The COMMITTEE of 100 on the FEDERAL CITY
founded 1923

TESTIMONY of the COMMITTEE OF 100
Z.C. Case No. 08-06 Comprehensive Zoning Regulations Review (ZRR):
Chapters B2 (Uses) & B4 (Height)
Case No: 08-06
September 20, 2010, 6:30 p.m.

Mr. Chairman, my name is George Clark and I testify tonight on behalf of The Committee of 100 on the Federal City, a group that has advocated on behalf of intelligent and smart planning and land use in Washington, D.C. since our founding in 1923. I also bring my perspective as the Zoning Revision Task Force member for the Federation Citizens Associations of DC, celebrating its 100th year in 2010, just like the Height Act. And as a ZRR Task Force member, I have seen how we got here tonight from a very involved perspective. And there's lots not to like about it.

When the Working Group met on the height two years ago for several sessions, there was remarkable unanimity among developers, architects and citizens that the Height Act is what it is, and that there was no need to involve the Zoning Regulations in the Height Act. The Office of Planning said it agreed. We focused on height issues that belong in zoning, and again had a remarkably high degree of agreement on those issues, such as rooftop

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structures and measuring points. When the Task Force met on height three times this summer, there was again unanimity that the Height Act did not belong in the zoning regulations. And then OP proposed in the setdown that Height Act somehow be incorporated into the regulations. This Commission thought that was not right, and in the setdown hearing told OP to strike that.

Yet OP is remarkably persistent in trying to assert its control over interpretation of the Height Act. The revised notice for this hearing purports to take out the Height Act, but squarely leaves it in, in defiance of the Commission's instructions. Section 401.5 and 403.1 still refer to street-based limits. The last two sentences of Section 402.6 include an interpretation of Height Act that should also be deleted. In addition, the Zoning Administrator's ("ZA") interpretations of the Height Act should not be in any subtitle of the zoning regulations as opposed to included in an appendix as a convenience, assuming that they are actual determinations and not newly written interpretations of those determinations. The implication is that the ZA's rules are zoning rules.

OP has told the Task Force that the Zoning Administrator is compiling a list of rulings made over the years. First, no one has ever been able to do this -- in fact when a FOIA request for them was made several years ago, the requester was told that they had been destroyed. Second, if the ZA is essentially writing up his views of the Height Act, that has to go through rulemaking, and not an informal process. Third, I have been told that the Director of DCRA is unaware that this project is going on. So we ask the question, is OP writing the text or is DCRA?

The Zoning Regulations contain provisions dealing with subjects also dealt with in the Height Act: allowable height, measurement of height, excepted structures, and set-back for roof structures; the two comprise separate legal regimes on the same subjects. These Zoning provisions cannot be applied in particular cases in such a way as to produce results in conflict with the Act. Thus, for example, if the height of a building allowable under the Regulations exceeds that allowable under the Act as determined by the Act, the Act controls. Accordingly, the current regulations provide, in §2510.1, that *"In addition to any controls established in this title, all buildings or other structures shall comply with the Act to Regulate the Height of Buildings . . . ."* This provision does more than simply record the independently existing legal state of affairs: it provides an explicit jurisdictional basis for interpretation of the Height Act by the Zoning Commission and the BZA in particular cases where they must ensure that the Regulation are not interpreted or applied in a way that is inconsistent with the Act.

What follows from this, so far as the proposed new regulations are concerned, is that §2510.1 provision should be retained. It was retained, in an earlier OP draft, but dropped. It should be restored, and should replace the narrower provision in the proposed § 400.4, which refers only to the Act's height limitations ("all buildings are also subject to the *height limitations* of the Height Act . . . ."). This should be done not only for the important jurisdictional reason just mentioned, but also because as already noted the Height Act (like the proposed new height regulations) does more than simply establish height limitations, and it must be complied with in

all respects, not just in respect of height limitations.

OP should also be required to visually depict -- and not just in 2 dimensional drawings -- the impact of its proposed height limitations. I won't talk more about the disastrous idea on height measurement from viaducts other than to ask you to go up to the 11th floor of this building and see how you like a 12 story building built from the top of the wires over the H Street bridge. What does that do to the scenic vista of the Capitol. And if you're ok with that, try it from Cardozo High School, or the Armed Forces Retirement Home, or from the New York Avenue corridor -- or H Street NE? We need to protect the scenic vistas that make Washington the City that it is.

