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Executive Director

Marcel C. Acosta

IN REPLY REFER TO:
NCPC File No. Z.C. 08-06-1

JAN 1 1 2011

Zoning Commission of the
District of Columbia
2nd Floor, Suite 210
441 4th Street, NW
Washington, D.C. 20001

Members of the Commission:

The National Capital Planning Commission, at its meeting on January 6, 2011,
approved the enclosed action on the comprehensive zoning regulations rewrite for
Chapter B-2 Use Categories and Chapter B-4 Height. A copy of the Staff

Recommendation is also enclosed.

Sincerely,

Marcel C. Acosta
Executive Director

Enclosures

cc: Harriet Tregoning, Director, D.C. Office of Planning
Anthony Hood, Chairman, Zoning Commission

ZONING COMMISSION
District of Columbia

CASE NO. 08-06

EXHIBIT NO. 117
ZONING COMMISSION
District of Columbia
CASE NO. 08-06
EXHIBIT NO. 117

COMMISSION ACTION

NCPC File No. Z.C. 08-06-1



PROPOSED RULEMAKING COMPREHENSIVE ZONING REGULATIONS REWRITE: CHAPTER B-2 USE CATEGORIES AND CHAPTER B-4 HEIGHT

Washington, DC

Submitted by the District of Columbia Zoning Commission

January 6, 2011

Commission Action Requested

Approval of report to the Zoning Commission of the District of Columbia pursuant to 40 U.S.C. § 8724(a) and DC Code § 2-1006 (a).

Commission Action

The Commission:

Advises the Zoning Commission that the proposed language establishing a set of use categories as described in the rulemaking will not adversely affect any federal interests.

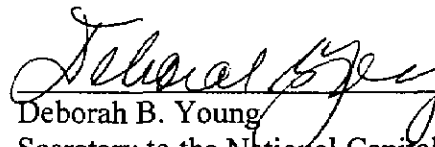
Notes that relative to the proposed text on building height that the federal interest would not be adversely affected, if the following changes to the proposal are made:

- Reflect in §404 that the Height Act does not provide a mechanism for relief to be granted by the Board of Zoning Adjustment from the Height Act provisions for maximum building heights.
- add "...public or private street..." at the end of the sentence in §402.2.
- add "...the height of a building shall not be measured from the human-constructed elevation, but shall be measured..." in §402.4.

Notes that recommendations of the Office of Planning's setdown report dated August 12, 2010 concerning the following: street frontage measuring points; streets fronting on open spaces; business and residential street definitions; single and multiple/connected buildings definition and the exterior wall definition, however were not incorporated in the Zoning Commission's proposed action. Instead they will be considered by the Department of Consumer and Regulatory Affairs (DCRA) in a new Subtitle M to the Zoning Regulations. Because Subtitle M has not

been provided for NCPC review, staff is not able to determine whether the content of Subtitle M will be adverse to the federal interest.

Therefore **requests** that DCRA provide a draft of Subtitle M for NCPC review as soon as it is available and incorporate into Subtitle M the recommendations of the Office of Planning's setdown report dated August 12, 2010 for the following: street frontage measuring points; streets fronting on open spaces; business and residential street definitions; single and multiple/connected buildings definition and the exterior wall definition, as these recommendations satisfactorily reflected NCPC staff input.

A handwritten signature in cursive script, appearing to read "Deborah B. Young", is written over a horizontal line.

