

## 4. The Committee's Zoning Recommendations

Of the 20 different “subject areas” that make up DC’s current Zoning Review, there are many that have relevance to the ARTS District. However, the primary purpose of the committee’s work is to review the objectives and the functioning of the current ARTS District regulations and make recommendations on the future zoning of the ARTS District. Thus, the committee’s focus has been the “Arts & Culture” subject area of the Zoning Review and ***this report presents the committee’s zoning recommendations within the framework of the “Arts & Culture” subject area of the current DC Zoning Review.***<sup>7 8</sup>

### 4.1 Arts Districts

#### **Recommendation 1:**

***The ARTS Committee recommends that the new “ARTS zoning template” provisions be applied as a stand-alone “ARTS” zoning district.***

- The ZC’s guidance on Arts Districts instructs OP to create a template of zoning provisions that would apply to existing and future Arts Districts in one of three ways: either the provisions could be applied as a stand-alone district, as a part of individual commercial districts or as an overlay.
- The stand-alone model (e.g. a zoning category of its own for “ARTS” districts like “R-5-B” or “C-3-A” are currently stand-alone zoning district classifications that are used all over the city in appropriate contexts) seems to the committee to be the most conducive to facilitating the necessary accompanying economic development policies to support Arts Districts.
- We note that, if the stand-alone “ARTS” zoning model is adopted, this neighborhood will have to look closely (as the work on the new ARTS template is progressed by OP) at how a range of maximum “zoning envelopes” (e.g. floor area ratio or “FAR”, height, etc) will be defined and applied under that model in an appropriately contextual manner.<sup>9</sup>

#### **Recommendation 2:**

***Alternatively, if the overlay model is retained to designate Arts Districts, the Committee recommends that the existing Uptown ARTS Overlay District be split into two ARTS Overlay Districts (the “14<sup>th</sup> Street Corridor ARTS Overlay District” and the “U Street Corridor ARTS Overlay District”).***

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<sup>7</sup> In particular, section 4 of this report follows the structure of the ZC’s Guidance Note on the “Arts & Culture” subject area, which is reproduced in full in Appendix D. The Committee withholds making recommendations on the “Commercial Corridors” subject area of the Zoning Review until OP has issued its report on that subject area and we have had an opportunity to review OP’s recommendations and assess their impact on the ARTS District. Some of the zoning issues discussed in this report (e.g. bonus density, the “25% limit”, etc) cut across both the “Arts & Culture” and the “Commercial Corridors” subject areas.

<sup>8</sup> The primary documents related to the “Arts & Culture” subject area of the DC Zoning Review can be found online at: <http://www.dczoningupdate.org/artsculture.asp?area=ace>

<sup>9</sup> At present there are 4 different maximum “zoning envelopes” that apply throughout the Uptown ARTS District: those related to the C-2-A, C-2-B, C-3-A and CR zones, in addition to the maximum envelopes specified in the ARTS Overlay regulations.

- One important reason that the existing Uptown ARTS Overlay District has failed to be fully effective is that it is too large. The existing district encompasses very different zoning contexts, building forms, and built environments such as streets and sidewalks.<sup>10</sup>
- In addition, the sheer scale of the current Uptown Overlay (it is much larger, for example, than the current Neighborhood Commercial Overlay districts, which are each quite compact) has been a major deterrent to the ability of cohesive community institutions to emerge to actively support “the Arts District”.
- “One size does not fit all” in the current ARTS District and future customization (whether in the context of a stand-alone model or of an overlay approach where the current Uptown Overlay is split into two overlay corridors) of the zoning regulations governing the area covered by the current ARTS District will be essential.
- It is critical that corridor communities, whether they be on U Street or on 14<sup>th</sup> Street, be empowered in order to instill local “ownership” and advocacy for that part of the broader Arts District. This will strengthen the overall Uptown Arts District by allowing for the possibility for actions to support the arts corridors to occur both in unison across the entire district, as well as separately and targeted at the needs of particular sub-areas.

**Recommendation 3:**

***The Committee recommends that the application of the new ARTS zoning template as part of individual commercial districts not be supported.***

- In the absence of substantial further information and analysis from OP on this option, this model seems to us likely to be completely unworkable. In particular, we are concerned that an insufficiently nuanced and targeted zoning treatment of arts uses would be the likely result of this approach.

**Recommendation 4:**

***The Committee recommends that zoning within ARTS Districts be brought into a measure of basic zoning conformity where necessary.***

- Specifically, it is not appropriate for residential zoning to apply to lots fronting onto major ARTS (and commercial) corridors. In the case of the Uptown ARTS District, a 200-foot long stretch of 14<sup>th</sup> Street (on the east side between Riggs and S Streets, NW) is currently zoned “R-5-B”. This creates an enormous “dead zone” in the heart of the ARTS corridor and is a major obstacle to the development of a cohesive and unified ARTS District streetscape.
- As envisaged by the Comprehensive Plan (see Appendix C) and as part of the current citywide zoning review, these kinds of anomalies should be addressed as necessary through consideration of up-zoning segments of frontage to the appropriate commercial or ARTS zoning category.

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<sup>10</sup> In addition to different underlying zoning along the two streets, 14<sup>th</sup> Street, where the street is 110 feet wide including 20 feet wide sidewalks, provides a very different retail environment to U Street, where the street is 85 feet wide including 14 feet wide sidewalks. Moreover, the building forms are very different, reflecting the different history of the areas, with 14<sup>th</sup> Street being characterized by the large former automobile showrooms, which had maximum street level display frontage, while U Street is mainly characterized by smaller storefront buildings.