Height Act regulations?

So far as we are aware no regulations pursuant to the Height Act have ever been promulgated by any DC government body, and we are aware of no systematic compilation of interpretations of the Act by any such body. What has happened in fact is that the Commission and the BZA have interpreted the language of the Act directly when the occasion required.[1] In so doing the BZA takes into account the interpretation of the Act by the permitting authorities in DCRA in each case, but is not bound by it and may find it inconsistent with the Act, and such findings by the BZA are subject to judicial review in the Court of Appeals. While the Mayor,

[1] See, e.g., the 1993-94 GWU/WETA PUD case, Z.C. Order No. 749-A, in Z.C. Case No. 93-9C (Apr. 11, 1994);BZA Order No. 17109, Appeal of Kalorama Citizens Association, November 8, 2005; BZA Order No. 15568, Appeal of Howard University, October 21, 1991.

through DCRA, presumably has authority to promulgate such regulations, it is not clear to us that this additional layer of rule-making would serve any purpose other than to complicate what is already a complicated state of affairs. The Mayor's regulations, while presumably binding on DCRA, the BZA and the Commission to the extent that they are called upon to apply the Act, would also be subject to judicial scrutiny for consistency with the Act. If, however, what is intended is not formal regulations but simply a compilation of past or intended future interpretations of the Act by DCRA officials, these might be of help to prospective permit-seekers, but they would still be subject to administrative and judicial scrutiny and their legal status would be murky at best.

The matter seems to us to be further confounded by the second sentence of §400.4:

"Height Act language adopted by the Department of Consumer and Regulatory Affairs matches the general height limitations of this chapter and is attached as Appendix A."

Whatever the legal character of the "Height Act language" that would be adopted by DCRA – whether formally promulgated regulations or something less – if we can assume that this "language" is to be consistent with the Act, we do not see in what sense it could be said to "match the general height limitations of this chapter" . Those limitations are found in the proposed §§ 403 and 404, dealing with "Street-based height limits" for residential and business blocks respectively, and those sections are in important respects not consistent with the Height Act, for the following reasons. *First*, the proposed permissible heights for "residential blocks" would in some cases permit higher heights than the Height Act permits for "residential streets";

and *second*, the definitions of "residential block" and "business block", which make the relative density of residential blocks the determinative criterion for both definitions, are for that reason also not consistent with the Height Act (as discussed below).

RECOMMENDATON:

(1) The second sentence of §400.4, which seems both superfluous and inaccurate, should be struck.

(2) The proposal that DCRA promulgate either regulations pursuant to the Height Act or some compilation of its interpretations of the Height Act should be put aside pending reexamination, clarification and some showing that it would meet a compelling need and would be a net improvement over the present situation.

§402 – General Rules of Measurement, and § 405.1

§402.1 would provide that "*The height of a building shall be measured from its midpoint along any abutting street frontage.*" As it stands, this provision does nothing to address the recurring problem of buildings that take their allowable height from a lower, wider street and then measure it from a higher, narrower street, with the resulting intrusion of inappropriate height onto lower scale of the narrower street. An earlier OP draft had effectively dealt with this problem by including the following language:

"When a building abuts more than one street, the street chosen to determine maximum allowable height must also be used to determine the measuring point for building height. This measuring point will set the basis for all height measurements of the building."

That provision was later dropped.

RECOMMENDATION:

This provision should now be restored as a part of § 402.1.

To the same end, the proposed, § 405.1 (which appears under the heading "Rules of interpretation for street-based height limits"), which specifically authorizes the harmful practice described above, should be amended to make it consistent with § 402.1 as amended. § 405.1 now provides that

"[t]he abutting street with the widest right-of-way shall be used to determine the street-based height limit for a building."

It should be amended to read

"Any abutting street may be used to determine the street-based height limit for a building."

