March 14, 2024

Zoning Commission of the District of Columbia
441 4th Street, NW - Suite 210
Washington, DC 20001

VIA IZIS

Re: OAG Comments on Notice of Proposed Rulemaking in Z.C. Case No. 22-25 of the Office of Zoning – Text Amendment

Dear Members of the Zoning Commission:

The Office of the Attorney General ("OAG") respectfully submits these comments in response to the Notice of Proposed Rulemaking ("NOPR") for Z.C. Case No. 22-25, proposing changes to the procedural regulations for the Zoning Commission (the "Commission") and Board of Zoning Adjustment (the "Board"). OAG's comments focus on two key issues: (1) Public participation; and (2) the Commission's racial equity tool. OAG asserts that the NOPR fails to meaningfully address the concerns raised about these topics by OAG and members of the public or justify the decisions reached by the Commission. OAG believes that to advance public participation and procedural equity in a manner consistent with the Comprehensive Plan (the "CP"), the Commission should consider making additional changes to address these critical issues.

I. Public Participation

There are serious issues of public participation in the current zoning process, which is demonstrated by the significant amount of written public comments and oral testimony at the public hearing on the proposed text amendment about problems with the current requirements and procedures for public participation. In relying on the statements made by the Office of Zoning ("OZ") and the Office of Planning ("OP") in their post-hearing responses to public comments, which the Commission subsequently incorporated largely verbatim into the NOPR, the Commission appears to have disregarded many of these comments rather than consider them as critical feedback on how the current process is hindering equitable participation for District residents.[1]

While there are multiple aspects to the participation issue, OAG believes that the following 5 areas are the most critical concerns that the Commission should consider addressing in a revised text amendment.

[1] OP Supplemental Report and Summary Chart of Comments (Ex. 45 and 45A); Memo from OZ – Chart of Responses to OAG's Comments (Ex. 46).

A. Public Notice: Earlier Property Posting and Updates to Online Case Record

OAG maintains that applicants and petitioners should be required to post public notice on the property that is the subject of a zoning application/petition at the time of the filing of the application/petition. Posting on the property is the most direct means of providing notice of a zoning case to the general public, and yet, currently, notice is not posted on the property until after the case has been scheduled for a public hearing, which is fairly late in the overall zoning process.[2] Although case information is available through the ANC (which does receive notice of case filings), OZ's website, and the DC Register, these methods rely on either closely following an intermediary body (the ANC) or knowledge of OZ's online case system or the DC Register, which can hinder residents' direct notice of a zoning matter. Earlier posted notice would provide a clear, visual indicator on the subject property, thus increasing actual notice of cases and allowing the public more time to review and participate at the ANC level and before the Board and the Commission. The impact of earlier posted notice also could be further enhanced through the inclusion of more easily understandable case information in the posted signs and mailed notices, or through the use of technological shortcuts, such as QR codes linking directly to the online case record, which would make it easier for residents to directly access critical case information.

Additionally, OAG believes that there should be a requirement that all OZ's notices be filed in the case record within 24 hours of transmittal to either the parties or the DC Register. In addition to the physical notice on the property, the online case record is the main source of case information for the general public. OZ should also update its Interactive Zoning Information System ("IZIS") to ensure that residents are able to request case notifications under a variety of criteria, such as by ANC, Ward, or relief type, not simply under case number.[3] Providing earlier and more direct and easily understandable notice is essential to ensuring that all District residents are equitably informed of zoning matters.

OAG believes that the Commission's justification for not changing the posting and notice requirements—namely, that early posting on the property "would be unnecessarily burdensome and complex since there already exists various other means of providing notice to the public such as through referral to the affected ANC and publication of notice in the *District of Columbia Register*"—is flawed.[4] Posting the property sooner would not result in additional administrative burdens for OZ because OZ simply provides applicants and petitioners with the physical notice signs. Rather, it is the applicant/petitioner who is responsible for posting, maintaining, and updating (including adding or changing relief and hearing dates) the signs for the duration of the zoning proceeding and documenting that the signs are accurate and properly posted.[5] Posting the property earlier in the process would only require OZ to provide the physical signs to applicants earlier in the process.

