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We are not trying to overturn the Comp Plan: we want to make it better!

Addressing the Committee of 100's misinformation campaign

June 2017

The Committee of 100 on the Federal City, a planning and historic preservation organization in DC, has written letters and a white paper criticizing the work of a coalition Greater Greater Washington has been a part of for the last nine months. In January, this coalition released a priorities statement that laid out the group's ten priorities for the ongoing Comp Plan amendment process.

The Committee of 100 (C100) has focused on the ninth point, "clarify zoning authority," and has been spreading misinformation about the coalition's intent and work. As an independent member of this group, Greater Greater Washington would like to respond to this misinformation.

The C100 attempts to cast doubt on the goals and members of this coalition

The C100 chair, Stephen Hansen, accused the coalition of being led by developers as an attempt to slip in this "clarify zoning authority" point "under the guise of promoting affordable housing." This is an unfair characterization of a collaborative, long-term effort that included numerous groups (a full list can be found at dchousingpriorities.org).

This coalition was intentionally broad, founded on the belief that for-profit developers and affordable housing advocates could work together towards solutions in the Comp Plan. We believed that there was achievable middle ground between these groups, and that advocating together for that middle ground advanced the work of everyone. All groups engaged with the process to advance a number of priorities. All ten are important. All groups did some negotiating and compromising to reach consensus. The statement has been endorsed by 81 organizations, including seven Advisory Neighborhood Commissions across five wards (2, 4, 5, 6, and 7).

C100 has every right to a contrary view on land use, but attempting to paint anyone who does not share their priorities as a front for developers is unfair to the meaningful work and compromise of the diverse groups involved. Many of them tirelessly and often thanklessly advocate for affordable housing or the needs of disadvantaged residents every day.

C100's analysis of the Comp Plan is incorrect

The fundamental argument C100 makes in its white paper is that "the Zoning Commission does not have the 'purview' to supersede the levels in the maps in exchange for community benefits" and that "if adopted, this provision would be a radical departure from current law."

This is incorrect. Rather, the Zoning Commission has long held this exact power, and the Comprehensive Plan explicitly states as much: that "density bonuses (for example, through Planned Unit Developments) may result in densities that exceed the ranges" in the accompanying map (section 226(c)). In other words, while the Comp Plan contains maps which are important parts of the plan and often cited in land use decisions, the plan also specifically says the Zoning Commission can rule to exceed them.

Opponents of a few projects have advanced novel interpretations of the Comp Plan that ignore this power. They found some success in recent DC Court of Appeals decisions which go against prior settled precedent.

To address this misinformation and the true intent of the coalition's "clarify zoning authority" bullet point, some background is needed. Advisory Neighborhood Commissions, civic and citizens' organizations, political groups, and others interested in writing resolutions on this issue should be aware of the following:

1. What the Comprehensive Plan is
2. What a Planned Unit Development is
3. How PUDs relate to the Comp Plan
4. What changed in recent court cases
5. How C100 is misinterpreting the Comp Plan and the coalition's priorities

What is the Comprehensive Plan?

The Comprehensive Plan is an over 600 page document which is supposed to lay out plans for all aspects of growth and change in DC. Most of it, like the chapter on waste disposal, are great opportunities to put all the city's ideas in one place, but the text in the Comp Plan in those areas is less enforceable. On zoning and land use, the Comp Plan is much more powerful. The DC

Council doesn't actually get to control zoning or review developments, so the Comp Plan is the playbook for those decisions.

The Zoning Commission, a board made up of 3 mayoral appointees and 2 federal appointees, has near-final say on zoning, but is legally required to follow the Comprehensive Plan, which is passed by the DC Council. The Comp Plan, therefore, is the way for the council to express its will on land use. The public too can weigh in during the drafting and amending of the Comp Plan.

What is a PUD?

A Planned Unit Development, or PUD, is a part of the official zoning system. The land under your home has an "underlying" zoning (for example, RF-1, which indicates predominantly attached rowhouses). The zoning defines what can be built "as of right." But if you wanted to build something else and if you had a large enough parcel of land (this only applies to big parcels) you could file for a PUD.

In a PUD, the Zoning Commission could let you build taller or more densely than the underlying zoning allows. But in exchange, it would review your project very closely for quality, and demand some "community benefits."

The DC Office of Planning would do most of the negotiating with you. They might (and often do) ask you to include more affordable housing than the underlying zoning requires. They might ask for bikeshare stations, a public plaza with furniture for public use, and/or other things. The local Advisory Neighborhood Commission would weigh in, too, in an advisory way.

There are critics of the whole system of PUDs. Anti-development activists dislike them because the Zoning Commission can allow more density than is permitted without PUDs. Some community organizations feel the Zoning Commission does not ask for as many benefits as it should. Finally, developers feel that sometimes they are being “shaken down” for things like cash payments to local organizations as “community benefits.”

