ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA

Case No. 14-13E - Office of Planning – Proposed Text Amendments to Penthouse Regulations

Joint Submission of the Committee of 100 on the Federal City
and
Kalorama Citizens Association
August 13, 2021

Chairman Hood and members of the Commission:

Our comments concern only one element of this multi-faceted case: the Office of Planning's proposals for the elimination of existing protections against visually intrusive penthouses erected on rowhouses and other especially vulnerable classes of buildings, which were established by the Commission in 2015. At the January 21, 2021 hearing on this case, the Chairman expressed concern about the alarms that we and others had raised regarding this element of OP's proposed amendments. At his direction OP and we had extensive conversations about our concerns. Unfortunately, OP's proposed comprehensive rollback of protections remains in the text now before the Commission.

OP's Supplemental Submission of February 18, 2021, devotes substantial space to rebutting our positions on various aspects of the penthouse protections. In this submission we will address the key points of contention. We also will show the internal inconsistencies in OP's proposal. Further, we will demonstrate that OP relies on a definition of "rowhouse" that is inconsistent with Webster's Third International Dictionary, the binding authority for interpreting terms that are undefined in the Zoning Regulations.

Our recommendations for changes in the text now before the Commission are set out at the end of this paper.

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OP's proposals would eliminate existing protections in three ways:

1. First, contrary to OP's claim, **the amendments would eliminate all special protections for a large class of buildings that are among those most in need of it and are currently covered.**

When the Commission authorized penthouses for human occupancy in 2015, it made an exception for **rowhouses, detached or semi-detached dwellings and flats** – probably the vast majority of buildings in the R, RF and RA districts. It was understood that these types of structures, because of their physical configuration and relatively small size, were especially vulnerable to the visual blight of a bulky oversized rooftop addition. Consequently, the Commission barred having a penthouse as a matter of right on these types of buildings.

At the same time, the Commission recognized that many homeowners, and especially rowhouse owners, were interested in having a readily accessible roof deck. So to accommodate this legitimate interest, the Commission provided that owners of rowhouses and detached or semi-detached dwellings and flats could apply for a Special Exception to be allowed a modestly-sized penthouse ten feet high or less with up to 30 feet of storage space, just to provide a stair or elevator access to a roof deck.[1] To further limit visual impact, the rules on setback from exterior walls (one foot of setback for each foot of height on all sides) would apply.

[1] C§1500.4.

While the existing regulations provide special protections for **"rowhouses and detached and semidetached dwellings and flats** [i.e., two-family dwellings]", OP proposes to change this list to "single household dwellings, flats in any zone or houses in an RF zone converted pursuant to Subtitle U § 320.2".[2] Thus for rowhouses, detached or semi-detached dwellings that do not happen to be *used* as a "single household dwelling" or "flat" because they contain more than two units, there would be no special protections. Such structures would be allowed to have a penthouse as a matter of right with heights ranging from 12 to 20 feet, to be occupied by any use permitted in the zone. This change will affect a very large -- and growing -- number of buildings. RA districts, for example, have substantial and increasing numbers of these converted rowhouses and semi-detached buildings with three or more units.

To illustrate the internal contradictions of the proposed rule, it is noteworthy that while OP proposes to *remove* protections from rowhouses that are not used as "single household dwellings", OP proposes to *extend* protections to apartments converted from flats in RF districts, which by definition have three or more units. OP thereby acknowledges that there is nothing intrinsically wrong with protecting buildings with more than two units, although it would deny affording such protections to rowhouses with more than two units.

OP's response to this anomaly is to deny that its amendments otherwise make any change in the types of building**s** covered by C§1500.4, asserting -- despite the fact that rowhouses and detached and semidetached dwellings have been dropped from the list of protected

[2] Proposed C§1501.1(a).

structures – that somehow any building included under the existing regulations would be covered under the new one. The plain language of the current text indicates unequivocally that that is not the case: for example, a rowhouse outside an RF zone that contains more than two dwelling units is clearly included under the current list, which explicitly includes rowhouses, but it is not covered by the proposed new list since such a building is neither a single household dwelling, flat or converted flat in an RF district. OP acknowledges that its draft conflates the terms 'use' and 'building form'. Supplemental Report of Februay18, 2021, p. 5.