Deborah B. Young
Secretary to the National Capital Planning Commission

STAFF RECOMMENDATION



NCPC File No. ZC 08-06-1

PROPOSED RULEMAKING
COMPREHENSIVE ZONING REGULATIONS REWRITE:
CHAPTER B-2 USE CATEGORIES AND CHAPTER B-4 HEIGHT

Washington, DC

Submitted by the District of Columbia Zoning Commission

December 30, 2010

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Abstract

The District of Columbia has undertaken a comprehensive review of its zoning regulations, which have not been updated since the 1950s. Regulations on height and permitted uses are two of the many subject areas included in this Zoning Regulation review. The existing "use" section in the Zoning Regulations includes over 650 distinct uses, which has led to confusion. The Office of Planning (OP) has conducted research nationally to analyze best practices and determine ways to simplify the existing "use" section. This research has led OP to propose a shift to a different system that includes 29 "use categories" that are intended to contain all uses, but not specifically by name. These use categories will be combined with five permission levels in a matrix that will delineate which uses are allowed in particular zone districts.

Changes to the height regulations are also being proposed at this time. The Height of Buildings Act of 1910, as amended (the Height Act) established the overall height limit in the District of Columbia and the Zoning Regulations provide greater delineation and further restrictions on heights by zone district. The District has decided that while the Height Act will be referenced in the new height regulations, all District of Columbia interpretation of the Height Act provisions will be located in Subtitle M, a special new section of the District of Columbia Municipal Code Title 11 based on the Zoning Administrator's interpretations. NCPC has not been provided a copy of Subtitle M, so the exact content of this subtitle is unknown.

Commission Action Requested by Applicant

Approval of report to the Zoning Commission of the District of Columbia pursuant to 40 U.S.C. § 8724(a) and DC Code § 2-1006 (a).

Executive Director's Recommendation

The Commission:

Advises the Zoning Commission that the proposed language establishing a set of use categories as described in the rulemaking will not adversely affect any federal interests.

Notes that relative to the proposed text on building height that the federal interest would not be adversely affected, if the following changes to the proposal are made:

- Reflect in §404 that the Height Act does not provide a mechanism for relief to be granted by the Board of Zoning Adjustment from the Height Act provisions for maximum building heights.
- add "...public or private street..." at the end of the sentence in §402.2.
- add "...the height of a building shall not be measured from the human-constructed elevation, but shall be measured..." in §402.4.

Notes that recommendations of the Office of Planning's setdown report dated August 12, 2010 concerning the following: street frontage measuring points; streets fronting on open spaces; business and residential street definitions; single and multiple/connected buildings definition and the exterior wall definition, however were not incorporated in the Zoning Commission's proposed action. Instead they will be considered by the Department of Consumer and Regulatory Affairs (DCRA) in a new Subtitle M to the Zoning Regulations. Because Subtitle M has not been provided for NCPC review, staff is not able to determine whether the content of Subtitle M will be adverse to the federal interest.

Therefore **requests** that DCRA provide a draft of Subtitle M for NCPC review as soon as it is available and incorporate into Subtitle M the recommendations of the Office of Planning's setdown report dated August 12, 2010 for the following: street frontage measuring points; streets fronting on open spaces; business and residential street definitions; single and multiple/connected buildings definition and the exterior wall definition, as these recommendations satisfactorily reflected NCPC staff input.

* * *

BACKGROUND

History of Zoning Regulations

The current Zoning Ordinance of the District of Columbia was approved in 1958. While there have been numerous text and map amendments during the past 50 years, the District has never undertaken a comprehensive zoning revision. As this is a 50-year-old document, there are substantial changes needed to reflect the current thinking about land use including adding concepts like sustainable development. In addition, some concepts like parking standards and antenna regulations are based on 1950s ideas and technology, and the use of outdated terms like “telegraph office” and “tenement house” clearly need to be changed. For years the Zoning Commission has experienced a steady increase in the number of text and map amendments submitted for approval. New overlay requests, zoning consistency actions, and changes to the text are also increasingly common.

Many of the building-form standards in the current regulations are based on standards proposed in a 1965 report written by Harold Lewis, a New York planning and zoning consultant, on zoning changes for the District of Columbia. The standards proposed in the Lewis Report for building and lot controls were often based on the average of existing conditions in the District. While this approach set a good target for new development, it automatically made half of the existing buildings in D.C. non-conforming to zoning. The Zoning Commission has encountered challenges trying to address these non-conformities for the past 50 years and this zoning revision is being proposed to address these challenges.