§402.4 deals with the point of measurement of building height in situations where the curb grade has been artificially changed, and we find it generally acceptable with the following two qualifications:

First, paragraph (c) ,which would allow measurement of height from "an elevation previously determined by the Zoning Administrator", is too open-ended: it needs to include criteria having to do with the time when and circumstances under which such a determination was made by the Zoning Administrator. It should make clear that what is intended is a determination made at some significantly earlier time for purposes unrelated to the question of the permissible height of the proposed structure.

RECOMMENDATION:

§402.4(c) should be to provide greater specificity, as indicated above.

Second, by providing in paragraph (d) that "An elevation or means of determination established for a specific zone elsewhere in this title", this section postpones the question of allowing a particular building or all buildings in a particular zone to achieve an outsize height by

measuring height from an adjacent bridge or other artificial elevation. We would oppose any such provision as bad policy and inconsistent with one of the Draft Height Chapter's stated objectives of regulating height: providing "vertical control to accommodate appropriate density and good design."

§402.7 addresses the question of when multiple structures are regarded as a single building for purposes of determining height. The definition of "building" is of great relevance to questions of determining allowable height, because of the practice of securing a height for a building on a narrower street, inappropriate for that street, by constructing an enclosed passageway – a kind of umbilical cord -- to a structure on a wider street. This is one of the harmful practices allowable under the present Regulations that should be eliminated in any genuine effort at reform. Earlier OP drafts had made a commendable effort to do so, by including the following provision:

A "building" is a structure having a roof supported by columns or walls for the shelter, support, or enclosure of persons, animals, or tangible property. When separated from the ground up or from the lowest floor up by common division walls, each separate portion shall be deemed a separate building unless all of the portions share mechanical systems and at least one floorplate, and there will be open access between all portions on at least half of the shared floors. Two or more structures that are in all other respects physically separate from each other cannot be combined to form a single building through the introduction of any type of physical connection

between the structures, including a trellis, walkway, garage or tunnel, at any location.

Unfortunately the present OP draft not only does not eliminate the umbilical cord practice, it explicitly legitimizes it by providing that the necessary connection between the two structures may be merely an enclosed passageway or walkway. There is no justification for such a provision other than to provide the builder an otherwise unavailable height, at the cost of disproportionate intrusion into the streetscape of the narrower street.

RECOMMENDATION:

Section 402.7 should be re-drafted along the lines of the earlier provision just quoted.

Finally, we would propose a **new section, 402.8**, to further address the problem of the problem of buildings fronting on narrow street that take their allowable height from a front on a wider street. An earlier OP draft included the following proposed provision:

"When a building is located on a through lot that is not a corner lot, the building's height on the street not chosen as the measuring point is limited to ten feet more than the height that would otherwise be allowed on that street, as that height is measured from the building's measuring point. Above that height the building may rise to its full permitted height at a one to one setback from the street wall on the street not chosen as the measuring point."

This provision was a worthy effort to address the problem of inappropriate height on the

narrower street, by requiring a setback and stepdown on that portion of a through building that fronts on the narrower street. To our recollection it was not opposed, but instead was broadly supported, when presented to the Working Group in 2008. It is unfortunate that it has since disappeared.

RECOMMENDATION:

A new section 402.8, above, should be added.

§§ 403 and 404 - *Street-based height limits for residential and business blocks*

As already pointed out, the definition of "residential block" in § 403 is not consistent with the Height Act because it would in some cases permit higher heights than the Height Act permits for "residential streets"; and the definitions of "residential block" and "business block", which make the relative density of residential blocks the determinative criterion for both definitions, are for that reason also not consistent with the Height Act.[2] That statute speaks only of "residence" and "business" streets, and makes no distinction between the two on the basis of relative density; in fact it contains no mention of density at all. Specifically, it provides no basis for excluding some streets that are in fact and law predominantly residential in character from the "residence" category on the basis of their relative density or whether the non-residential

[2] Note that the Height Act employs the concept of residential or business "street" rather than "block". OP's draft employs "block", which must then be defined in terms of "blockface" – i.e. one side of a square -- to make clear that the rules do not apply to an entire square.

zoning of a cross street turns the corner for a parcel or two, or for including some predominantly residential blocks as "residence streets" for purposes of the Act and excluding others for any other reason.

