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 the Kalorama Citizens Association

July 24, 2020

Chairman Hood and Members of the Commission,

In 2015 the Zoning Commission adopted Order 14-11, which enacted sweeping reforms of R-4 (now RF) zoning. Its underlying objective 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 such as turrets, cornices, mansard roofs, and the like– defining features of a rowhouse -- against removal or significant alteration. In addition it enacted:

-- a matter-of-right building height limit of 35 feet, increasable to 40 feet only by Special Exception.

--a prohibition on impeding the functioning of a solar energy system or a chimney or flue by construction activities on an adjacent property.

--a prohibition on construction extending more than ten feet to the rear of an adjacent structure.

The Order's protection for original roof top architectural elements is exceptionally strong: removal or alteration of such an element is flatly prohibited, and with only two exceptions it is not possible to evade this prohibition by special exception. That is because a special exception from the provision setting out that prohibition -- §E-206.1 -- is required by §E-206.2 to meet the conditions of §E-5203.3, which include the condition stated in E-5203.1(d) that an original architectural element not be removed or significantly altered.

The two exceptions are projects that seek to increase building height above the 35-foot matter-of-right limit, or that seek to convert a building with less than three dwelling units to an apartment building. For these kinds of projects the Commission adopted special provisions allowing the BZA to waive the prohibition (E-5203.2 for height increase cases, and U-320.2(l) and U-320.3 for residential and non-residential conversions respectively.

But these projects, whether entailing removal of an architectural element or not, would be allowed only if they met certain criteria aimed at protecting neighboring properties and preserving neighborhood character. These protections were included in response to a principal concern voiced by residents of R-4 neighborhoods at the time: the potential adverse effect on one's own home of a conversion of a neighboring home to an apartment building. The required standards and procedures designed to mitigate any such adverse effects specifically for residential conversions were regarded as something of a big deal at the time. They are found in U-320.2 as follows:

(i) Any addition shall not have a substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling or property, in particular: (1) The light and air available to neighboring properties shall not be unduly affected; (2) The privacy of use and enjoyment of neighboring properties shall not be unduly compromised; and (3) The conversion and any associated additions, as viewed from the street, alley, and other public way, shall not substantially visually intrude upon the character, scale and pattern of houses along the subject street or alley;

(j) In demonstrating compliance with Subtitle U § 320.2(i) the applicant shall use graphical representations such as plans, photographs, or elevation and section drawings sufficient to represent the relationship of the conversion and any associated addition to adjacent buildings and views from public ways;

(k) The Board of Zoning Adjustment may require special treatment in the way of design, screening, exterior or interior lighting, building materials, or other features for the protection of adjacent or nearby properties, or to maintain the general character of a block; . . .[1]

In the pending case the Office of Planning proposed, without explanation, and the Commission has tentatively accepted, changes that would seriously weaken these existing protections in two ways.

First, the prohibition on altering or removing original

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1 Similar protective measures were adopted for cases involving increase in maximum building height (E-5203.1 (e) and (f)) and conversions of nonresidential buildings to apartment use (U-320.3 (b) through (d)).

architectural elements would be downgraded by eliminating all current constraints on evading the prohibition by special exception. The provision that flatly rules out special exceptions to allow removal of architectural elements except in height increase or conversion cases -- §E-5203.3 -- would be deleted. In its place would be a new provision, §E-§5207, 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 typical Special Exception language equips each component part with its own verbal escape hatch -- "substantially" or "unduly" – that gives the BZA a wide discretion that is virtually unassailable in an appeal to the Court of Appeals because of the deference that the Court is required to give to agency interpretations of their own governing rules.

Second, the standards and procedures for mitigating adverse effects on a home from conversion of a neighboring home to apartment use -- U-320.2(i), (j), (k) - - would be deleted.

OP has not acknowledged this roll-back of key achievements of Order 14-11, or even acknowledged, in its summary of public comments in the case, that this issue was raised at the hearing.[2] Indeed it has repeatedly denied that its proposals weaken the protections enacted by that Order, claiming that it is merely "reorganizing for clarity" or "removing duplicative provisions".[3] In fact, however, a reading of OP's pending text makes clear that at the moment it becomes effective, the regulations will change and residents seeking to protect the character of their RF-zoned neighborhood against ill-designed redevelopment will lose basic tools given them by the Commission for this purpose in Order 14-11. For this reason alone it is imperative to reopen the record to allow a full examination of OP's proposed downgrades, which

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2 See OP Supplemental Report of March 19, 2020, p. 2 *et seq*.

3[2] See Public Hearing Notice, p. 2; Hearing Transcript, ZC 19-21, February 13, 2020, Statement of Office of Planning, pp. 9-10, 13.

have not been explained or justified by OP or aired by the Commission.`

There are strong indications that the protections for architectural elements adopted in 14-11 have not been enforced in accord with the Regulations. A random sample of cases discloses a number of cases that did not fall within either of the two exceptions mentioned above (height increase and conversion to apartment use) but in which removal or alteration of original architectural features was nevertheless supported by OP and approved by the BZA. This outcome required avoiding, by one means or another, applying the unambiguously mandatory condition in §E-5203.3 prohibiting removal of architectural elements in such cases. OP and the Board have employed an imaginative array of such means, none of which is authorized by the Regulations – as indicated by the following table:

Means employed in past BZA cases to avoid enforcing the ban in E-5203.3 and 5203.1 (d) in cases not involving height increase or conversion

1.Cite but ignore. Cite the ban but ignore it and proceed to decide on the basis of your own criteria whether the removal would be acceptable. See BZA case nos. 19741, 19763, 19546 and 20199

2. **Waive.** Cite the ban but waive it on the basis of E-5203.2 even though that provision, which applies only to height increase cases, is not legally applicable here. See BZA case nos.19425, 19565, 19472.