Zoning Update Process

A comprehensive review of zoning regulations was identified as a goal in the 2006 *District Elements of the Comprehensive Plan for the National Capital*. The Zoning Review process officially began in 2007 with a pair of public roundtables before the Zoning Commission and the formation of a citywide task force. Since then, the District of Columbia Office of Planning (OP) has organized eighteen public working groups by subject area and held over 150 public meetings. NCPC staff attended many of these meetings. Each subject area has been reviewed in consultation with a public working group that discusses issues identified in the Comprehensive Plan as well as issues arising from the existing Zoning Regulations.

Recommended changes were forwarded to the 24-member task force, appointed by City Council members, for further review and input. Finally, recommendations for most subject areas were made available for public review including at least one public hearing before the Zoning Commission. After the conclusion of public review for each subject areas, OP has been working with the Office of the Attorney General to draft zoning language to reflect the proposed policy changes.

OP used the proposed reorganization of the Zoning Regulations and the conceptual recommendations previously approved by the Zoning Commission as a framework for developing updated text for each section of the regulations. Each section of text will be reviewed by the Zoning Commission and heard at public hearings separately over the course of

the next year. After text sections have been approved by the Zoning Commission, these separate text sections will be unified into a proposed set of zoning regulations that will be the subject of a final public review.

The District of Columbia Office of Attorney General has determined that the new structure of Title 11 of the District of Columbia Municipal Regulations will include numerous subsections, including the following:

- Subtitle A - Administration and Procedures section;
- Subtitle B - General Regulations
- Subtitle C - General Processes
- Subtitles D to J will contain all land use requirements and permissions for the various zones
- Subtitle M will contain the Zoning Administrator's interpretations, including the District of Columbia's interpretation of the provisions of the Height Act

NCPC has been meeting with OP over the past two years, as well as participating in public meetings regarding many of the proposed text changes. Staff submitted several letters to the Zoning Commission on the height regulation changes outlining NCPC concerns and in some instances adding proposed text changes, with the most recent letter submitted on September 14, 2010 just prior the Zoning Commission's more recent public hearings on the changes to height and use. In this letter, NCPC outlined two outstanding issues: the types of structures allowed on top of roofs and the ability for the Board of Zoning Adjustment to approve special exceptions for non-conforming rooftop elements relative to the provisions of the Height Act. NCPC staff also requested two clarifications to language regarding public vs. private streets and the use of measuring points from human-constructed elevations. These concerns are further elaborated herein.

PROPOSED RULEMAKING

In its setdown report, dated August 12, 2010, OP describes the existing “use” and height sections in the Zoning Regulations, the main issues with each topic area as well as a framework for possible changes to update the current language to address the identified issues. The following is a summary of this report outlining the reasons for the text changes and a description of the proposed changes.

Proposed Use Categories

Currently, the Zoning Regulations lists all of the uses that are allowed by zone - in what OP setdown report refers to as “nesting.” Currently there are 650 distinct uses identified in the Zoning Regulations. This nesting is “...dependent on an initial list of allowed, permitted, or not permitted uses in a lower intensity zone. As the zones increase in intensity and additional uses are allowed, the higher intensity zones must add uses to their lists in the section or chapter and refer back to earlier, less intense, zones for the full list of permitted uses. Many uses that are nominally allowed as a “matter of right” in fact have conditions that limit their permission in some but not all zones. The lists of matter-of-right uses mix uses allowed without particular conditions with uses that have conditional permission, without distinction.”¹

OP also stated in its August 2010 setdown report that the existing conditions described above lead to many problems regulating “uses.” The following is a list of issues that were identified in the public review process and which OP stated in its setdown report were addressed with the proposed text.

