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728778	Submitted to ODAI	Notices, Opinions	Zoning Commission Order No. 08-06-A (Comprehensive Zoning Regulations Rewrite: Chapter B-2 Use Category Regulations)	3/4/2011 Vol 58/9	3/1/2011 10:16:17
728681	Submitted to ODAI	Notices, Opinions	Zoning Commission Order No. 08-06-B (Comprehensive Zoning Regulations Review: Chapter B-4 Height)	3/4/2011 Vol 58/9	3/1/2011 10:15:14
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ZONING COMMISSION
District of Columbia
CASE NO. 08-06
EXHIBIT NO. 129

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EXHIBIT NO. 129
EXHIBIT NO. 129

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 08-06-B
Z.C. Case No. 08-06
(Comprehensive Zoning Regulations Review: Chapter B-4 Height)
February 7, 2011

The Zoning Commission for the District of Columbia (the "Commission"), pursuant to its authority under § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797; D.C. Official Code § 6-641.01 (2008 Repl.)), hereby gives notice that it took final rulemaking action to adopt amendments to Title 11 of the District of Columbia Municipal Regulations ("Title 11"). The amendments create a new chapter that consolidates and restates all of the existing provisions within Title 11 that concern the height of buildings and structures. More detailed information, discussion, and analysis for the proposed text can be found by clicking on "Setdown Report for Height and Use" at www.dczoningupdate.org/documentcenter.asp.

This new chapter will be part of a revised Title 11. The Commission has already approved a codification format that would divide the revised Title 11 into 10 subtitles. A description of this codification can be found at www.dczoningupdate.org/codereorganization.asp. The adopted Chapter 4 will be included within a new Subtitle B entitled "General Regulations."

As noted in adopted § 400.3:

In addition to the height limitations of the Zoning Regulations, all buildings are also subject to and shall conform with the limitations of the Act to Regulate Height of Buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 452, D.C. Official Code §§ 6-601.01 to 6-601.09 (2001) ("Height Act"). The regulatory interpretation of, and rules pertaining to, the Height Act adopted by the District Department of Consumer and Regulatory Affairs ("DCRA") are located in Subtitle M.

As of the date that these amendments were adopted, DCRA had not yet proposed these rules or confirmed that the rules will be codified in the proposed subtitle. The Commission has requested the Office of the Attorney General ("OAG") and the Office of Planning ("OP") to continue to work with DCRA towards the formal adoption of Height Act interpretations through rulemaking.

One area in which the Zoning Regulations and the Height Act should conform is the general measurement of height. Adopted § 402 sets out the rules for making such measurement and states at the outset in adopted § 402.1 that "unless otherwise stated, the rules of this section are identical to DCRA rules for the measurement of building height under the Height Act, which appear in Subtitle M." The Commission has been apprised that the Zoning Administrator has reviewed § 402, as proposed, and expressed his agreement with its applicable principles.

The Commission will not issue a notice of final rulemaking at this time, but will wait until it has reviewed all portions of the 10 subtitles and issued final orders for all approved text. At that point OP, OAG, and the Office of Zoning will make any editorial changes needed to achieve consistency within the approved text and then present a final consolidated version to the

Commission. The Commission will then decide whether to authorize the publication of a notice of final rulemaking that will make the revised Zoning Regulations and Map effective, subject to whatever transitional measures the Commission may adopt.

Zoning Review Process to Date

The Zoning Review process began in 2007 with a pair of public roundtables before the Commission and the formation of a citywide Taskforce. Since then, OP has organized 19 public working groups by subject area and held over 180 public 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 have been forwarded to the 24-member appointed Taskforce for further review and input. Finally, recommendations for most subject areas have been made available for public review including a public hearing before the Commission. After the conclusion of public review for each subject areas, OP has worked with OAG to draft zoning language to reflect the proposed policy changes.

Proceedings Leading to the Adoption of this Amendment

In this case, a notice of public hearing containing policy recommendations regarding the regulation of height within the Zoning Regulations was published in the *D.C. Register*. The public hearing was advertised for and held on September 25, 2008. A guidance meeting scheduled for February 5, 2009 was deferred in order for OP and OAG to work with the Zoning Administrator to develop a unified set of height interpretations.