As previously indicated, inconsistency with the Height Act is not of itself a basis for criticism of this Draft Height Chapter of the Zoning Regulations, since the underlying premise is that this set of provisions will not govern cases to which the Height Act applies. Height Act aside, on their merits these twp provisions are arbitrary in concept and destructive in practical effect, and should be redrafted. The critical provision is § 401.1, the effect of which is that any block that has even a piece of a lot with a "neighborhood residential" zoning is by that fact transformed entirely into a residential block for height purposes. ("Neighborhood residential" is not defined, but presumably means something like R-1 through R-4.) But if you live on a block that is all "apartment residential" except for a single piece of a commercially zoned lot, your whole block is thereby automatically transformed into a "business block" for height purposes. There can be no justification for this arbitrary discrimination other than to cram more density into certain row-house and apartment neighborhoods.

Moreover, the practical effect would be a seriously adverse – potentially devastating -- impact on many rowhouse neighborhoods that may be zoned with various of the R-5 categories, by excluding them from the "residential block" category for height purposes on the basis of the fact that they abut a commercial street and have a bit of commercially zoned property at the end

of the block. For example, a narrow residential street of, say, 30 feet in width, lined with forty-foot rowhouses, but with an 80- foot right of way – not uncommon – is limited to a 70 foot height if treated as a "residence street" (already far exceeding the height of a typical rowhouse). But if it is treated as a "business block" under the new regulations and the Height Act, it would have as much as 100 feet, depending on the underlying zone district. The proposal would provide a strong incentive for destabilization and destructive redevelopment of existing residential rowhouse neighborhoods, through demolition or otherwise, that would be vastly out of scale with existing residential buildings. This would be possible under existing zoning in many cases, but the proposed provision is also an invitation to rezone dozens of these blockfaces, which could happen virtually overnight notwithstanding their historic preservation status and/or the fact that they are largely built-up. Additionally, medium-density apartment areas would be similarly vulnerable to destructive redevelopment, and the medium-density apartment category substantially nullified.

Finally, a major problem with these proposals is that, so far as we are aware, no one has compiled data on exactly which areas of the city changes would affect, so the Commission and the community are being asked to by a pig in a poke. Compiling this data would require first specifying what is meant by "neighborhood residential" and "apartment residential" and where they will likely be mapped, once we get past the text case(s) involved. There also a striking lack of justification for the changes that are being sought, especially since they do not appear to be in line with the Comprehensive Plan.

Recommendation:

§§ 403 and 404 should be redrafted to the effect that blocks that are predominantly residential in fact and under the Zoning Regulations will be treated as residential for height purposes. No action should be taken on any proposal until the areas affected have been comprehensively identified.

§ 406 – Height Limit Exceptions

§ 406.1 lists the roof structures that may exceed height limitations provided in the Zoning Regulations. We would note in passing that the list will be substantially shorter for buildings that reach the maximum allowable height under the Height Act, which of course has its own list of allowable roof structures.

§ 406.2 sets out the set-back requirement for some allowable roof structures, again paralleling, but differing from, the corresponding provision in the Height Act, which requires set-back from "the exterior walls". Accordingly, since 1986, when the Commission adopted Order 84-10, the requirement in the Zoning Regulations has been set-back from "all exterior walls" (11 DCMR §400.7(b)). But the definition of "exterior wall" in the Height Act and the Regulations has been the subject of a longstanding contest between developers who want to maximize freedom of action in the location of various roof structures that are permitted to exceed height

limits, and preservationists and others concerned with the building's aesthetic quality and its impact on light, air and streetscape. This is because the concept of "exterior wall" is the criterion in the Act, and the only criterion, for determining when these roof structures -- which often have been simply ugly boxes unrelated to the design of the building -- must be set back toward the middle of the roof and thus made less visibly intrusive.