- Cohesive information about permissions needed
- Information about determining use type and definition needed
- Conditions, standards and criteria to classify uses are needed
- Guidance needed about how to administer mixed or multiple uses
- Confusion between accessory uses and building types
- Multiple conflicting permission standards for the same use
- Regulation of uses by expansive lists requires constant updating
- Incomplete and inconsistent definition of uses
- Uses are regulated in zones of increasing intensity by referring to permissions of uses in lower intensity, and adding additional uses, which is known as “nesting.”
- Combination of uses that are permitted by condition with uses that are permitted as a matter-of-right in a single list mixes different types of permission together
- Excessive repetition of information

Based on research nationally, OP is proposing to shift to a different system than the existing “use” list and has identified 29 broad “use categories” that are intended to contain all uses, but not specifically by name. OP is proposing this system in order to reduce confusion and the need to frequently update the use category list.

¹ Office of Planning, *Setdown Report for Portions of ZC 08-06 – Zoning Regulations, Review for general reorganization, general height chapter and general use chapter*, August, 12, 2010.

These new use categories are:

- Agriculture
- Animal sales, care and boarding
- Antennas
- Arts design and creation
- Basic utilities
- Chancery
- Commercial Parking
- Community-based Institutional Facility
- Daytime Care
- Education
- Emergency Shelter
- Entertainment, Assembly, and Performing Arts
- Firearm Sales
- Food and Alcohol
- Health Care
- Institutional
- Lodging
- Local Government
- Marine
- Motor vehicle-related
- Office
- Parks and Recreation
- Production, Distribution and repair
- Residential
- Retail
- Service
- Sexually-oriented business
- Transportation and Infrastructure
- Waste-related services

This proposal to update the use regulations consists of seven subsections which are summarized as follows:

Introduction to Regulation of Uses and Relationship of the General Chapter to Land Use Subtitles – This section is to provide information about the proposed system of use categories in order to add clarity for users.

Rules for Determining Use Categories – This section is to provide an explanation of rules on which to base determinations and definitions of use categories.

Applicability of Multiple Uses – This section is to provide an explanation of regulating mixed or multiple uses in a single development.

Accessory Uses – This section is to provide an explanation of regulating accessory uses.

Temporary Uses – This section is to provide an explanation of regulating temporary uses.

Definitions of Use Categories – This section is to establish uses by broad use categories, including all of the existing uses.

In addition, the Zoning Regulations will include “use” permission tables in each of the zoning district subtitles that will provide guidance on how to find “use” permission and associated conditions for each individual zone. There are five permission levels for each zone: Permitted, Not Permitted, Conditional, Special Exception, and Accessory. The Zoning Administrator is responsible for determining uses to be allowed within each category. Once these determinations are made, they will be incorporated into each use subsection in the Zoning Regulations.

Proposed Height Regulations

OP stated in its August 12, 2010 setdown report that the largest issue in drafting the height regulations has been the relationship of the Zoning Regulations to the Height of Buildings Act of 1910, as amended (Height Act). The Height Act sets the height parameters within which the District's zoning regulations are permitted, but the Height Act itself is not part of the zoning regulations. In a document entitled *Recommendations Regarding Measurement and Regulation of Height*, dated September 15, 2008, OP recommended that the Zoning Commission include the Height Act within a single height chapter in the Zoning Regulations. This recommendation has evolved since that 2008 recommendation after working with the 24-member zoning task force. OP has since undertaken several drafts of the height chapter based around three different options, as follows:

1. Height chapter contains new street-based zoning height regulations that correspond to but do not directly reference the Height Act.
2. Height chapter directly contains Height Act language and interpretations in plain language. Height Act portions would be part of the chapter text, but would not be officially part of the zoning regulations.
3. Height chapter would not contain any Height Act language, but only refer to the Act by reference. Height Act regulations and interpretations would be attached to the Zoning Regulations as an Appendix. [OP SELECTED OPTION]

The District has decided to use the third option listed above for the framework of the Zoning Regulation regarding height, and will include the Height Act only by reference in the zoning height section of the regulations and attach an appendix of the Zoning Administrator interpretations to the Zoning Regulations.