For the next 18 months, OP continued to work with the working group on this subject matter to draft text that comported with its understanding of the Zoning Administrator's views. Notice of a public hearing on the proposed text was advertised in the August 6, 2010 edition of the *D.C. Register* based upon the Commission's prior decision to waive the setdown process for hearings under this docket. At a special public meeting held September 2, 2010, the Commission rescinded the waiver, voted to setdown the case for hearing for September 20, 2010, and confirmed the continued validity of the public hearing notice. However, the Commission decided to remove those portions of the text that dealt exclusively with Height Act interpretations, concluding that the Zoning Administrator had exclusive jurisdiction in that area. The Commission expressed its preference that such rules as DCRA might adopt should be within the proposed Subtitle M.

A second notice of public hearing was published in the *D.C. Register* on September 10, 2010 that reflected the narrower scope of proposed height rules.

Pursuant to § 13 (d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)) notice was given to all Advisory

Neighborhood Commissions (“ANCs”). The reports received, and the Commission’s response, will be discussed later in this Order.

The public hearing took place as scheduled on September 20, 2010 and the matter came before the Commission for proposed action on November 8, 2010, at which time it voted to refer the text to the National Capital Planning Commission (“NCPC”) for review pursuant to § 492 of the District Charter and to authorize the publication of a notice of proposed rulemaking in the *D.C. Register*.

A Notice of Proposed Rulemaking was published in the *D.C. Register* on December 3, 2010, at 57 DCR 11637. No comments were received.

NCPC, through a delegated action dated January 6, 2011, noted that the proposed text amendments would not adversely affect the federal interest if the following changes were made:

1. 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.
2. Add “...public or private street...” at the end of the sentence in § 402.2.
3. Add “...the height of a building shall not be measured from the human-constructed elevation, but shall be measured...” in § 402.4.

As to the first request, § 404 would authorize the Board of Zoning Adjustment to grant special exception relief from setback and other requirements that apply to roof structures permitted to exceed the maximum zoning height. The Height Act does not allow for similar relief from its setback requirement applicable to certain structures granted height waivers. The Commission does not believe it necessary to make this point in the Zoning Regulations. NCPC may wish to explore with DCRA whether the contemplated Height Act regulations could be a suitable place to state the restriction.

NCPC’s second comment would accomplish the following change to the second sentence of § 402.2.

Where no *street frontage* exists, the height of a *building* shall be measured from its midpoint along its façade nearest to a public or private street.

The Commission notes that the Height Act uses the term “street” with no qualifier and in the Zoning Regulations the term “street” is defined as “a public highway designated as a street, avenue, or road on the records of the Surveyor of the District of Columbia.” This reflects the long-standing practice of measuring height only from public streets. NCPC has furnished no analysis of the impact of allowing private streets to be used for this purpose as well, and this

Commission is concerned that the consequences of doing so would be unpredictable and potentially adverse.

The third requested revision would make the following modification to the introductory language of § 402.4 as follows:

When the curb grade has been artificially changed by a bridge, viaduct, embankment, ramp, abutment, excavation, tunnel, or other type of artificial elevation or depression, the height of a *building* **shall not be measured from the human-constructed elevation**, but shall be measured using the first of the following four methods that is applicable to the site:

The NCPC staff report indicates that the insertion of the bolded and underlined text would strengthen the provision. However, the phrase could be interpreted as precluding height measurement from an artificial elevation in all instances. This would directly conflict with § 402.4(a), which specifically allows height to be measured at a human-constructed elevation if permitted in a specific zone. The Commission appreciates NCPC's drafting recommendation, but concludes that including the provision would result in the potential for misinterpretation.

In addition to the comments received from NCPC, the Commission received reports from ANC 6A, dated September 15, 2010; ANC 6B, dated September 22, 2010; and ANC 6C, dated September 13, 2010. ANCs 6A and 6C shared a common concern about what was advertised as § 402.4 (c), but which is now § 402.4(b). As just discussed in the context of NCPC's concerns, § 402.4 provides rules for determining height when there is an artificial elevation. As revised from the notice of public hearing, the provision now indicates the order in which the rules apply, and thereby addresses one of ANC 6A's concerns.