- Naturally, existing residential uses at any such sites would be grandfathered and, under DC's current Zoning Regulations, there are well-established procedures for existing property owners to be fully involved in consideration of any property rezoning that affects them.
- However, rezoning would provide the option of either remaining residential or redeveloping in the future with mixed residential/commercial uses, which is a very different proposition from being legally required to remain residentially zoned while neighboring property owners with similar parcels have been granted greater mixed use (residential/commercial) development rights.<sup>11</sup>

**Recommendation 5:**

***The Committee recommends that where undeveloped city-owned parcels that currently have inappropriate uses and/or inappropriate zoning are contiguous to ARTS Districts, these sites should be integrated wherever possible into the ARTS District zone.***

- Again, as a matter of basic zoning conformity, undeveloped city-owned parcels (especially those with inappropriate semi-industrial uses) that are located contiguous to ARTS Districts and currently have anomalous zoning should be incorporated into the ARTS zone, so that future land use and redevelopment of those sites takes place within an appropriate zoning framework.
- In particular, the lot(s) owned by the Department of Parks and Recreation located on the northern side of the 1300 block of S street, NW, are currently zoned "R-5-B" yet they are house a bus parking lot of large size and a commercial building. Given their adjacency to the ARTS District and their current inappropriate zoning, these lots should be re-zoned "ARTS" and incorporated into the ARTS zone.<sup>12 13</sup>

**Recommendation 6:**

***The Committee recommends that the new ARTS zoning template provide for the possibility that the maximum zoning envelope in ARTS Districts be able to be allocated flexibly between residential and commercial uses.***

- Commercial office development can be very important in providing the daytime foot traffic that sustains many daytime retail and ARTS uses. Occupants of commercial buildings need to eat lunch, shop and run errands in the vicinity of their offices.
- The kind of daytime foot traffic that is generated by commercial offices can play a critical role in the sustainability of an ARTS District. In general, many ARTS uses cannot rely on nighttime foot traffic (provided by residential uses and restaurant uses) alone, but in many cases require the daytime foot traffic vitality that is provided by retail and service uses that are open during business hours.

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<sup>11</sup> There is a basic issue here of equality of zoning treatment. It is the view of the Committee that the current residential zoning of, for example, this segment of 14<sup>th</sup> Street is discriminatory in that the affected property owners are being deprived of the same development rights as other similarly situated property owners along the corridor.

<sup>12</sup> This is also an issue of equality of zoning treatment. It is discriminatory to the surrounding property owners to have an inappropriate semi-industrial use located on an R-5-B-zoned site.

<sup>13</sup> With the exceptions of Recommendations 4 and 5, all other recommendations in this report apply only to commercially zoned property.

- In the ARTS Overlay District there are many sites that would be appropriate for the development of “Class B” and “Class C” commercial office space. These uses would support critical daytime foot traffic, which remains in short supply in parts of the current ARTS Overlay, and should not be prevented by the new ARTS zoning template. Otherwise, there is a significant risk that daytime retail and arts uses suffer the double blow of lack of daytime patronage and rising rents associated with restaurant uses.
- In addition, additional flexibility regarding commercial uses would likely make certain smaller-scale sites economically viable for redevelopment that were not previously economically viable for redevelopment as residential uses. This would help to reduce streetscape “dead zones” that currently undermine joining up retail clusters into a viable, cohesive, synergistic and genuinely mixed use (arts, retail, restaurants, residential, office) corridor.<sup>14</sup>
- Moreover, the “livability” of mixed-use areas is increased when floors of office space provide a “buffer” between the ground floor/street level, which can be noisy, and upper floor levels of residential uses.
- Finally, while commercial development may not be appropriate for all ARTS zoned districts, it is likely to be very appropriate in the case of those ARTS Districts that already have an established and substantial residential use component that would not be threatened by adding “Class B” and “Class C” commercial office space to the use mix. Thus, the new ARTS template needs to provide the flexibility to allow this.

**Recommendation 7:**

***The Committee recommends that sites within ARTS Districts that face environmental remediation issues (including title caveats that prevent future redevelopment as residential uses) should have the right to develop the full zoning envelope permitted in that ARTS zone for commercial use.***

- Many districts, including the ARTS Overlay District, have sites such as current and former gasoline service stations that can never be redeveloped for residential use because of environmental remediation problems and associated title caveats. Unless these sites are permitted to use the full zoning envelope for commercial uses, many of them will never be viable for redevelopment, leaving “dead zones” in the ARTS District streetscape.

**Recommendation 8:**

***The Committee recommends that the Zoning Commission be asked to issue a revised “Arts & Culture Guidance Note” with some urgency (i.e. during 2009) so that the further Zoning Review work on the Arts & Culture subject area will reflect the Commission’s consideration of the recommendations contained in this report.***

- Whether a stand-alone “ARTS” zoning category is created or an ARTS overlay approach is retained, the ARTS zoning template (currently under development) will need to be adapted to meet the needs of not just the Downtown ARTS District (which seemed to have been OP’s

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<sup>14</sup> Additional flexibility in this regard has already been demonstrated to be necessary for redevelopment of existing ARTS uses to be viable in some cases. For example, the Lincoln Theatre redevelopment required a text amendment in 2008 to allow a larger commercial use component (relative to residential) in order for the project to go ahead.

focus in 2008) but also the different zoning context and challenges faced by the Uptown ARTS District.<sup>15</sup>

- In order for the significant work of this community on the future zoning of the ARTS District to be taken up as part of the Zoning Review, it is necessary for the Zoning Commission to ask OP to modify the “ARTS zoning template” (currently under development) to reflect the needs of the Uptown ARTS District as identified in the recommendations of this report.

## 4.2 Arts Uses

### **Recommendation 9:**

***The Committee recommends that OP’s draft “Proposed Arts Use List” (PAUL) be revised to remove restaurants and bars from the list of Arts uses and to provide a tiered structure that makes allowance for the varying financial competitiveness of different types of arts uses, along the lines of the Committee’s revised PAUL proposed in Appendix E.***

- In October 2008 OP published a draft PAUL that, relative to the mish-mash of Arts uses currently identified throughout the zoning regulations, unifies and simplifies the list of Arts uses for zoning purposes by grouping these uses by type.<sup>16</sup> The Zoning Commission, in its guidance note (see Appendix D) endorsed OP’s basic approach and instructed OP to continue working on this list, which will in the future be applied in the zoning regulations for all parts of the city that are ultimately identified as Arts Districts.
- The Committee supports the effort to modify the PAUL and to group arts uses into types, since a major problem with the current use lists contained in the ARTS Overlay is that they lack a coherent focus on the Arts by including all kinds of other uses.
- In this regard, OP’s new draft PAUL remains fundamentally flawed in that it continues to include restaurants, bars, nightclubs and the like as “Arts Uses”. While restaurants, bars, nightclubs, etc are important land uses in their own right; there is widespread consensus in this neighborhood that these uses are not **primarily** “arts uses” in character. For this reason the Committee believes that it would be entirely inappropriate for these uses to be defined as “Arts Uses” in the new zoning regulations.
- This is not to say that restaurants, bars, clubs and like uses do not play an important role in partnering with arts uses by providing exhibition space or live performance space free of charge. They often do play a critical partnership role with the arts. This symbiotic relationship (additional