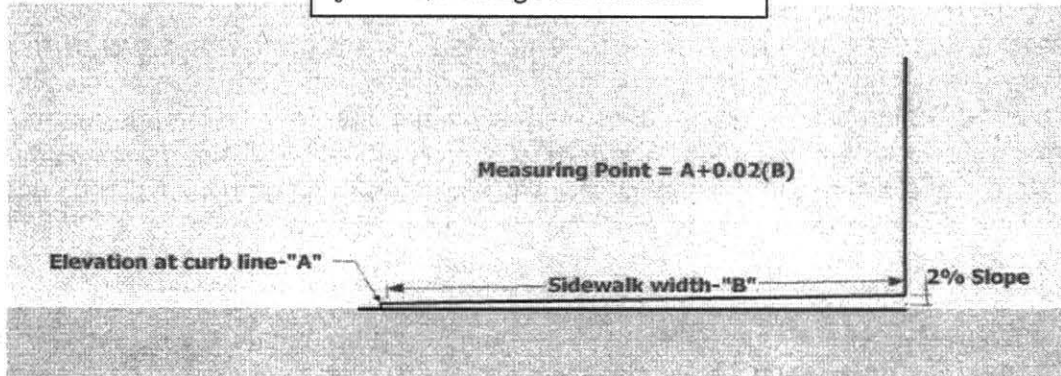
The current proposal for general height regulations consists of four subsections that are summarized as follows (full text is attached to this report in Attachment A):

- Relationship to the Land Use Subtitles – This section is to provide background information about how height regulations will be codified and used.
- General Rules of Measurement – This section is to provide clear guidance for how zoning height is to be measured.
- Height Limit Exceptions – This section is to provide clear guidance for the type of structures allowed above zoning height limits and the rules for those structures.
- Height Limit Special Exception Standards – This section contains a list of sections of the height regulations that may be waived by special exception and the criteria for special exception review.

The following images which have been developed by OP, align with NCPC staff input on height concerns, and are included with the proposed text to graphically demonstrate how several of the height regulations will be addressed. The first illustration describes how to determine the

measuring point elevation from the sidewalk which can include a two percent slope from curb to property line, with a maximum change of 12 inches.