3. Cite it but decline to enforce it, on the ground that enforcement would make it impossible to get the desired Special Exception, and proceed to decide on the basis of your own criteria whether the removal would be acceptable. See BZA case no.19771.

4. Cite it but find it inapplicable on the ground that its enumerated examples (“turret, tower or dormers”) are exhaustive rather than illustrative. See BZA case nos.19516, 19428.

> **5. Cite it but ignore it, and proceed to decide on the basis of E-5203.1(e**) whether the removal would be acceptable, even though that provision, which applies only to height increase cases, is not legally applicable here. See BZA case no.19624.

Almost all of the architectural element cases of which we are aware have lacked any opposition. Typically OP's Report asserts a legal basis for granting the special exception, and the Board's "Summary Order" merely endorses OP's recommendation of approval without further analysis.

We find this state of affairs sad and disturbing, as should OP and the Commission, in our view. Surely something is amiss when a provision of the regulations adopted by the Commission is routinely ignored by DC government officials, or even – remarkably -- purportedly nullified by the Board of Zoning Adjustment. What is called for at a minimum is a thorough review of the actual application of 14-11 protections for original architectural elements, before any further consideration of changes to those protections, and some assurance that any regulations on this subject will be faithfully implemented in the future. The review should cover also the application of the ten-foot rear extension limitation, of which a review is already underway at the request of the Commission.[4] The review should ask: Can it fairly be said that the intended 14-11 reforms have reduced the incidence of intrusively inappropriate redevelopment in RF neighborhoods? If so, how? If not, why – and what should be done to the existing regulations to address this deficiency?

We support and welcome the extension of protections of solar systems now found only in RF zones to appropriate buildings in R zones. We particularly commend the application of these protections to new construction as well as to additions and alterations of existing buildings.

However, we oppose the formula finally agreed upon by the Commission for determining the availability of

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4 See OP Supplemental Report of March 19, 2020, p. 2.

a Special Exception to the requirement that construction not exceed a 5% increase in shading incidence of a solar energy system on an abutting property. We recognize the efforts of OP and the Commission to grapple with this key element of the proposed regulations. But the resulting formula leaves this critical determination to the unfettered subjective discretion of the Board of Zoning Adjustment by requiring only that it conclude that the applicant "has made its best efforts" to mitigate shading. (See proposed D-5207.1 and U-5207.2) This inserts an element of arbitrariness and unpredictability into the calculus of a potential investor in a solar energy system that is unacceptable and unnecessary.

What is sorely needed is a formula that would tie the acceptability of a special exception to objectively verifiable criteria having to do with the percentage of shading – as is done with the basic shading limit of 5% -- balancing the interest in increasing reliance on renewable energy with that of increasing the supply of affordable housing. OP and the Commission clearly need to go back to the drawing board again on this point. The thoughtful suggestions found in the comments submitted in this case by architect Guillermo Rueda would be a good place to start.

Conclusions

A. We oppose the downgrading of the protection of original roof-top architectural elements and urge that the record be reopened for purposes of addressing these unexplained proposals by OP. The reasons underlying the Zoning Commission's adoption of these protections a mere five years ago are even more valid today. To diminish them in any way would constitute an open invitation to developers to design projects that remove or alter these defining features. Accordingly we urge that the provisions securing these protections -- §E-5203.3 and §E-5203.1(a)-(d) -- be retained and that §E-5207.1 – their proposed permissive replacement -- be dropped.

B. We oppose the deletion of provisions designed to protect a home against adverse effects from the conversion of a

neighboring home to apartment use, and accordingly urge that U-320.2(i), (j) and (k) be retained.

C. We urge the Commission to reopen the record in this case also for the purpose of securing a thorough review by OP of the application of the architectural elements protections enacted in 2015 along with a review of the 10-foot rear extension limit, and at a minimum to delay any consideration of amending those protections until such a review has been completed. The Commission should recognize that no decision on changing these protections can reasonably be made without a full understanding as to how they have worked – or failed to work – in the past.

D. We note that retaining and strengthening these protections is in no way antithetical to the District's goal of increasing the supply of affordable housing. There are ample opportunities in the current zoning regulations to increase the number of dwelling units in rowhouses in RF and other zones, while at the same time respecting the character of these iconic buildings and neighborhoods.

E. We support and welcome the extension of protections of solar systems now found only in RF zones to appropriate buildings in R zones. But we oppose the language finally agreed upon by the Commission to determine the availability of a Special Exception to the requirement that construction not exceed a 5% increase in the shading incident of a solar energy system on an abutting property. We urge the Commission to reopen discussion on this issue.