B. Increased Notice and Automatic Party Status for Building Tenants

OAG maintains that notice of zoning hearings should be provided to the individual tenants of

[2] OAG Comments, Ex. 34 at p. 3-5.
[3] OAG Comments, Ex. 34 at p. 3-4.
[4] NOPR, Ex. 51 at p. 9.
[5] Subtitle Y §§ 402.3-402.10; Subtitle Z §§ 402.3-402.10, and Subtitle Z §§ 502.3-502.9.

buildings within 200 feet of a site subject to a zoning application. The majority of District residents—58.9%—are rental tenants, and they should not be subject to lesser notice requirements than other District residents simply because they rent rather than own their homes.[6]

Further, as OAG has advocated in other cases, tenants of a property that is the subject of a zoning application should be granted automatic party status.[7] Tenants of a property that is redeveloping pursuant to a zoning application clearly meet the standard for party status and will be "more significantly, distinctively, or uniquely affected in character or kind" than the general public.[8] Currently, tenants must navigate the multi-step process of requesting party status to fully participate in the zoning case—a process further complicated by the public notice issues OAG and others have raised. As a result, having to formally request party status further increases the existing barriers preventing tenants from fully participating in zoning cases. These barriers are particularly high for people of color, those with limited financial resources, and those who are not fluent in English, who face struggles obtaining legal counsel or other resources to assist them in participating in the zoning process. Automatic party status would ensure that these tenants have a seat at the table during the zoning process and would encourage better communication and collaboration between developers and rental tenants.

The Commission's justification does not address these underlying issues of procedural fairness and the disadvantages that tenants face in notice and participation in zoning matters. The Commission has not provided any evidence to support its assertion that providing notice to individual tenants within 200 feet would be impracticable or unduly burdensome. To the degree that these increased notice requirements might create some additional burden to either applicants/petitioners or OZ, OAG believes that those burdens are balanced by the benefits of increased notice to such a significant portion of the District's residents. In the alternative, adopting some of the other recommendations to improve notice, such earlier posting on the property, would offer other ways of providing tenants with earlier and more meaningful notice. Similarly, the Commission's arguments that automatic party status for building tenants would result in undue burdens or delays to the zoning process is also unsupported by evidence as it would only apply in a relatively small number of cases but would ensure that residents most at risk of displacement would be able to participate in the zoning process more easily.

C. Referral of OP/OZ Text Amendments to ANCs Prior to Setdown

OAG maintains that the Commission should not adopt the proposed Subtitle Z § 500.1, which would exempt OP and OZ from the requirement of Subtitle Z § 500.7 to refer their text amendments, including those with related map amendments, to the affected ANCs prior to setdown. As exemplified by the current case, text amendments proposed by OP and OZ often involve broad policy issues that can have profound implications on District residents. Permitting these amendments to be proposed and setdown with minimal advance public notice or involvement violates basic principles of procedural due process as well as the CP's directive that "District-led

[6] B25003 – Tenure, American Community Survey 1-Year Estimate 2022.
[7] OAG has also advocated for automatic party status for tenants in buildings that are subject to zoning cases in its own text amendment, Z.C. Case No. 22-05. *See*, Ex. 3 and 4 Z.C. Case No. 22-05.
[8] Subtitle Y § 404.13, Subtitle Z § 404.14.

planning activities shall provide meaningful, accessible, and equitable opportunities for public participation early and throughout these planning activities."[9]

The proposed Subtitle Z § 500.1(b) exempts OP/OZ text amendments that include related map amendments from the referral requirements. This is a particularly egregious omission because a map amendment will have very specific impacts on a set geographic area, and thus the affected ANCs should be given early notice of the proposal for any zone change. The Commission appears to acknowledge the importance of notifying ANCs of proposed map amendments because the proposed Subtitle Z § 500.1 does not exempt OP map amendments that do not include related text amendments from the ANC referral requirements. In fact, and somewhat illogically, the NOPR relies on this fact to support the exemption of other OP rulemaking cases.[10] The application of notice requirements to certain rulemaking cases and not to others, without any kind of rational basis for the distinction, constitutes an arbitrary and capricious determination by the Commission.