§402.3 Measuring Point Elevation

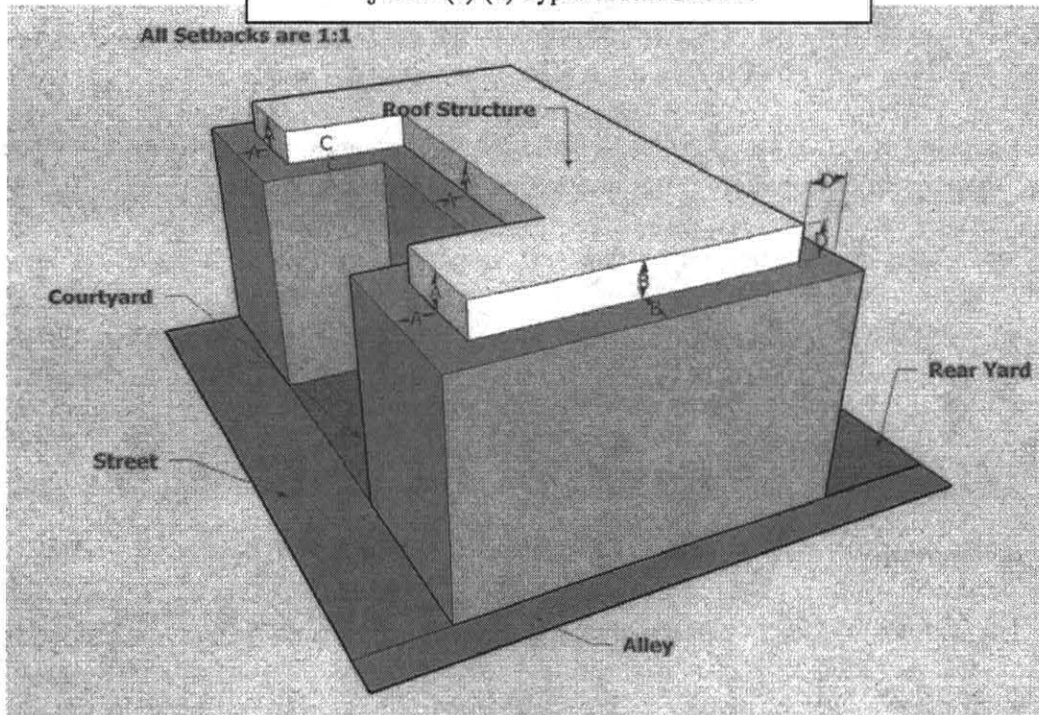


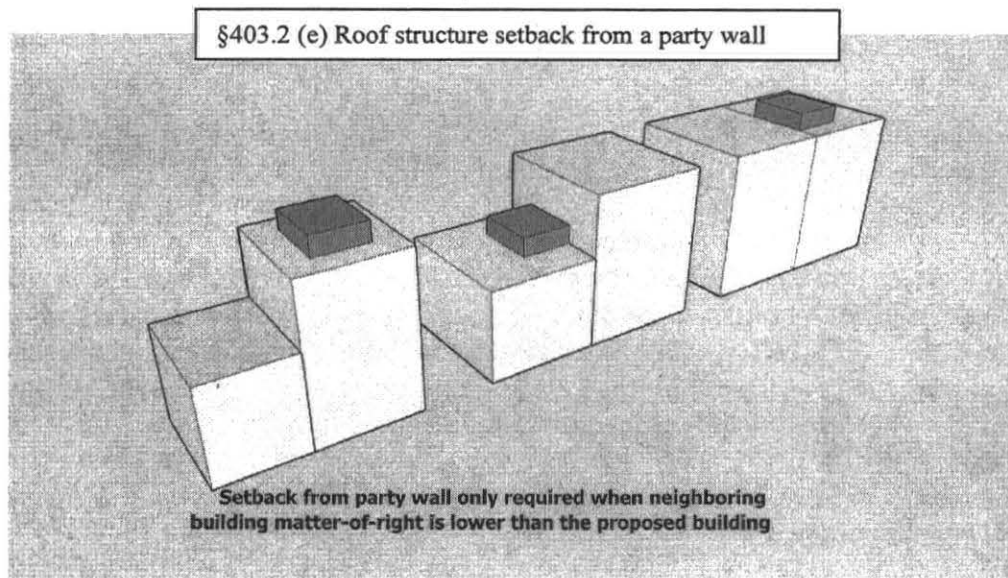
The next two illustrations delineate setback requirements for allowable rooftop structures. Below is an illustration that indicates all of the locations where setbacks are required including:

- (A) any wall facing a public street
- (B) Any wall facing a public alley
- (C) Any wall facing a courtyard open to a public street
- (D) Any wall that maintains a setback from and faces a lot line.

The final illustration, on the next page, describes the roof setback for building along party walls

§403.2 (a)-(d) Types of roof setback





While the proposed height regulations included in the revised Zoning Regulations include partial text or concepts taken from the Height Act, the exact provisions in the Act are not included as part of the proposed regulations. The proposed height regulations do not include the following areas:

- Street frontage measuring point
- Streets fronting on open space
- Business and residential street definitions
- Single and multiple/connected buildings definition
- Exterior wall definition

It is the decision of the District of Columbia that the Zoning Administrator, based in DCRA, is the entity charged with the District of Columbia interpretation of the Height Act provisions. OP has been working with DCRA to have Subtitle M completed prior to final approval of the full zoning text. Subtitle M is not expected to be available for public review until sometime next year. OP has provided NCPC with its recommendations to the Zoning Administrator on the interpretation of the provisions of the Height Act. NCPC has not been provided a copy Subtitle M, so the full content of this subtitle is unknown.