The second rule, as stated in (b), is to use "an elevation for the site that was determined prior to the effective date of this section by the Zoning Administrator, or the Redevelopment Land Agency, its predecessors or successors". ANC 6C was concerned that this would permit future Zoning Administrators to change these measuring points without public comment. The Commission notes that the rule clearly allows only the use of determinations made prior to the effective date of the section. ANC 6A views these 20-year-old determinations as obsolete. The Commission is sympathetic with this position, but cannot ignore the fact that buildings and structures were built under the authority of these decisions and that to disavow them would create unacceptable nonconformities that are unlikely to be replaced by new building constructed under possibly stricter rules.

ANC 6A also views what is now § 402.4(a) as arbitrary, because it permits the Commission to establish the measuring point for an artificial elevation on a zone-by-zone basis. However, ZRR represents a rejection of one-size-fits-all zoning in favor of neighborhood focused zoning controls. When a neighborhood includes property constructed at an artificial elevation, the Commission must and will judge height limitations based upon what is best for that area.

Lastly, ANC 6B stated its concerns with respect to what constitutes a cellar or a story. Adopted § 401.4 provides that “Zone height limits shall be stated in terms of feet.” Therefore, concerns over what is a story, which in some circumstances depended upon whether a lower level was a basement or cellar, will no longer be relevant to the future measurement of height once these rules take effect. The ANC was also concerned about the inconsistent use of the phrases “building face” and “building façade.” The Commission notes that the latter phrase does not appear in the adopted text, but requests that OP determine whether there is a need to use both terms and, if so, formulate definitions that differentiate their meaning.

Having recognized each ANC as the source of its recommendation, and articulated why it did or did not find the advice persuasive, the Commission has given ANCs 6A, 6B, and 6C the great weight to which they are entitled by law.

At a properly noticed public meeting held on February 7, 2011, the Commission took final action to adopt the text amendments, but to delay publication of a notice of final rulemaking until the text has been finalized and conformed to all other text that will comprise the revised Zoning Regulations adopted under this docket.

The following new Chapter 4, **HEIGHT**, is adopted for inclusion within a proposed Subtitle B, **GENERAL REGULATIONS**, of a revised Title 11 DCMR:

CHAPTER 4 HEIGHT

400	Introduction to Height Regulation Chapter
401	Relationship to the Land Use Subtitles
402	General Rules of Measurement
403	Height Limit Exceptions
404	Height Special Exception Standards

400 INTRODUCTION TO HEIGHT REGULATION CHAPTER

400.1 This chapter provides height regulations for the District. The provisions of this chapter apply to all zones.

400.2 The intent of regulating height is to:

- (a) Promote successful transitions between areas of differing density;
- (b) Ensure adequate light and air to neighboring properties and zones; and
- (c) Provide vertical control to accommodate appropriate density and good design.

- 400.3 In addition to the height limitations of the Zoning Regulations, all buildings are also subject to and shall conform with the limitations of *the Height Act*. The regulatory interpretation of, and rules pertaining to, the Height Act adopted by the District Department of Consumer and Regulatory Affairs (“DCRA”) are located in Subtitle.M.¹