<sup>15</sup> See, for example, page 5, “Remaining Issues” paragraph of Recommendation 1 of OP’s Public Hearing Report for ZC #08-06-4 entitled “Proposed Amendments to Zoning Regulations Governing the Arts”, August 28, 2008, available online at:

<https://www.communicationsmgr.com/projects/1355/docs/Arts%20and%20Culture%20OP%20Report.pdf> , where OP recommends that the Downtown ARTS District be incorporated into a new stand-alone ARTS district, but does not mention the Uptown ARTS District. In addition, the “Arts & Culture” subject area documents scarcely mention the Uptown ARTS District: most if not all of the examples cited relate to the Downtown ARTS District, which is a completely different zoning context to the Uptown Arts area. See the documents available online at: <http://www.dczoningupdate.org/artsculture.asp?area=ace>.

<sup>16</sup> See page 7 of

<https://www.communicationsmgr.com/projects/1355/docs/Arts%20and%20Culture%20OP%20Report.pdf>

foot traffic to the restaurants/bars/clubs etc in exchange for free space) is a win-win relationship for both use groups that occurs naturally now and will continue to occur in the future throughout Arts Districts. However, it neither relies on nor requires incentives via the zoning regulations. Nor does this type of “accessory use” partnership warrant restaurants, bars, and clubs and like uses being redefined as “arts” uses.

- Not only is such a redefinition of restaurants, bars and clubs as “arts uses” not warranted in land use terms, it is severely damaging to arts uses. The experience over the past 20 years with the current Arts Overlay regulations, which group restaurants, bars and nightclubs together with arts uses, demonstrates the failure of this approach.<sup>17</sup> Providing bonus density equally to both highly profitable restaurant and bar uses on the one hand, and to less profitable arts uses on the other hand, has naturally favored those more profitable uses. Within the ARTS Overlay district, restaurant and bar uses have flourished, while arts uses have generally languished or, at least, failed to flourish. It would continue to cause significant damage to the viability of arts uses if non-arts uses such as restaurants are given equal footing in qualifying for “arts” bonuses.
- Furthermore, even after removing non-arts uses such as restaurants from the list, great care still needs to be taken with the PAUL groupings. While many uses can qualify as having an artistic or creative component, there is a fundamental difference between arts uses that are commercially competitive with other land uses (in terms of cash flow and profits) and arts uses that are not-for-profit or lower-profit uses that -- as the Arts & Culture Working Group stated -- *“can almost never compete on a financial level with other more profitable uses”*.<sup>18</sup>
- Thus, the PAUL and the PAUL sub-groupings need to make a clear distinction between financially competitive and financially challenged arts uses, so that --where appropriate-- the latter are able to be specifically referenced for additional zoning incentives in the regulations. As noted in OP’s recommendations *“... sometimes the promotion of a certain group of arts is desired”*.<sup>19</sup> For this reason highly profitable and negligibly profitable arts uses should not be grouped together in the PAUL.
- The PAUL published by OP is missing this key necessary dimension: the ability to focus zoning incentives not just by general category of arts use (e.g. visual arts versus performing arts), but to *“focus benefits on those use groups”*<sup>20</sup> that are at risk of otherwise becoming extinct in some parts of the city as a result of being priced out of arts districts by non-arts uses such as restaurants and even by other more profitable arts uses.
- The Committee’s proposed revised PAUL (see Appendix E) is a first effort at attempting to incorporate this dimension into the arts use list. The Committee’s PAUL excludes restaurants, bars, nightclubs, etc., and introduces a two-tier structure to the PAUL. “Tier 1” arts uses are

<sup>17</sup> See section 1908.1, Chapter 19 (Uptown ARTS Overlay District) of Title 11 of DC Municipal Regulations.

<sup>18</sup> See page 1 of <https://www.communicationsmgr.com/projects/1355/docs/Arts%20and%20Culture%20-%20Meeting%20%20Summary.pdf>

<sup>19</sup> Page 7, paragraph 2, of OP’s Public Hearing Report for ZC #08-06-4 entitled “Proposed Amendments to Zoning Regulations Governing the Arts”, August 28, 2008, available online at: <https://www.communicationsmgr.com/projects/1355/docs/Arts%20and%20Culture%20OP%20Report.pdf>

<sup>20</sup> Ibid, page 9.

those that our review indicated generally struggle to compete financially in this district, while “Tier 2” arts uses are those that are generally more financially competitive.<sup>21</sup>

- As the Office of Planning makes further progress on refining the PAUL approach (preferably along the lines recommended here in Appendix E), the Committee will review and address the issue of the zoning definitions of the preferred arts uses.<sup>22</sup>

### 4.3 Arts Requirement

#### **Recommendation 10:**

***The Committee strongly supports the Zoning Commission’s guidance that new construction in Arts Districts be required to provide a minimum level of a space for Arts uses, but recommends that this requirement be defined in terms of Gross Floor Area (5%) rather than Floor Area Ratio (0.5) and that the requirement be subject to a minimum building-size threshold and extend also to addition & alteration projects in arts districts.***

- The ARTS Overlay District regulations currently provide for optional bonus density of 0.5 FAR to apply to new construction projects and to additions exceeding 75% of a building’s assessed value if these projects include any of the listed arts, restaurant/bar and retail uses.<sup>23</sup> As discussed elsewhere in this report (see sections 4.2 and 4.6), this “optional bonus density” approach has been unsuccessful in promoting arts uses, largely because (1) the bonus FAR was also granted for non-arts uses, and (2) the bonus FAR was too small and/or difficult to utilize without additional bonus height in which to do so.
- OP is currently recommending that developments in Arts Districts be subject to an “arts requirement”. The recommendation to introduce an “arts requirement” within Arts Districts, which has been accepted by the ZC, is also strongly supported by the Committee.
- However, OP’s recommendation is that all new developments within Arts Districts (regardless of the size of those developments) would be required to provide 0.5 FAR for specified arts uses. Thus, a building of 20,000 square feet on a 4,000 square foot lot would be required to provide 2,000 square feet for arts uses, while a 4,000 square foot building on a 4,000 square foot lot would be required to provide the same 2,000 square feet for specified arts uses.<sup>24</sup>
- In the Committee’s view, the arts requirement as currently envisaged by OP and the ZC would be entirely inequitable across property owners and would introduce a prohibitive obstacle to infill and other small redevelopment projects within Arts Districts.