Greater Greater Washington agrees that PUDs aren’t perfect, but also sees them as an opportunity to leverage private capital and interest towards building more homes and affordable homes that the city desperately needs. What is more, we hope to rectify some of the problems with PUDs with language in another of the coalition’s principles:

- **Prioritize affordable housing as a community benefit.** When rezoning or granting significant zoning relief, the District should affirm through the Comprehensive Plan that affordable housing (in addition to any underlying requirement) is the highest priority benefit and that other community benefits should be long-lasting.

Making affordable housing the highest priority benefit would push for it to be a greater part of the community benefits package. Making benefits long-lasting would ensure that if there are other benefits, they are things like a public park or plaza, which would exist for the life of the building, rather than a one-time cash payment.

How do PUDs relate to the Comp Plan?

While the Zoning Commission can waive the regular zoning for a PUD, it can't waive whatever rules there are in the other various parts of the Comp Plan. What do those parts say? Well, that's confusing.

The Comp Plan has a big map, called the Future Land Use Map, which defines some areas of the city as things like "moderate density residential" and "high density commercial." But it also has other text that says the Zoning Commission should do things like encourage housing around Metro stations. The Comp Plan says that the maps and text are of equal importance.

What to do when they conflict? What power does the Zoning commission currently have in these situations? There's this important sentence in section 226(c) of the Land Use Element:

> ***It should be noted that the granting of density bonuses (for example, through Planned Unit Developments) may result in heights that exceed the ranges cited here.***

This clearly states that the Zoning Commission can decide to prioritize the map over the text if it wants, or the text over the map and allow something denser than what the Future Land Use Map allows, as a part of its overall interpretation of the Comp Plan as it pertains to the project.

This was the prevailing legal view until the last few years.

What changed in recent court cases?

In three cases from 2012-2016, called the *Durant* cases, a 3-judge panel on the DC Court of Appeals overturned a PUD because, they said, the size of a project wasn't consistent with its designation on the map.

A development at 901 Monroe Street had heights that, the court said, were consistent with Medium Density Residential, but the FLUM only allowed Moderate Density Residential. The Zoning Commission's order claimed 901 Monroe was actually consistent with Moderate Density Residential.

It appears that the court either didn't notice or deliberately ignored 226(c). It was not mentioned in the opinions, for instance.

As with any court decision, legal scholars can debate it. One article in the Harvard Law Review argued that actually, the Zoning Commission could have allowed this project, but had to say, in essence, "we are deciding to allow Medium Density Residential in this area even though the map says Moderate Density Residential" rather than arguing, as the commission did, "this project is consistent with Moderate Density Residential." That article, therefore, concludes that the Zoning Commission did have the power to allow the development, but it simply didn't frame its order correctly.

In response to *Durant* and another case about the McMillan Sand Filtration Site (decided on somewhat different grounds, but also overturning a PUD), activists have started preparing legal challenges to other PUDs. Many developers have abandoned PUDs across the city and scaled back plans to matter of right development because of this change in legal precedent and the threat of lawsuits.

How does this affect affordable housing?

The impact on affordable housing is significant, as many of these PUDs incorporate higher levels of affordable units than what would be included in a "by-right" project. Still, some activists prioritize stopping new buildings or taller buildings. For them, halting the PUD pipeline is a victory.

Greater Greater Washington disagrees. If a property owner forgoes a PUD, the city loses an opportunity to negotiate to add more community benefits. Meanwhile, the properties will still get redeveloped just now "by-right", and many of the issues opponents might be concerned about remain unaddressed.

For instance, Greater Greater Washington has been publishing a series of articles on the controversial Brookland Manor development on Rhode Island Avenue. Here, some tenants and their representatives say there is not enough affordable housing and not enough protections for existing tenants to return.

There are many serious concerns about what is happening Brookland Manor, including how tenants have been treated. But on the question of the number of affordable units being replaced, the Comp Plan and the new legal precedent around PUDs played a role. The owner, MidCity, originally wanted to build more total housing and more affordable housing, preserving more of what was there (but not all). But the Zoning Commission and Office of Planning turned down that proposal from 2014, likely in part or entirely because of *Durant I*, which had been decided in 2012. As a result, the buildings are smaller but there is far less affordable housing.

This is not to say that there aren't other ways to preserve and produce affordable homes, for Brookland Manor and other cases. But PUDs can be valuable tool, and we at Greater Greater Washington believe we should have all the tools at the table when it comes to affordable housing in DC.

The C100 is misinterpreting the current Comp Plan, and making false accusations

The C100 has attacked one particular priority relating to PUDs, but with an incorrect interpretation of the Comp Plan. Let's review the "clarify" bullet again.