OZ and OP have justified this reduced notice standard by arguing that "imposing an additional referral period for OP/OZ text amendment petitions would create delays and disrupt the current practice of having OP/OZ file text amendments shortly before a public meeting."[11] The NOPR contains no additional justification as to why the District agencies charged with responsibility for the District's planning and zoning processes should be held to a lower standard of public notice and involvement than the general public or other agencies. Indeed, CP § 2506.2 makes clear that District-led planning activities should serve as the model for equitable public engagement. OAG is therefore disturbed that the Commission has accepted this reasoning without question given its implications for the public participation of ANCs and their constituents. The Commission's only other justification on this point—the argument that the Commission is not required to give great weight to ANC setdown forms—is similarly unfounded.[12] In soliciting ANC feedback on setdown through an ANC Setdown Report, the Commission has indicated its desire to hear from ANCs at the setdown stage of the zoning process. If the intent is for ANCs to weigh in at setdown, then they must be given sufficient notice, and OP and OZ should not be held to a lower notice standard than other petitioners.

This proposed exemption is not only deeply problematic, but it also raises broader questions about the purpose of the setdown stage in the zoning process. Though nominally to allow the Commission to assess the merits of a proposed case before proceeding to a hearing, in practice, setdown serves, at best, as a meaningless intermediate step that only adds time to the zoning review process and, at worst, as an opportunity to block proposals from undergoing review and discussion in a public forum. The amount of public involvement that the Commission desires at setdown is unclear—although permitting ANCs to submit setdown reports, it is proposing to limit the notice given to the ANCs, and it qualifies the level of consideration it must give to the setdown reports. The Commission has also indicated that it narrowly interprets the current language of Subtitle Z § 400.11 to prohibit it from considering anything other than the initial application/petition, the OP

[9] CP § 2506.2.
[10] NOPR, Ex. 51 at p. 9 "The Commission also notes that the proposed text amendments require rulemaking map amendment cases to be referred to the affected ANCs; therefore, affected ANCs are allowed time to submit ANC Setdown Forms in rulemaking map amendment cases."
[11] NOPR, Ex. 51 at p. 13.
[12] NOPR, Ex. 51 at p. 9.

setdown report, and any ANC setdown reports. As a result, setdown determinations are made in an information vacuum, with the Commission relying almost exclusively on OP's recommendation, which has particularly troubling implications for the text amendment process. OAG believes that serious consideration must be given to the purpose and efficacy of the setdown process to ensure greater overall equity of the zoning process.

D. Notice to Residents Within 200 Feet of Properties Subject to OP or ANC Map Amendments

OAG also objects to the new subsection Subtitle Z § 502.1(d), which would exempt rulemaking map amendments proposed by either OP or an ANC from the requirement to provide notice of the public hearing to all property owners within 200 feet of the property that is the subject of the map amendment. No justification has been provided for this exemption, and OAG again questions why government entities should be held to a lower standard of notice than other petitioners. While no justification based on administrative burden has been raised, OAG notes that, as with other application types, the only information that OP or an ANC would need to provide this notice is the list of owners within 200 feet that is available from the Office of Tax and Revenue. As with all other cases, the mailing of this notice would be done by OZ and given that this requirement is applicable to only a small subset of cases, providing this notice would not constitute an undue burden on OZ staff.

E. Notice to District Agencies

OAG maintains that OZ should be required to provide official notice of applications/petitions to District agencies involved in zoning decisions, including but not limited to OAG, the Department of Housing and Community Development (DHCD), and the Department of Buildings (DOB) to ensure that all District agencies may participate fairly. The text amendment's proposed changes to Subtitle Z §§ 405.4 and 504.3 would require all District agencies participating in a Commission case to submit reports 10 days prior to a hearing. OAG has no objection to a clear and uniform agency filing requirement. However, currently, the application and hearing notices are only provided to OP and the Department of Transportation (DDOT). As a result, OAG and other District agencies must resort to constantly monitoring the OZ website for new cases and updates to ongoing cases in order to participate. The burden that this requirement places on other agencies appears to contradict the Commission's assertion that "all District agencies are encouraged to participate in cases in which they are interested."[13] Conversely, the administrative burden on OZ to provide notice of cases and hearings to additional agencies is minimal as service to agencies is done by email.