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<sup>21</sup> We believe that this tiered approach is a more flexible and effective model than, for example, the relatively crude approach taken in the existing Downtown ARTS District regulations, where a not-for-profit arts use is entitled to an additional 25% of density bonus in excess of other for-profit arts uses. See section 1704.9, Chapter 17 (Downtown Development Overlay District), Title 11 DC Municipal Regulations.

<sup>22</sup> Given the time constraints under which this review of the ARTS Overlay District has been carried out and the need to set priorities, this issue of the zoning definitions of arts uses was viewed as being not a critical priority that needed to be addressed by the Committee at this stage of the Zoning Review.

<sup>23</sup> See section 1904.1, Chapter 19 (Uptown ARTS Overlay District) of Title 11 of DC Municipal Regulations.

<sup>24</sup> The Committee checked with OP that this is the correct interpretation of their proposed arts requirement.

- For these reasons the Committee is convinced that, while an “arts requirement” within Arts Districts is a vital zoning tool, such a requirement must be based on gross floor area (“GFA”) rather than FAR, in order not to discriminate against small developments. In addition, because the cash-flow burden of an arts requirement on small developments with limited commercial frontage (and already heavy relative proportions of square footage that must be allocated to core building functions), the arts requirement should be subject to a minimum building-size threshold of around 10,000 square feet.
- Under the Committee’s proposed arts requirement (5% of GFA), a building of 20,000 square feet on a 4,000 square feet lot would be required to provide 1,000 square feet for arts uses, while a 4,000 square feet building on a 4,000 square feet lot would be exempt from any arts requirement.
- The requirement for 5% of GFA to be provided for arts uses in new construction and substantial redevelopment projects in Arts Districts (above a minimum size of around 10,000 square feet) is the single most important factor that will result in at least a minimum amount of space being set aside in Arts Districts for arts uses. In the Committee’s view, it is absolutely critical that OP and the ZC carry forward a minimum Arts Requirement based on GFA into the new zoning regulations.
- However, again, this requirement will not serve any useful purpose in promoting and preserving arts uses in Arts Districts if restaurants, bars and nightclubs are defined as “arts uses” for the purposes of fulfilling this arts requirement (see section 4.2 above). In that case, restaurant and bar uses will crowd out arts uses in being chosen as the uses to fulfill this requirement, as they are more profitable and can pay higher rents than virtually all true “arts uses”.
- Thus, it is critical that this “arts requirement” only be able to be fulfilled by arts uses such as those listed in the Committee’s proposed revised PAUL in Appendix E.
- Moreover, it is very important that no “buy-out” possibility exist for this arts requirement. The Committee does not support any provision along the lines of an “Arts Proffer Condition” where, in lieu of providing 5% of GFA to an arts use, a developer could provide a contribution to an arts fund. This approach would not be appropriate because it undermines the fundamental purpose of land use zoning in Arts Districts to preserve and set aside a minimum amount of space in these districts for arts uses.
- However, one completely “optional” variation on the Arts Requirement that the Committee does support is the possibility of **halving the minimum arts requirement to 2.5% of gross floor area IF (and only if) the floor area allocated to the arts use is ground floor frontage space**. This option of halving the 5% GFA requirement would probably need to be subject to a minimum floor amount of square footage below which the requirement could not be reduced any further (e.g. a minimum GFA allocated to the arts use of, say, 500 square feet).<sup>25</sup>
- It is also very important that appropriate procedures be put in place for legally recording (via deed restriction or similar) the sites to which the minimum arts requirement applies and thus

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<sup>25</sup> For example, among the smallest known arts venues currently in existence in the ARTS District today is “Transformer Gallery” near the southwest corner of 14<sup>th</sup> and P Streets, which comprises approximately 500 square feet of gross floor area. It is difficult to envisage an arts use being able to be effective in a space smaller than this.

occupancy of that space is limited to arts uses, so that these provisions can be properly monitored and enforced by the Zoning Administrator's office. For purposes of transparency, there should be a log of the properties to which this arts requirement applies, which can be easily accessed and monitored by the public (e.g. on the Zoning Administrator's website).<sup>26</sup>

#### 4.4 Non-Arts Uses

##### **Recommendation 11:**

***The Committee recommends that the zoning tool of limiting the maximum streetscape frontage on primary corridors that may be occupied by eating and drinking uses be retained in the new ARTS zoning template, albeit with significant modifications (as discussed below) to modernize this provision, and that priority be accorded to submission of a text amendment to enable the enforcement of an updated eating and drinking uses limitation in the ARTS Overlay District to begin by early 2010.***

- The existing ARTS Overlay zoning regulations contain a provision limiting eating and drinking uses on 14<sup>th</sup> and U Streets to a maximum of 25% of the street frontage.<sup>27</sup> This regulation has never been enforced by the DC Zoning Administrator within the ARTS Overlay District because of ambiguities regarding the appropriate measurement of linear frontage under this provision.
- A measurement carried out by a neighborhood association in mid-August 2009 suggests that eating and drinking uses either currently occupy or will soon occupy around 29% of the total relevant frontage on 14<sup>th</sup> and U Streets.<sup>28</sup> However, there is a very large range around this overall total figure for 14<sup>th</sup> and U streets: for example, one block has around 90% of frontage occupied by eating and drinking uses, while other blocks have zero percent of frontage occupied by these uses.
- While the current limitation provision was badly written, its original purpose of preserving the vibrancy of the daytime streetscape (by limiting the proportion of uses that may be closed during the day) remains valid. Without a limitation of this kind, there is a significant risk that restaurant and bar uses crowd out retail and other uses at the streetscape level and harm the daytime street activity, which is critical for a balanced mixed-use (arts/retail/restaurant) environment to survive and thrive. This theoretical risk has already become a reality in a few spots within the ARTS Overlay District (see Appendix F).
- However, restaurants and bars are an important ingredient in having a vibrant ARTS District: they contribute foot traffic to the arts and retail uses, and play an important role in achieving a vibrant and safe nighttime street environment.
- In addition, how people shop has changed over the 20 years since the ARTS Overlay was introduced, with some retail uses now relying increasingly on Internet sales rather than simply on-site business in retail stores.