> ***Clarify zoning authority.*** *Through the Comprehensive Plan, the District should affirm that the Zoning Commission has the purview to allow increased density for Planned Unit Developments that supersedes the levels in the Comprehensive Plan's* ***maps*** *in exchange for community benefits. [Emphasis added]*

The important word to keep in mind here is **maps**. The Zoning Commission can allow density greater than what's in the **maps**, if it's otherwise consistent with the Comp Plan. The Comp Plan, remember, already says that very thing:

> ***226(c)*** *… It should be noted that the granting of density bonuses (for example, through Planned Unit Developments) may result in heights that exceed the ranges cited here.*

C100 interprets the Comp Plan a different way. In their view, the map is an absolute ceiling on any buildings. If the map says an area is moderate density, then you can't build medium density no matter what else the plan says. They write,

> *The Home Rule Act requires that zoning shall not be inconsistent with the Comprehensive Plan, which the DC Council adopts and periodically updates. ... Because this new language would authorize the ZC to make decisions that are inconsistent with the Plan, it could not legally be a part of the Plan.*

That's incorrect. If the plan says that PUD heights can exceed what's on the maps, then it's consistent with the plan to exceed heights on the maps.

C100 doesn't think so:

> *[T]he Zoning Commission does not have the "purview" to supersede the levels in the maps in exchange for community benefits. In fact, if adopted, this provision would be a radical departure from current law with significant negative consequences, giving the Zoning Commission power it does not currently have. This amendment would enable the unelected Zoning Commission (ZC) to establish its own height and density allowances*

for individual development projects and ignore the Plan's limits adopted by the elected Council. The ZC currently does not have that authority[.]

That might be a logical sentence, if only 226(c) and some other similar sentences weren't in the plan, directly contradicting the above claim by C100.

PUD's are not the only priority here.

Greater Greater Washington would like to restore PUDs to the actual, functioning part of the land use process they used to be. But, we also want to strengthen other elements of the Comp Plan to better provide for the needs of communities.

Build more affordable housing—but allow extra density to pay for it. Protect ALL the tenants, not just a few—but allow extra density to pay for it. And so on.

One of the coalition's priorities directly addresses this:

- **Preserve existing affordable housing**. When redevelopment occurs on properties with housing made affordable through subsidy, covenant, or rent control, the District, Zoning Commission, and neighborhoods should work with landowners to create redevelopment plans that preserve such units or replace any lost ones with similar units either on-site or nearby. These entities should provide the necessary density and/or potential funding to ensure it is financially feasible to reinvest in the property with no net loss of affordable units.

There's a lot of decrepit housing which is "affordable" because it's in bad shape. It needs capital to fix it up, but we don't want to lose the affordability in the process. In order to get financing for such an effort, for-profit developers need to show that they can also provide a return to investors. That requires including more homes to rent or sell on the same footprint of land. In other words, they can use density to cover the cost of preserving affordable housing and creating more.

Right now, the law lets property owners redevelop properties and not keep the existing affordable housing or replace it with similarly-sized units. The coalition supports requiring one for one replacement and for tenants to return... but also "provid[ing] the necessary density and/or potential funding to ensure it is financially feasible to reinvest in the property with no net loss of affordable units." In Greater Greater Washington's opinion, that's the only feasible way to actually get the reinvestment and preserve affordable housing.

We believe the desires of tenant groups and social justice groups and affordable housing groups and even developers can all coexist. They can't, however, if you oppose tall or new

buildings at all costs, believing that taller buildings are a worse problem than people losing their homes, worse then rising rents pricing people out of the city.

How should community groups weigh in?

If you are a community group or ANC commissioner and someone asks you to pass a resolution about "protecting the integrity of the Comp Plan" or something like that, just ask: would this change stop people from living here or staying? Ultimately, that's what it's about: people, not buildings.

A policy statement which asks for protection against displacement and new affordable housing but doesn't offer a way to cover its costs will ultimately not protect people or add affordable housing. The District's Housing Production Trust Fund does pay for some of these efforts, but even $100 million a year or more is a drop in the bucket against the need. Funding plus increased affordable housing from processes like PUDs can do far more.

The PUD process is not perfect. It's too susceptible to the practice of "community benefits" being a little money for an ANC commissioner or a favored ally instead of the real benefits like permanent affordable housing, parks and plazas, and other features of the actual development. And C100 makes some reasonable points that the city could state up front what is allowed, rather than negotiate on a project-by-project basis.

We at Greater Greater Washington don't want the Comp Plan to be ignored; we just want it to prioritize things like producing more homes, adding more affordable homes, and implementing policies that protect tenants and preserve existing affordable housing. We see these needs as worthwhile benefits and support allowing larger buildings to make them possible.

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