PROJECT ANALYSIS

Use Categories

Staff has reviewed the proposed general “use category” regulations and finds that there are no federal interest concerns regarding the proposed text. Staff also commends the Office of Planning for the community process that it used to develop the proposed text changes. Staff finds that OP has undertaken a thorough analysis of the issues, provided case studies on best practices and used this knowledge to develop a “use category” system that will provide flexibility and more clearly organize all of the various “uses” that currently exist and that may be used in the future. Therefore staff recommends that the Commission **advise the Zoning Commission that the proposed language establishing a set of use categories as described in the rulemaking will not adversely affect any federal interests.**

Height Regulations

Staff has reviewed the proposed height regulations and has determined that the main federal interest is if this section conforms to the provisions of the Height of Buildings Act of 1910, as amended. NCPC staff has participated in the Zoning Regulations Rewrite process over the past two years on a number of concerns that pertain to the Height Act. However, several sections that pertained to interpretations of the Height Act were not included in the height regulations rulemaking following the Zoning Commission public hearing on September 20, 2010. These removed sections included the following:

- Street frontage measuring point
- Streets fronting on open space
- Business and residential street definitions
- Single and multiple/connected buildings definition
- Exterior wall definition

These sections are expected to be included in Subtitle M, a special section in the Zoning Regulations for the Zoning Administrator’s interpretations. Staff is unsure how the District will interpret the provisions of the Height Act that will be included in Subtitle M.

Staff raised several additional concerns regarding height regulations in a letter from the Executive Director sent to the Zoning Commission dated September 14, 2010 (Attachment C). In addition, staff is interested in understanding more about Subtitle M, as many of the Height Act interpretations are expected to be included in it.

NCPC letter to Zoning Commission dated September 14, 2010

Staff included two main concerns about the proposed height regulations in a letter to the Zoning Commission dated September 14, 2010. This first concern centered on the apparent conflict between the proposed height regulations in §403.1 and allowable rooftop structures that are

included under the provisions of the Height Act. Also included in the letter was a request for more clarification to be included in the proposed zoning regulations for several items including the delineation of private vs. public streets, the measurement from artificial elevations, and the need for Subtitle M to be completed to ensure that it is fully consistent with the proposed height regulations.

Staff finds that the first issue raised in the September 14, 2010 letter was adequately addressed in the new text included in § 403.1: Height Limit Exceptions. This section which the Zoning Commission has taken a proposed action on includes the following change "...The following structures may be built above the zone height limitations, subject to the conditions of this section and the Height Act:..." to the proposed text. Staff finds this language addresses the concerns that have been raised.

The second issue raised in the September 14, 2010 letter is the apparent conflict between the Height Act and the height regulations in §404: Height Special Exception Standards. This section establishes the parameters for the Board of Zoning Adjustment to use in determining if an applicant is able to seek relief from §§403.2 (b) through (e) or § 403.4 of the proposed height regulations.

PROPOSED TEXT – § 404.1

- 404.1 The Board may grant, by special exception, relief from §§ 403.2 (b) though (e) or §403.4 if, in addition to meeting the general requirements of [§ 3104], the applicant demonstrates that granting the relief would not:
- a. Be incompatible with the purpose and intent of height regulations listed in §400.2; or
 - b. Result in adverse impact on:
 1. Existing solar or wind power generation facilities in the immediate vicinity; or
 2. The visual character of the surrounding neighborhood.