<sup>26</sup> This suggestion of creating an easily accessible, publicly available log of properties to which deed encumbrances apply also extends to other recommendations in this report that would result in title caveats (e.g. section 4.6 below regarding bonus density and height for arts uses).

<sup>27</sup> See section 1901.6, Chapter 19 (Uptown ARTS Overlay District) of Title 11 of DC Municipal Regulations.

<sup>28</sup> See the table contained in Appendix F.

- For these reasons the Committee believes that it is now overkill to reserve 75% of the frontage on 14<sup>th</sup> and U streets for non-restaurant and bar uses. A substantial level of community consensus emerged during this review that a level of 40-50% is the appropriate maximum frontage that should be occupied by restaurants, bars and similar uses on the 14<sup>th</sup> and U Street corridors within the ARTS District.
- However, with this expansion in allowable restaurant/bar frontage to 40-50% along 14<sup>th</sup> and U streets, it would be inappropriate for a special exception procedure to be able to take this level above 50%. It is the Committee's strong view that the level of 50% should be viewed as an absolute maximum, above which increases in restaurant/bar frontage should not be permitted.<sup>29</sup>
- Moreover, this expansion in the frontage limitation on eating and drinking establishments could only be contemplated by the community in the context of the removal of restaurants, bars and similar uses from the list of preferred arts uses (PAUL), as recommended in section 4.2 of this report.
- The Committee examined in detail the four measurement options identified by OP for this provision, and discussed these options with the community.<sup>30</sup> Overwhelmingly, the option supported was OP's "Option 1" which retains linear frontage as the unit of measurement. Linear frontage is the measurement option that most closely corresponds with the purpose of this provision.
- In addition, it is essential that the area over which this provision is to be calculated be clarified. In the Committee's view, the most appropriate area over which this provision should be calculated is the linear frontage of these establishments per (zoning) "square" as defined in the current zoning regulations.<sup>31</sup> This approach would have the significant advantages of:
  - (1) Being easily able to be tracked and monitored by the Zoning Administrator (since the zoning square is a basic part of each lot's identifying address);
  - (2) Spreading the benefits (and burdens) of restaurants, bars and like uses much more evenly and fairly throughout the ARTS District; and,
  - (3) Almost certainly avoiding any situation of a de-facto moratorium on these uses arising within Arts Districts since, while one zoning square may have reached its limit, other zoning squares elsewhere in the district would almost certainly continue to have room under the limit to be able to accommodate eating and drinking establishments.
- Regarding the definition of eating and drinking establishments for the purpose of this provision, the Committee favors retaining the existing definition passed by the Zoning Commission in

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<sup>29</sup> While it may be appropriate to consider some mechanism for allowing *de minimus* increases above 50% to be permitted in individual cases, perhaps via the more stringent requirements of a variance procedure, in general the zoning regulations in Arts Districts should establish the 50% level of frontage as the absolute maximum level able to be occupied by restaurants, bars and similar uses.

<sup>30</sup> See page 1 of <https://www.communicationsmgr.com/projects/1355/docs/CA%20-%20Meeting%20%20-%20Presentation%20Boards.pdf>

<sup>31</sup> See section 199.1, Chapter 1 (The Zoning Regulations), Title 11, DC Municipal Regulations: a square is defined as "land designated as a square on the records of the Surveyor of the District of Columbia." A very rough approximation would be that using each square as the measurement area would mean applying this provision more or less block by block.

2006, provided that definition excludes establishments where no eating or drinking occurs on the premises.<sup>32</sup>

- In addition, the measurement issue that has arisen with this provision in some Neighborhood Commercial Overlay Districts (such as Cleveland Park), regarding eating and drinking zoning being a property right that remains with the property owner (after the eating or drinking use has vacated the premises) until the building's use changes when a non-eating/drinking use moves in, needs to be addressed. One solution may be to limit the grandfathering of the entitlement to an eating/drinking establishment at the property to, say, six months, after which the entitlement would expire if another such use had not applied for appropriate building and liquor licensing permits at that property.
- ***Given the current influx of eating and drinking uses into the ARTS District,<sup>33</sup> a text amendment that modernizes the current limitation along the above lines is urgently needed*** so that enforcement of this provision by the Zoning Administrator can begin in the ARTS District in early 2010, before the frontage in some parts of this district risks becoming even more over-weight with these uses.
- Finally, on a separate issue, it should be noted that if the stand-alone "ARTS" zoning model is the approach adopted (as we recommend in section 4.1), it would be necessary to review whether there are particular non-arts uses (e.g. industrial uses, semi-industrial uses, other non-arts uses) that would be inappropriate in ARTS zone districts and should not be permitted at all.

#### 4.5 Combined Lot Development/Transfer of Development Rights

##### **Recommendation 12:**

***The Committee recommends that the proposed flexibility regarding transfer of PAUL requirements and earned bonus rights should be supported, provided that (as envisaged in OP's August 2008 recommendations) this transfer flexibility only applies within the same Arts District.***

- The Zoning Commission's October 2008 guidance note on the Arts & Culture subject area provides for flexibility to be allowed in "... *the location of Arts uses and density in the Arts district through combined lot developments (CLDs) or transfer of development rights (TDRs), or other methods. Both Arts requirements and bonus density could be traded between properties.*"<sup>34</sup>
- Given the critical role that will be played by the 5% GFA Arts Requirement in reserving space for arts uses in individual Arts Districts, it would be entirely inappropriate for this requirement to be able to be traded away to sites outside that particular Arts District. Thus,

<sup>32</sup> See DC Register, February 17, 2006, Zoning Commission Case No. 02-06, which defines eating and drinking establishments as either (1) establishments with CR, DR, CT, DT, CN or DN alcoholic beverage licenses, or (2) establishments that are required to obtain a Basic Business License with a Public Health Food Establishment Restaurant Endorsement.

<sup>33</sup> Over the past two months or so around 20 new openings of, or applications to open, eating and drinking uses have occurred within the ARTS District.

<sup>34</sup> See Appendix D.

flexibility to transfer this requirement should only apply within the same arts district (as envisaged in OP's August 2008 recommendation).

