requirement to mean that the BZA must acknowledge those concerns and articulate reasons why those concerns and issues were rejected and the relief requested from the zoning regulations was granted. See Kopff v. District of Columbia Alcoholic Beverage Control Bd., 381 A.2d 1372, 1384 (D.C.1977) ("We conclude that 'great weight' means that an agency must elaborate, with precision, its response to the ANC issues and concerns."); see also Levy v. District of Columbia Bd. of Zoning Adjustment, 570 A.2d 739, 746 (D.C.1990) ("[T]he [Board] is required to give issues and concerns raised by the ANC 'great weight' [through] 'the written rationale for the government decision taken.' "). While it may be helpful to an applicant seeking a variance or a special exception to have the support of the local ANC, that body's recommendation in favor of a project does not provide any substantial support to justify the BZA's decision.
> https://caselaw.findlaw.com/dc-court-of-appeals/1740591.html (Emphasis added).

Apart from its misreading of Metropole, which involved a contested case, one ANC's views in a rulemaking case of citywide interest cannot be given controlling weight in OP's drafting of proposed rules for the Commission's consideration.

Solar Installations

As we stated in our February testimony, we welcome the extension of protections for solar installations when abutting properties are undergoing new construction or renovation, but believe the standard and proof for measuring degree of intrusion should be nondiscretionary.
For all of the foregoing reasons, the draft rules should be revised and reissued for further public comment. Thank you for consideration of our views.

Laura M. Richards
Chair, Zoning Subcommittee
Committee of 100 on the Federal City