The Executive Director also stated in his September 14, 2010 letter that:

The Height Act provides specific requirements for rooftop structures and the manner in which they should be set back once a building is at the maximum height permitted. However, the law does not allow for relief to be granted from these requirements by the Board of Zoning Adjustment. For consistency with the requirements of the Height Act, the Zoning Regulations should reflect this.

The Office of Planning did not propose any text changes to clarify this because its view is that local zoning has to provide for a mechanism for relief and it does this by outlining how this relief will be granted. Under the Height Act, no relief mechanism is allowed above the limit of height. Therefore staff recommends that OP include a sentence or phrase in the proposed text acknowledging that the Height Act does not include a mechanism for relief from its rooftop setback provisions.

In addition, two other sections need clarification. The Height Act establishes a strong relationship between street-widths and building heights. In §402.2, the proposed regulation currently only identifies public streets, but should also include private streets that are publicly accessible, such as those private streets located in subdivisions. Making this change will reinforce the building-height to street-width relationship established in the Height Act as it would allow for height to be taken from these private streets as well. In §402.4, additional clarification is necessary to strengthen where height may not be measured from in its description. Staff supports language that was identified in the OP report dated September 15, 2008 which stated "...Where natural elevation is interrupted by a bridge, viaduct, embankment, ramp abutment tunnel or other type of artificial elevation, the height of a building will not be measured from the human-constructed elevation...". Staff finds that by adding where the measurement will not be taken, strengthens the language.

Therefore staff recommends that Commission **note that relative to the proposed text on building height that the federal interest would not be adversely affected, if the following changes to the proposal are made:**

- **Reflect in §404 that the Height Act does not provide a mechanism for relief to be granted from the Height Act provisions by the Board of Zoning Adjustment.**
- **add "...public or private street..." at the end of the sentence in §402.2.**
- **add "....the height of a building shall not be measured from the human-constructed elevation, but shall be measured..." in §402.4.**

Subtitle M

The District is developing Subtitle M, a special section in Title 11 of the District of Columbia Municipal Regulations, to address Zoning Administrator interpretations, including those of the Height Act provisions. Since staff has not had the opportunity to review Subtitle M, formally or informally, the full content of this section is unknown. Staff, however, is aware of some of the interpretations that may be included in Subtitle M because the following were included in the OP setdown report from August 12, 2010, but not included in the proposed action taken by the Zoning Commission on this case. These items include:

- Street frontage measuring point
- Streets fronting on open space
- Business and residential street definitions
- Single and multiple/connected buildings definition
- Exterior wall definition

While the Zoning Administrator has not provided staff with a copy of Subtitle M, OP has submitted additional background information on its recommendations to DCRA with respect to the areas listed above and other concerns. Staff finds this additional background information helpful, however the recommendations are only OP preferences, not what the Zoning Administrator may ultimately allow.

It is unclear to staff if the Zoning Administrator will adopt the text from the August 12, 2010 version of the height regulations for Subtitle M or if the Zoning Administrator will propose other text. Therefore staff recommends that the Commission:

- **Notes that recommendations of the Office of Planning's setdown report dated August 12, 2010 concerning the following: street frontage measuring points; streets fronting on open spaces; business and residential street definitions; single and multiple/connected buildings definition and the exterior wall definition, however were not incorporated in the Zoning Commission's proposed action. Instead they will be considered by the Department of Consumer and Regulatory Affairs (DCRA) in a new Subtitle M to the Zoning Regulations. Because Subtitle M has not been provided for NCPC review, staff is not able to determine whether the content of Subtitle M will be adverse to the federal interest.**
- **Therefore requests that DCRA provide a draft of Subtitle M for NCPC review as soon as it is available and incorporate into Subtitle M the recommendations of the Office of Planning's setdown report dated August 12, 2010 for the following: street frontage measuring points; streets fronting on open spaces; business and residential street definitions; single and multiple/connected buildings definition and the exterior wall definition, as these recommendations satisfactorily reflected NCPC staff input.**