- In addition, given the important role played by the Greater 14<sup>th</sup> Street Historic District and the Greater U Street Historic District in determining the appropriate mass of new construction within the ARTS Overlay District, the possibilities for trading earned bonus rights – even within the same arts district -- may in practice be somewhat constrained.<sup>35</sup>

#### 4.6 Bonus Density & Height for PAUL Uses

##### **Recommendation 13:**

***The Committee recommends that the new arts template provide a 2 to 1 bonus density for Tier 2 PAUL uses, and a 3 to 1 bonus density for Tier 1 PAUL uses (based on the proposed revised PAUL contained in Appendix E of this report).***

- The current ARTS Overlay regulations provide bonus density of 3 to 1 for theatre uses and 2 to 1 for arts uses (including restaurants, bars and nightclubs).<sup>36</sup> There is simply no information that the Committee is aware of that would suggest that the 2008 proposals of OP and the ZC to offer 1 to 1 bonus density for PAUL uses would be in any way effective in incenting arts uses in arts districts. Even the existing 3 to 1 bonus density provision that applies to theatre uses has never been utilized in the 20-year history of the Uptown ARTS Overlay District regulations.<sup>37</sup>
- OP's Arts & Culture Working Group noted, "...Arts uses can almost never compete on a financial level with other more profitable uses"<sup>38</sup>. To achieve meaningful results regarding the objective of the Comprehensive Plan ("... to make it more affordable for artists to practice their craft ...")<sup>39</sup>, then it is necessary to offer bonus densities of greater than 1 to 1 because arts uses are less profitable and cannot pay the same rents as other uses, so 1 for 1 density bonuses simply do not provide a sufficient incentive for developers.
- To have any chance of being effective, bonus density of 3 to 1 needs to be offered to the least financially competitive arts uses (Tier 1 of the proposed revised PAUL contained in Appendix E), and 2 to 1 to other arts uses (Tier 2 of the proposed revised PAUL contained in Appendix E).
- Given the importance of retail uses to arts districts, and the fact that retail uses in many cases also struggle to compete financially with restaurant/bar uses in the ARTS Overlay District, these

<sup>35</sup> See Appendix C for further information regarding the Greater 14<sup>th</sup> Street and Greater U Street Historic Districts.

<sup>36</sup> See section 1904.2, Chapter 19 (Uptown ARTS Overlay District) of Title 11 of DC Municipal Regulations.

<sup>37</sup> The only new construction of theatre square footage in the ARTS Overlay District since its inception was the 2001 expansion of Studio Theatre on 14<sup>th</sup> Street. In the case of this project, the 3 to 1 bonus density was not utilized.

<sup>38</sup> See page 1 of: <https://www.communicationsmgr.com/projects/1355/docs/Arts%20and%20Culture%20-%20Meeting%20Summary.pdf>

<sup>39</sup> See section II ("Arts & Culture Subject Area Process") of OP's Public Hearing Report for ZC #08-06-4 entitled "Proposed Amendments to Zoning Regulations Governing the Arts", August 28, 2008, available online at: <https://www.communicationsmgr.com/projects/1355/docs/Arts%20and%20Culture%20OP%20Report.pdf>

uses should continue to qualify for bonus density within Arts Districts, but it must necessarily be at a lower level than that applying to arts uses (otherwise the more financially competitive retail uses will compete directly with the less financially competitive arts uses for bonus density occupancies, to the ultimate detriment of the objective of retaining arts uses in Arts Districts).<sup>40</sup>

**Recommendation 14:**

***The Committee recommends that the new Arts template provide for the possibility that the bonus density described above for Tier 1 and Tier 2 PAUL uses be available, under certain highly circumscribed conditions (as described below), up to a maximum of one additional storey in height (10 feet) within Arts Districts.***

- The efficacy of bonus density as a zoning tool--without provision for bonus height to accommodate that density—has proven to be extremely limited in areas (like the ARTS Overlay District) that are historic districts and thus subject to Historic Preservation Guidelines.<sup>41</sup>
- The protection afforded to the existing historic structures that is provided by the Historic District Guidelines is important and highly valued across both the residential and business communities in the ARTS District.
- However, the Historic Preservation Review Board (HPRB) also pays close attention to the maximum height and density envelopes specified by the zoning regulations governing these areas and attempts, to the extent possible and where appropriate, to accommodate the indicated zoning envelope.
- Therefore, it is important that the zoning regulations signal to the HPRB that, in those limited number of situations where additional height and density could appropriately be accommodated, while retaining the historic fabric and character of a neighborhood, in order to achieve important land use goals such as incenting the retention of (PAUL) arts uses in Arts Districts, such opportunities may be considered by HPRB on a case-by-case basis.
- It is possible to conceive of single or combined lot developments within the current boundaries of the ARTS District where existing conditions (e.g. the absence of contributing historic buildings and/or other special factors) may allow for an additional 10 feet in height (e.g. 1 additional storey) to be accommodated appropriately without significant impact on the historic character of the area.
- This possibility for additional height flexibility to accommodate bonus density for arts uses should be subject to some very significant controls. As described below, this bonus height flexibility:
  - ❖ Should not be an entitlement, but rather a special exception procedure that would require a public hearing;

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<sup>40</sup> One approach would be for the new Arts template to provide a bonus density in arts districts of 1 to 1 for retail uses, and zero for restaurant/bar type uses (which simply do not require incenting in arts districts). Given the time constraints under which this review of the ARTS Overlay District has been carried out and the need to focus as directly as possible on arts-related issues at this stage, the question of defining a list of retail uses that might qualify for bonus density in arts districts has been set aside at present for future review.

<sup>41</sup>All references to height in this report are to the height of buildings *excluding* roof structures.

