

TO THE COMMISSIONERS

RE: Structures above the zoning height limits, but equal to or below the height limits set by the Act of June 1, 1910, as amended. (CCC: 799.1 - Structures above the zoning height limits).

REPORT:

Mr. J. J. Illgenfritz, Deputy Director of the Department of Licenses and Inspections, by memorandum dated April 28, 1955, requested the opinion of this office relative to structures above the zoning height limits. The precise question is: Whether, in a specific height district, the approval of the Commissioners is required for a permit for the erection of a spire, tower or penthouse on a building in such district whose height, including the spire, tower or penthouse, will be equal to or less than the maximum height established for buildings in such district by the Act of June 1, 1910 (36 Stat. 452) as amended (Sec. 5-401 thru 409, D. C. Code, 1951 ed.) where the zoning regulations have reduced the permitted height of buildings in such district to a maximum equal to the height of the building alone now standing therein.

I am informed that the question arises from the case involving a building located on Calvert Street, N. W. opposite the Shoreham Hotel. This building was erected a number of years ago, and it is now contemplated erecting an elevator shaft on its roof to connect with a bridge to be built between this building and a recently completed addition to the Sheraton Park Hotel. Under the Act of June 1, 1910, the building in question could have been constructed to a height of 90 feet. However, it was constructed only to a height of 40 feet. Under present zoning regulations no building may be constructed to a height in excess of 40 feet in the height district in which this building is located; however, the combined heights of the contemplated elevator shaft and the existing building will not exceed the 90-foot height allowable under the Act of 1910.

Mr. Illgenfritz, in his memorandum, has stated that heretofore it has been the policy of the Department of Licenses and Inspections to require special Commissioners' approval for spires, towers, penthouses, etc., which are above the zoning heights but equal to or below the maximum heights of buildings authorized by the Act of 1910. Mr. Illgenfritz concludes his memorandum by stating:

"It is my opinion that this procedure has been in error and that both the Act of 1910 and the Zoning Regulations, give as a matter of right, the authority to construct a spire, tower, penthouse, etc., up to a height equal to that established by the Act of 1910, even though such height may be greater than the zoning height limit.
* * *

Section 5 of the Act of June 1, 1910 (36 Stat. 454; Section 5-405, D. C. Code, 1951 ed.), provides in part that:

"Sec. 5. * * * * *

"Spires, towers, domes, minarets, pinnacles, penthouses over elevator shafts, ventilation shafts, chimneys, smoke stacks, and fire-sprinkler tanks may be erected to a greater height than any limit prescribed in this Act when and as the same may be approved by the Commissioners of the District of Columbia: * * *,"

The quoted provision of Section 5, supra, is dependent, in its application, upon the preceding paragraphs of Section 5 of such Act which prescribe the maximum building heights in various parts of the District of Columbia.

Section 12 of the Zoning Act of 1938 (Act of June 20, 1938, 52 Stat. 797; Section 5-424, D. C. Code, 1951 ed.) provides in part as follows:

"Wherever the regulations made under the authority of this Act require a greater width or size of yards, courts, or other open spaces, or require a lower height of buildings or smaller number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in or under any other statute or municipal regulations, the regulations made under authority of this Act shall govern. * * *" (Underscoring supplied)

Congress in enacting the Zoning Act of 1938, recognized that there would be instances wherein the Zoning Regulations promulgated pursuant to such Act would prescribe, for the same areas, lower maximum building heights than those contained in the Act of 1910, and therefore resolved any possible conflict by enacting the above-quoted section 12.

Section VIII of the Zoning Regulations divides the District of Columbia into four height districts, namely, 40, 60, 90, and 110 foot districts, which are shown on the map designated as the "height map" located in the offices of the Zoning Commission.

Section IX of the Zoning Regulations provides as follows:

"In the district designated as the 40-foot district on the 'height map' no building shall exceed 40 feet in height, or three stories in height."

The building in the specific case referred to is located in a 40-foot height district.

Section XIII of the Zoning Regulations provides in part as follows:

"The foregoing requirements in the height district shall be subject to the following exceptions and regulations:

"1. The provisions of the Act of June 1, 1920, as to spires, towers, domes, pinnacles, penthouses over elevator shafts, ventilation shafts, chimneys, smoke stacks, and fire-sprinkler tanks shall continue in full force and effect, except that on buildings hereafter erected the Commissioners of the District of Columbia shall not approve the construction of fire-sprinkler tanks, water towers, or housing for air conditioning equipment to a height in excess of 130 feet measured from the level of the curb opposite the middle of the front of the building. Fire sprinkler tanks, water towers, or housing for air conditioning equipment may be erected or enlarged on buildings existing prior to December 1, 1944, as provided under Section XIII of these regulations. (As amended Dec. 1, 1944 and Feb. 25, 1943.)"

It is clear that by virtue of Section 12 of the Zoning Act of 1933 the building heights established by Section VIII of the Zoning Regulations supersede the building heights established by the Act of 1920 in all cases where the regulations prescribe a lower height than those contained in the Act of 1920 for the same areas. It is also clear by the quoted portion of Section 5 of the 1920 Act that whether the Commissioners' approval for the erection of a spire, etc., was required under the 1920 Act was dependent upon whether the combined height of the building and spire, etc., exceeded the maximum building height allowable under the 1920 Act for the particular area.

To reach the conclusion that the Commissioners' approval for the erection of a spire, etc., is necessary only where the combined height of the building and spire, etc., exceeds the 1920 heights, it would be necessary to hold that, although the Zoning Regulations establish a lower building height than the 1920 Act and supersede the height limits of the 1920 Act, still, when a spire, etc., is to be erected on a building in a height district governed by the Zoning Regulations, the 1920 building heights supersede the lower heights established by the Zoning Regulations and are to be applied in determining whether the Commissioners' approval is required under Section 5 of the Act of 1920.

Under such a holding anyone could, as a matter of right, erect a 50-foot spire, etc., atop any building in a 40-foot district without the approval of any public official if the building were located in an area where the 1920 Act prescribed a 40-foot building height.

An interpretation of Section XIII of the Zoning Regulations leading to such a conclusion would, in my opinion, be contrary to the declared purpose of

Congress in enacting the 1933 Zoning Act. Such declared purpose was to promote the health, safety, morals, convenience, order, prosperity, or general welfare of the District of Columbia and its planning and orderly development as the National Capital (Act of June 20, 1933, 52 Stat. 797; Section 5-413, D. C. Code, 1951 ed.).

It is my opinion, therefore, that the approval of the Commissioners is required for the erection of a spire, etc., on any building whose combined height will exceed the maximum height established by the Zoning Regulations for the height district in which such building is located regardless of the fact that such combined height would be below the building height requirements of the Act of June 1, 1910.

RECOMMENDATION:

That a copy of this opinion be sent to the Director of Licenses and Inspections and to the Director of Planning, Zoning Commission.

VERNON E. HEST,
Corporation Counsel, D. C.

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5/26/55