401 RELATIONSHIP TO THE LAND USE SUBTITLES

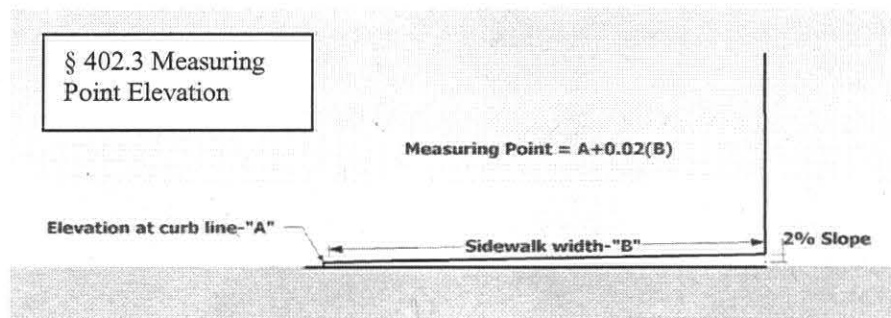
- 401.1 In addition to the general regulations of this subtitle, each land use subtitle shall include a height regulations chapter containing height regulations specific to the zones within that subtitle, including tables identifying zone-specific height maximums, conditions, and exceptions.
- 401.2 Zone height limitations shall be codified and presented in the development standards table within each land use subtitle.
- 401.3 Where the maximum height permitted within a zone differs from the maximum height permitted by the Height Act, the more restrictive maximum height shall apply.
- 401.4 *Zone* height limits shall be stated in terms of feet, and shall be evenly divisible by five (5).
- 401.5 The height limits in each zone district apply to structures located in the public space included within the zone district’s boundary.

402 GENERAL RULES OF MEASUREMENT

- 402.1 This section provides rules of measurement for the purpose of determining compliance with zone height limitations. Unless otherwise stated, the rules of this section are identical to DCRA rules for the measurement of building height under the Height Act, which appear in Subtitle M.
- 402.2 The height of a *building* shall be measured from its midpoint along any *abutting street frontage*. Where no *street frontage* exists, the height of a *building* shall be measured from its midpoint along its façade nearest to a public street.
- 402.3 The measuring point for determining height shall be the elevation at the midpoint of the adjacent curb except as provided in § 402.4, plus a two percent (2%) gradient between the curb and the property line, up to a maximum height

¹ DCRA has not yet proposed such rules or determined where in the DCMR they would be codified.

difference of twelve inches (12 in.). When an adjacent curb does not exist, the elevation for the measuring point shall be the elevation at the property line midpoint, where the street right of way meets the property line.



402.4 When the curb grade has been artificially changed by a bridge, viaduct, embankment, ramp, abutment, excavation, tunnel, or other type of artificial elevation or depression, the height of a *building* shall be measured using the first of the following four methods that is applicable to the site:

- (a) An elevation or means of determination established for a specific zone elsewhere in this title.
- (b) An elevation for the site that was determined prior to the effective date of this section by the Zoning Administrator, or the Redevelopment Land Agency, its predecessors or successors;
- (c) A *street frontage* of the building not affected by the artificial elevation; or
- (d) A level determined by the Zoning Administrator to represent the logical continuation of the surrounding street grid where height is not affected by the discontinuation of the natural elevation.

402.5 One- and two-family dwellings, and any building setback from all lot lines by a distance at least equal to its own height, shall be measured from the ground level at the midpoint of the building face closest to the nearest public right of way.

402.6 *Building* height shall be measured to the top of the roof including any parapet or balustrade on exterior walls, or any other continuation of the exterior walls. For purposes of calculating the *zone-specific* height, a parapet or balustrade of up to four feet (4 ft.) may be excluded from the height measurement. This exclusion does not apply in calculating maximum height under the Height Act.