- ❖ Should be subject to the “45 degree line provision” that requires that height be setback and stepped down for light and air purposes in situations where the lot in question abuts either a residence zone or an alley that serves as the zone district boundary line with an adjacent residence zone.<sup>42</sup>
  - ❖ Should be explicitly subject in the zoning regulations to the requirement that the additional height allowance (or some part thereof) be judged by the HPRB to be acceptable within the context of that part of the applicable Historic District.
- Bonus density without bonus height to accommodate that density simply does not work effectively: if no bonus height is offered, bonus density is severely weakened as a zoning tool to incent desired uses.<sup>43</sup>
  - The option of using bonus height (in a highly constrained way) to incent a narrowly targeted list of preferred arts uses, while not completely uncontroversial, has elicited broad support across a wide variety of participants in this Review.<sup>44</sup> There is considerable understanding throughout the ARTS District that the experience of the past 20 years indicates that, in order to achieve the important goals of Arts Districts, a much more targeted and serious effort is required to effectively incent the retention of arts uses. Otherwise, many of these uses will be lost over time. Meaningful incentives are necessary if we wish to retain arts uses in Arts Districts.
  - Moreover, there is no basis to fear that highly circumscribed height flexibility (of the kind outlined above) would result in ‘doomsday scenarios’ such as the ‘canyonization’ of the district. For example, the ARTS District has had –in the C-3-A zone that applies to virtually the entire 14<sup>th</sup> street corridor-- a 75 feet maximum height limit for almost 20 years, the past 10 of which have seen probably the biggest property price boom in a generation. Yet the average building height on this part of the 14<sup>th</sup> Street corridor remains in the order of 3 storeys. The probability of the highly circumscribed height flexibility described above resulting in canyonization is approximately zero.
  - After taking into account the necessary setbacks from residence zones and from existing contributing buildings, some sites in the ARTS District may be able to accommodate (without harm to historic character) an additional “storey” that in fact has a highly reduced footprint relative to lower floors. A very, very few sites within the ARTS District may be able to accommodate (without harm) an extra floor that has something approaching a medium to full-

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<sup>42</sup> See, for example, the current 45 degree line provision contained in the ARTS Overlay regulations: section 1902.1(b), Chapter 19 (Uptown ARTS Overlay District) of Title 11 of DC Municipal Regulations.

<sup>43</sup> Note also that this approach of offering bonus height alongside bonus density was also recently judged to be necessary in many districts in the Inclusionary Zoning regulations in order to have a realistic possibility of achieving the goal of providing effective incentives for affordable housing. See Appendix C for more information regarding Inclusionary Zoning.

<sup>44</sup> In contrast, the Committee has encountered no enthusiasm for adjusting, for example, lot occupancy standards, rear yard standards or side yard standards in order to accommodate bonus density. Adjustment of these zoning tools is viewed as potentially having more serious adverse consequences for neighboring property owners (than bonus height), as well as being significantly more complex to achieve in a way that is fair across the wide variety of unique situations that can exist at ground level in a dense mixed use urban context like the ARTS District. When OP issues its recommendations on these (and other) areas as part of the Zoning Review of the Commercial Corridors subject area, it will be important for this neighborhood to examine those proposals carefully for their impact on the ARTS District.

size footprint. The vast majority of sites will not be able to meet the conditions necessary to accommodate bonus height.

- Finally, the bonus density and height described above for PAUL uses should apply to only those new construction and addition/alteration projects that also meet the Arts Requirement.

#### 4.7 Design & Use Requirements

##### **Recommendation 15:**

***The Committee recommends that the zoning tool of requiring a minimum ground floor retail component on primary corridors in the ARTS District be retained and, subject to necessary minima for entry areas, etc., expanded from 50% to around 75%.***

- The existing minimum ground floor retail requirement is an important tool for achieving a vibrant daytime streetscape and must be retained in the ARTS District.<sup>45</sup> However, a development that provided only the bare minimum 50% ground floor retail component would not be an acceptable use of street frontage on the primary corridors in Arts Districts.
- Given the importance of retail to a vibrant Arts District, the minimum ground floor retail requirement should be increased to around 75% (or potentially even higher) in Arts Districts, subject to appropriate amounts of frontage remaining available for entrance foyers, and subject to a special exception procedure that would allow variation from the higher requirement for sites where it would be difficult to meet the new higher minimum.<sup>46</sup>

##### **Recommendation 16:**

***The Committee recommends that restaurants, bars and like uses be excluded from fulfilling more than 50% of the 75% minimum ground floor retail requirement, for sites above a certain minimum width in Arts Districts.***

- Given the important role of retail uses in supporting daytime foot traffic in Arts Districts, and the fact that retail uses struggle to compete financially with restaurant/bar uses in terms of the rents that they are able to pay, it is important that some portion of new construction ground floor retail space remain within reach of retail uses in Arts Districts.
- It is a reality that, at present in the ARTS District, restaurant and bar uses are pricing retail uses and other service uses out of the market for ground floor occupancy. The goal of restricting new construction developments above a certain size from allocating most if not all of their ground floor space to restaurant and bar uses is to create at least some ground floor space that these uses would not be eligible to compete for. This limitation would result in rental levels for a portion of new construction ground floor space not rising as rapidly as they otherwise would, which would be a potentially very important tool in the ability of Arts Districts to retain the vibrant retail component that is necessary for arts uses to survive and thrive.
- Since this limitation would only apply, essentially, to combined lot developments above a certain minimum width (say, 60 feet), it is important to note that the vast majority of current ground floor space available in the ARTS Overlay District would be exempt from this limitation.

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<sup>45</sup> See section 1901.1, Chapter 19 (Uptown ARTS Overlay District), Title 11, DC Municipal Regulations.

<sup>46</sup> Higher minimum ground floor retail requirements apply within other zoning districts in DC.

**Recommendation 17:**

***The Committee recommends that a zoning tool be considered for the new ARTS zoning template to allow limitations to be placed on ground floor uses (such as banks and pharmacies) on primary corridors that do not contribute to a vibrant streetscape within Arts Districts, and that priority be accorded to submission of a text amendment to bring this tool into effect.***

- Uses such as pharmacies, banks, loan offices and other financial institutions that do not contribute to a vibrant streetscape on primary corridors, either during the day or at night, are already subject to limitations in some other districts in DC.<sup>47</sup>
- In addition, the Zoning Commission's Guidance Note on the "Retail Strategies" subject area of the Zoning Review identifies ground floor occupancy limits for uses that are inconsistent with a vital streetscape as an appropriate zoning tool to be carried forward into the rewrite of the zoning regulations for retail areas.<sup>48</sup>
- Limitations on these uses must also be a tool available within the new zoning template for Arts Districts. Moreover, the extent of the current problem of streetscape "dead zones" in the ARTS District is such that an urgent text amendment is required to prevent any further impairment of the streetscape by such uses in the very short term. The introduction of any further retail dead zones in the present environment would likely be a near-mortal blow for retail uses in some parts of the ARTS District.
- A somewhat different example of a ground floor occupancy that creates a dead zone is the Verizon Telephone Exchange building located on the northwest corner of 14<sup>th</sup> and R Streets. At present this use is grandfathered in the zoning regulations and may be rebuilt without complying with the zoning requirements of the Overlay regulations.<sup>49</sup> Such a redevelopment of this site without regard for the surrounding ARTS District would be entirely inappropriate and this provision should not be incorporated in the new zoning template for Arts Districts or elsewhere in the new zoning regulations.
- In addition, OP should work with Verizon to seek to bring the ground floor of the existing exchange building into compliance with the ground floor retail requirement in the ARTS District.<sup>50</sup>