OP then seeks to solve this problem by venturing into Alice-in-Wonderland territory.[3] It ascribes to the term "row house" a special meaning, apparently known only to it and the Zoning Administrator, according to which if a rowhouse has more than two dwelling units it ceases to be a rowhouse.[4] This is patently at odds not only with the common usage of the term, but also with the Zoning Regulations, which require, in B §100.1(g), that since "rowhouse" is not defined in the Regulations, it "shall have the meaning given in Webster's Unabridged Dictionary." That dictionary defines a "row house" simply as "One of a series of houses connected by common sidewalls and forming a continuous group"[5] – clearly indicating that a row house is a row house

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3 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'

''The question is,' said Alice, 'whether you can make words mean so many different things.'

'The question is,' said Humpty Dumpty, 'which is to be master — that's all."

Lewis Carroll, Through the Looking Glass

[4] Supplemental Report of February 18, 2021, p. 4.
[5] Webster's Third New International Dictionary of the English Language Unabridged.

regardless of the number of dwelling units it contains. OP and the Zoning Administrator, like the rest of us, are bound by this definition, which when applied makes clear that OP's proposed changes would severely reduce the scope of the protective measures enacted in 2015.

OP claims further that those measures (existing protections under ZC 14-13) were not intended to cover, and do not cover, buildings with more than two units.[6] But the language of the relevant provision -- C§1500.4 -- evinces an exactly opposite legislative intent, since all of the building types currently listed, other than flats, may lawfully contain three or more dwelling units. Further, the terms "semi-detached building" and "detached building" are defined in the Zoning Regulations, and, like the definition of "row house", neither definition contains a limitation on the number of dwelling units.[7] Had the Commission intended to limit the applicability of C§1500.4 to buildings of two or less units it could readily have done so; it did not. We have reviewed the original rulemaking and find nothing in the Commission's Order or OP's Reports to the Commission that indicates any intent to make the penthouse protections contingent on the number of units.

This issue is important for reasons of sound land-use policy, because excluding buildings from these protective measures on the basis of the number of residential units they contain makes no sense. It misconstrues the whole purpose of these measures, namely: to prevent an unduly jarring visual effect on the building as a piece of architecture -- an effect that remains the same regardless of the number of units in the building. And it would produce the legal absurdity of a situation in which, of two adjoining

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[6] Supplemental Report of Februay18, 2021, p. 4.

[7] **Building, Semi-detached**: A building that has only one (1) side yard.
Building, Detached: A building that is completely separated from all other buildings and has two (2) side yards.

buildings identical in all material respects, one would be protected because it has two units and the building next door would not, because it has three. It is fundamental that if it is to command respect, the law must treat like situations alike.

Finally, to complete the removal of buildings from the list of types covered by existing special protections, OP would delete C§**1500.3(b), which restricts zones with 35- or 40-foot height limits to a penthouse limited to use for mechanical space and roof-deck access. OP's justification for scrapping this provision is merely that it "is not consistent with current policy".**[8] This special restriction is similar to that found in C§1500.4 for rowhouses, flats and detached and semi-detached buildings and overlaps it in some extent but differs in that it could be avoided by special exception. (Moreover, a proposed amendment would render C§1506.1 -- the provision on relief from certain of the penthouse requirements, which would govern this special exception in some cases-- substantially more permissive.)

The issue of OP's attempted elimination of protection against ill-designed penthouses takes on a special cogency in view of another case[9] recently before the Commission in which OP claimed that proposed amendments were merely for "clarification" or "elimination of duplication"

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[8] Supplemental Report of Februay18, 2021, p. 5.
OP, however, does not articulate what the "current policy" is, what the earlier policy was and when it changed, and how the change in policy came about. The Commission cannot promulgate rules based solely on agency policy. OP is the Commission's servant, not its master. Any policy change enshrined in zoning regulations must emanate from the Comprehensive Plan, or when the Commission's experience in administering the zoning docket demonstrates the need for an amendment. Indeed, this was the basis for the original pop-up rules.

[9.] ZC 19-21

and made no substantive changes,[10] we and others identified radical substantive changes that in fact weakened existing protections (in this case, protections against destruction of rooftop architectural elements),[11] and the Commission failed to take cognizance of those changes. Shortly thereafter the first BZA case emerged in which, as a result, restrictions on destruction of rooftop architectural elements that had been previously available to neighboring landowners were no longer available.[12] We would implore the Commission to avoid a repeat of that unfortunate sequence of events in the present case.