Zoning affects a wide variety of government functions and agencies. Therefore, regardless of whether an agency is considered a traditional "land use agency," input from *all* involved agencies is incredibly valuable in providing broader context and understanding of how the Commission and Board's decisions affect other parts of District government, and, in turn, on the services these agencies provide to District residents. Refusing to even provide notice to these agencies constitutes a myopic approach to land use policy that hinders intergovernmental coordination.

[13] NOPR, Ex. 51 at p. 10.

II. Codification of the Commission's Racial Equity Tool

OAG also maintains that the Commission should codify its racial equity analysis tool requirements into the Zoning Regulations. The Commission's current practice of allowing questions about the substance and procedures of the racial equity tool to be determined on an ad hoc basis results in inconsistent outcomes and bad legal precedent. These ad hoc practices therefore may expose the Commission's decisions to potential legal challenges for failure to satisfy the CP's racial equity directives.[14] Codifying the racial equity tool requirements would afford further refinement of the tool by clarifying the specific analysis and public engagement requirements, specifying the responsibilities of the various participants in the zoning process, and detailing when and how the steps in the racial equity analysis process fit into the overall timeline of zoning review.[15] Clarifying the racial equity tool and incorporating it into the regulations would enable it to achieve its intended purpose of providing data, historical context, and community feedback to better inform the Commission's decisions.

The Commission has justified its decision not to codify the requirements on the basis that the tool is still undergoing revision and codification would result in difficulty in making future changes to the tool. Although the text amendment process does require additional time and administrative steps, it would also provide the benefits of allowing the elements of the tool to be vetted and clarified through a public process, which in and of itself would support racial equity goals. OAG believes that the benefits of undergoing this public process and having clear, enforceable requirements in the regulations outweigh any administrative burdens of the text amendment process. Further, OAG believes that the proposal that was outlined in its original filing—to incorporate the racial equity tool requirements into the Zoning Regulations as a new chapter within Subtitle Z—would make adding future amendments relatively simple.[16]

Finally, problems resulting from the racial equity tool's lack of clarity and codification have recently arisen in Z.C. Case No. 23-02.[17] In that case, OP, the applicant, failed to perform the public outreach and engagement component of the racial equity tool, thereby impacting the ability of OP and the Commission to complete the racial equity tool. As multiple members of the public have noted, had the racial equity tool requirements been clarified and codified within the Zoning Regulations, it would have provided not only clarity on when and how the outreach should have been done, but also would have provided the Commission with a process for dealing with any omissions or oversights in the completion of the racial equity analysis. Without these regulatory safeguards, the Commission is left to "ad lib" procedures, which not only negatively affect community involvement but also raise issues of legal sufficiency.

III. Special Exception and Variance Relief in Rulemakings

[14] CP §§ 2501.4, 2501.5, 2501.8, 2506.2.
[15] OAG Comments, Ex. 34 at p. 8-10.
[16] OAG Comments, Ex. 34 at p. 8-10.
[17] OP Hearing Report, Ex.58 at p.20-22; Testimony of Jonathan Kirschenbaum, OP Case Manager, January 8, 2024 Public Hearing Transcript at 84-85, 163,172-175 and January 18, 2024, Public Hearing Transcript at 59-62, 66-68.

Lastly, OAG notes that the proposed text amendment adds new language into the rulemaking procedures in Subtitle Z § 500.9, stating that "The Commission, may also in its sole discretion, agree to hear related requests for variance and special exception relief as needed." Variances and special exceptions are contested matters, not rulemaking proceedings, and are therefore subject to different legal standards and processes. OAG does not believe that the Commission would be able to grant this contested case relief as part of a rulemaking, nor can OAG envision a situation in which such a request for relief might arise. Therefore, OAG recommends that this language be removed from Subtitle Z § 500.9.

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OAG believes that this text amendment provides the Commission with a rare opportunity to meaningfully evaluate how its procedures are working and how they can be changed to make the zoning process more accessible and equitable for all District residents. Therefore, OAG strongly encourages the Commission to consider these recommendations as well as those of the many members of the public who have submitted comments and testimony in the case and urges the Commission incorporate these recommendations into the text amendment.

Respectively submitted,

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Attachments:
Certificate of Service