403 HEIGHT LIMIT EXCEPTIONS

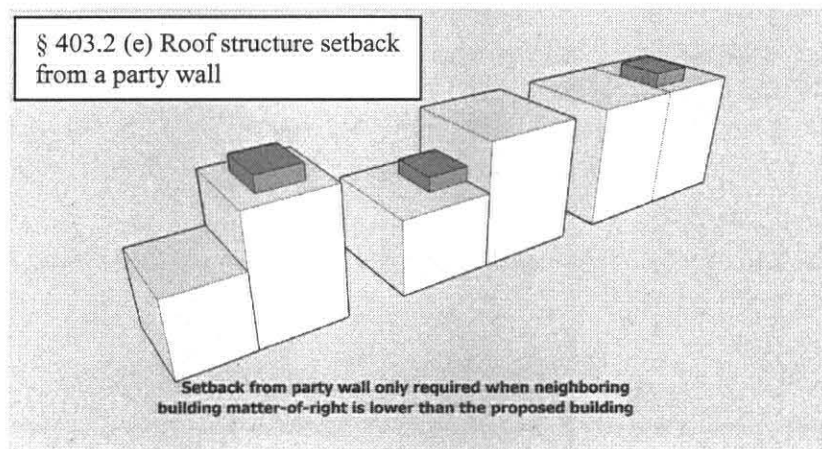
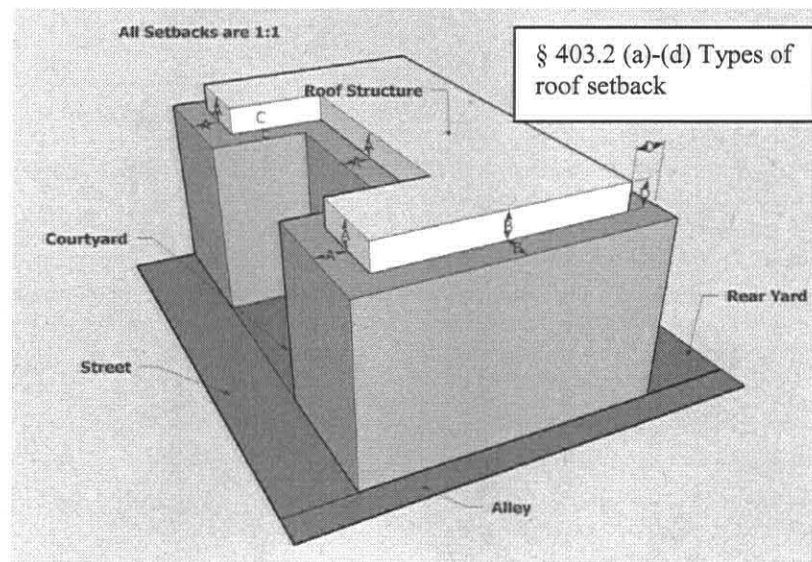
403.1 The following *structures* may be built above the zone height limitations, subject to the conditions of this section and the Height Act:

- (a) Spires;
- (b) Towers, including towers erected from the ground;
- (c) Domes, minarets, pinnacles;
- (d) Chimneys or smokestacks;
- (e) Skylights;
- (f) Antennas;
- (g) Penthouses fully or partially enclosing utilitarian features, including, but not limited to, mechanical equipment and its housing, elevators, and stairwells;
- (h) Building appurtenances dedicated to safety, including safety railings;
- (i) *Pergolas* and similar architectural embellishments;
- (j) Building components or appurtenances dedicated to the environmental sustainability of the building; and
- (k) Penthouses fully or partially enclosing accessory amenity features, such as communal recreation space, and structures accessory to outdoor recreation space.

403.2 A *structure* listed under § 403.1 (g) through (k) must be *set back* greater than or equal to its height above the roof on which it is situated from:

- (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; or
- (e) Any wall that abuts a lot line and that is taller than the greater of the adjacent property's existing or matter-of-right height.



- 403.3 Structures listed under § 403.1 (f) through (k) shall not rise more than twenty feet (20 ft.) above the roof.
- 403.4 Space enclosed by walls on a roof is limited to forty percent (40%) of the building's total footprint.

404 HEIGHT SPECIAL EXCEPTION STANDARDS

404.1 The Board may grant, by special exception, relief from §§ 403.2 (b) through (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.

On November 8, 2010, upon a motion made by Chairman Hood, as seconded by Commissioner May, the Zoning Commission **APPROVED** this Petition at its public meeting by a vote of **5-0-0** (Anthony J. Hood, Konrad W. Schlater, Greg M. Selfridge, Peter G. May, and Michael G. Turnbull and Peter G. May to approve).

On February 7, 2011, upon motion of Chairman Hood, as seconded by Commissioner Turnbull, the Zoning Commission **ADOPTED** this Order by a vote of **5-0-0** (Anthony J. Hood, Konrad W. Schlater, Peter G. May, and Michael G. Turnbull to approve; Greg M. Selfridge to approve by absentee ballot).