2. Second, having severely shrunk the list of kinds of buildings that are subject to the *existing* special protective restrictions against visually intrusive penthouses, OP then largely eliminates the restrictions – effectively scrapping the whole idea of durable special protections for especially vulnerable classes of buildings. The current regulations ban a matter-of-right penthouse on the protected classes of buildings, but make available by special exception, on terms binding on the BZA, a penthouse of precisely defined limited scale just for the purpose of providing access to a roof deck.[13] As noted above, OP would remove this ban in any zone, allowing habitable penthouses on whatever terms[14] as to height, setback or other characteristics may be provided as a matter of right[15] for the particular zone (which for RA districts, for example, allow

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[10]. ZC 19-21. Exhibits (Setdown Report) and 67 (Third Supplemental Report)
[11]. ZC 19-21 Exhibits 21,22 25, 26, 27
[12]. BZA 20290. See especially Exhibit 55.
[13]. C-§1500.4
[14]. See proposed C-§§1500 and 1501.1, the basic authorization of habitable penthouses.
[15]. See proposed C-§§1500 and 1501.1, the basic authorization of habitable penthouses.

heights up to 20 feet), or achievable by special exception under Subtitle X Ch. 9.

The only -- and very modest -- restriction that would remain is a limitation on the terms of the matter-of-right penthouse available for a single household dwelling, flat or converted apartment house in an RF district: that does not exceed the zoning building height: it would be allowed MOR if it is limited to roof-deck access and storage and is not on an alley lot.[16] In our consultation with OP we expressed support for the idea, so long as the stated conditions could not be undone by special exception. Unfortunately, unlike the terms governing the roof-deck access penthouse currently provided by 1500.4, under OP's proposal all of the prescribed conditions could be avoided by special exception,[17] greatly diminishing the proposed provision's value as a shield against unsightly rooftop additions – not to mention that it would not apply to many rowhouses and other buildings most in need of that protection.

Recommendation: The ban-plus-limited-special-exception arrangement in C-§1500.4 negotiated in 2015 -- which covers all the classes of buildings that OP seeks to cover in its proposed amendments -- should be retained. It is a reasonable compromise between two competing interests: protecting especially vulnerable buildings against visual blight from rooftop structures, and allowing homeowners the most convenient mode of access to a roof deck, and OP indicates that it has been very liberally granted.

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[16] Proposed C-§1501.1(a) and (b) . OP states that "On low density residential buildings, any penthouse is only permitted by special exception so would be subject to BZA review . . ." Supplemental Report of February18, 2021, p. 7). Under OP's proposals, this would be true only for penthouses that exceed the zoning height limit.

[17] See proposed C-§1501.1 (b), and Supplemental Report of February18, 2021, p. 6.

For the same reasons, C-§1500.b) concerning buildings with a 35- or 40-foot zoning height limit, should be retained.

3. Third, OP proposes to delete a critical piece of the rules that limit visual impact by requiring that a penthouse or rooftop structure be set back from exterior walls by distances equal to its height. Without these rules, a penthouse can appear just as a big box of the same external dimensions as the building, set down incongruously on top of it. Thus, **the current regulations require such a setback not only from front and rear walls but also -- for the protected classes of buildings (rowhouses, flats and detached and semi-detached buildings) -- from side walls, if the building is adjacent to a property that has a lower *or equal* permitted matter-of-right building height.[5] OP's amendments would strike "or equal".** This would increase the visual intrusiveness of the penthouse in two ways: First, for the many rowhouse blocks, where all buildings have the same matter-of-right height, penthouses spanning the full width of the building would be legally permissible. Second, in the case of the many existing rowhouse blocks with a uniform permitted height that exceeds the built height, a pop-up development that rises above its neighbor to the full legal height and on top of that adds a penthouse flush to the side wall is likely to have a grotesquely jarring visual impact on a whole block.

Recommendations

We urge the Commission to:

1. Delete proposed C§1501.1(a), regarding penthouses allowed matter of right on single household dwellings, flats or accessory buildings.,

2. Retain C§1500.4, renumbered as necessary., amended to change the penthouse height limit from 10 to 9 feet, in accord with OP's recommendation.

Additionally, as indicated above, we would support allowing a limited matter-of-right penthouse for roof deck access where the penthouse does not exceed the matter-of-right building height limit, provided that those limitations cannot be avoided by a special exception.

3. Retain C-§1500.1(b) concerning buildings with a 35- or 40-foot zoning height limit.

4. Retain the requirement that side wall setbacks be required when the permitted height of an adjacent building is the same as that of the building on which the penthouses to be located, by amending proposed C§1504.1(c) (3) to read as follows:

> "(3) The adjacent property along the shared side lot line has a lower **or equal** permitted matter-of-right building height; or . . . ".

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