**Recommendation 18:**

***The Committee recommends that the new ARTS zoning template explicitly require new construction developments in Arts districts to be consistent with DC Department of Transportation (DDOT) Streetscape Plans in those districts, including a requirement for Planned Unit Developments (PUDs) to specifically recognize DDOT Streetscape Plan provisions as a mandatory amenity in arts districts.***

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<sup>47</sup> For example, in the Downtown Overlay District: see section 1703.3(b), Chapter 17, Title 11, DCMR.

<sup>48</sup> See page 2 of: <https://www.communicationsmgr.com/projects/1355/docs/Retail%20ZC%20guidance.pdf>

<sup>49</sup> See section 1906.2, Chapter 19 (Uptown ARTS Overlay District), Title 11, DC Municipal Regulations.

<sup>50</sup> FCC regulations now require switching equipment to be located at a secure remove from ground floor locations, and there are other Verizon facilities in DC that contain switching equipment on upper floors in conjunction with retail and other services on the ground floor.

- The streetscape is critical to the success of Arts districts and the need for new development including PUDs to be consistent with DDOT streetscape plans is simply a basic land use issue that should be made explicit in the new ARTS zoning template.

#### 4.8 Ceiling Height

**Recommendation 19:**

***The Committee recommends support for the Zoning Commission's Guidance that a minimum (finished) ground floor ceiling height of 14 feet be required in Arts Districts, and recommends that ground floor ceiling heights in Arts Districts in excess of 14 feet be able to qualify (under highly circumscribed conditions) for a 1 to 1 bonus (building) height incentive up to a maximum of 4 feet.***

- Generous ground floor ceiling heights in Arts Districts are important in order to maximize the possibility for such space to be occupied by arts uses. They are also highly desired by retail occupancies. Finally, many of the historic buildings within the ARTS District were originally built with generous ground floor ceiling heights (e.g. the automobile showrooms) and it contributes to the overall harmony of the streetscape if in-fill development is also able to accommodate a generous ground floor ceiling height.
- The Committee proposes that, for example, if a development provided a minimum ground floor ceiling height of 15 feet instead of 14 feet, it may qualify for an additional 1 foot of building height, so as to ensure that the height of the upper floor levels was not compressed by the additional ground floor ceiling height.
- This 1 to 1 bonus (building) height incentive in respect of higher ground floor ceilings would only be available under the same tightly circumscribed conditions that were described in section 4.6 above, namely subject to: a special exception procedure, the 45 degree line provision, and the approval of the HPRB. This bonus building height incentive should also only be available up to a maximum ground floor ceiling height of 18 feet, and would not be in addition to the bonus height described in section 4.6, but would be one possible utilization of that flexibility.

#### 4.9 Arts Exhibition Areas

**Recommendation 20:**

***The Committee recommends that building lobby exhibition areas should not count towards the 0.5 FAR Arts Requirement.***

- The Zoning Commission's Guidance Note recommends that the contribution of building lobby exhibition areas toward meeting the Arts Requirement be limited to 5% of the requirement in Arts Districts.
- The Committee sees no reason why lobby exhibition areas, which are almost universally not open to the public, should count at all towards fulfilling the Arts Requirement. The Arts Requirement is far too important to Arts Districts for any of that already minimal requirement to be frittered away on private lobby spaces that simply do not contribute to the vibrancy of those districts.

#### 4.10 Arts Uses in Residential Zones

**Recommendation 21:**

***The Committee recommends that the Zoning Commission's Guidance -- that stand-alone arts uses be permitted as a special exception in existing buildings (such as former schools) in residential districts -- be supported.***

#### 4.11 Arts Home Occupations

**Recommendation 22:**

***The Committee recommends that the Zoning Commission's Guidance -- that artist's studios (and related arts uses that can meet home occupation standards) be permitted as home occupations -- be supported.***

#### 4.12 Artist Live-Work Space

**Recommendation 23:**

***The Committee recommends that the Zoning Commission's Guidance -- that artist live/work space (i.e. multiple artists apartments sharing communal workspace) be permitted in residential zones at the same density as other residential units (i.e. a zone allowing two units would allow two artist apartments) -- be supported.***

#### 4.13 Temporary Arts Uses

**Recommendation 24:**

***The Committee recommends that consideration be given in the new ARTS zoning template to creating a "temporary arts" land use designation (and associated procedures) that could be used to facilitate the use of vacant space in Arts Districts for time-limited temporary arts exhibitions and installations.***

- The ability to undertake temporary arts uses in otherwise vacant space would be extremely helpful to arts districts. It would seem possible for a way to be found to facilitate or incent such uses, while at the same time balancing the need for minimum procedures to be followed and safety provisions to be fully met.

#### 4.14 Zoning Compliance Resources

**Recommendation 25:**

***The Committee recommends that, as part of the current Zoning Review, the Office of Planning -- with the participation of independent experts -- undertake a (public) assessment of the minimum level of compliance resources needed in the DC Zoning Administrator's office to effectively monitor and enforce DC's Zoning Regulations.***

- An important element of any comprehensive zoning review, such as the one presently being undertaken by DC, should be to achieve maximum "buy-in" to the zoning regime by all affected parties.

- However, there is an enormous amount of skepticism (even cynicism) throughout the community, which has built up over many years, regarding zoning enforcement and compliance in DC. This situation is ultimately unhelpful to an effective zoning regime and needs to be seriously addressed within the framework of the current zoning review.
- Greater transparency regarding the level of resources necessary in the Zoning Administrator's office to enforce compliance with the zoning regulations, together with a commitment that adequate compliance resourcing will be one of the issues addressed as part of this Zoning Review, are two measures that would likely go a significant way to reducing community skepticism and increasing the willingness of parts of the community to embrace changes to the zoning regulations.
- At present (accurately or inaccurately) the widespread belief exists that the level of compliance resources in the Zoning Administrator's office is totally inadequate.