Even though the current zoning re-write exercise is no longer conceived as an effort to provide official interpretations of the Height Act, and thus there is nothing to rule out adopting regulations that are inconsistent with the Act to be applied in non-Height Act cases, we do think that the set-back requirements call for an effort to craft provisions in the regulations that are consistent with the Act, particularly in view of the fact that existing regulations already have adopted the statutory criterion – namely, set-back from exterior walls. This would require devising a definition "exterior wall" that reasonably reflects the apparent legislative intent of the drafters of the Height Act. There is nothing in the Act or its legislative history to suggest that "exterior wall" means anything other than what it would be taken to mean in ordinary usage – one of the four or more walls that define the outside perimeter of the building, by contrast to the various walls that partition off the interior of the building. By contrast, in all the protracted history of efforts to whittle away at the setback requirement, OP's present proposal as to the meaning of "exterior wall" is perhaps the most radically truncated and divorced from ordinary meaning. Who could possibly imagine that when the Congressional drafters of the Act in 1910 spoke of "exterior wall", they really meant "wall facing a public street or alley or open

courtyard". There is evidence in the record of the Commission's 1984 Order suggesting that the Commission was of the view that the proper interpretation of "exterior walls" would mean simply setback from the perimeter of the building's roof.

Leaving aside the question of consistency with the Act, there is every reason for the Commission today to tread cautiously and deliberate very carefully before undoing its work of a quarter-century ago, as it would do by adopting the proposed §406.2. Roof structure set-back is a very important factor in determining the architectural quality of particular buildings and the look of the overall streetscape. An intrusive roof structure will add an element of mediocrity to an otherwise well-designed building. These aesthetic effects are visually magnified in Washington's downtown and other principal commercial areas by the city's low profile mandated by the Height Act. In deciding how to deal with the setback issue the Commission will be significantly affecting, either for good or ill, the architectural quality of large portions of the city for many decades to come.

One of the strongest arguments for requiring set-back from the building's exterior perimeter is that, for all the effort that developers have put into getting a more relaxed standard, aerial photographs reveal that in a surprisingly high proportion of the post-World War II buildings in the principal commercial areas, architects and builders have devised roof structures that are in fact set back equally from all exterior walls. There is, in other words, compelling evidence on the ground that the more relaxed standard that OP has been persuaded to propose is

not a necessity but a convenience. There is no reason for this capital city to settle for it.

§ 406.2(e) requires separate comment. It provides that roof structure setback is required from lot-line walls (and we assume also party walls) only if the building is taller than the greater of the existing or matter- of- right height of the adjacent property. The problem with this is that, even assuming for argument's sake that a roof structure positioned on the lot line between two buildings of at least equal height will not be visually intrusive, this condition can be achieved only if both properties are built to that height. The provision makes the aesthetic effect of the roof structure on one building contingent on the future intentions of the owner of the adjacent property, who may never build to the required height or who, in many cases even in core commercial districts, would be prevented from doing so by of the constraints of historic preservation. So in the worst case, this provision portends a big ugly roof-top box looming over a Historic Landmark.

The problem would be particularly acute in rowhouse areas, because of the much greater mass of the roof structure relative to the mass of the building, and the lower height of the building. A twenty-foot roof structure on a rowhouse can be more than half as tall as the building itself and even on the tallest rowhouse will be an unavoidable and major visual intrusion. Moreover, vast areas of our rowhouse neighborhoods are protected by historic preservation, making future construction to increase a building's height extremely unlikely. Remember that we are writing land-use rules for a largely built-up city, not designing a planned community for some undeveloped rural tract.

For these reasons the problem of roof structures on rowhouses was explicitly addressed in the current Comprehensive Plan's Land Use Statement 2.1.B:

"Amend definition of exterior wall for zoning or height requirements to include the division-line wall or party wall of a row house or semi-detached house".

There is no ambiguity in the language of LU2.1.B, the object, intent and meaning of which are clear on its face: to include a division line wall or party wall of a row house or semi-detached house in the definition of "exterior wall", from which a roof structure must be set back. OP stated early in the re-write process that the "Comprehensive Plan calls for all party walls to be considered as exterior walls for zoning purposes," [3]yet now proposes that the Zoning Commission carry out this mandate in only a narrow subset of such cases. In so doing, OP has inexplicably disregarded the charter requirement that zoning not be inconsistent with the Comprehensive Plan.

Recommendation:

The Commission should have all concerned go back to the drawing board and craft a new regulation that (a) retains the present "all exterior walls" criterion, and (2) defines this criterion as requiring setback from the perimeter of a building's roof. Among other things, any regulation must fully implement Comprehensive Plan Statement 2.1.B.

LOW DENSITY RESIDENITAL MEASURING POINT

[3] Recommendations Regarding Measurement and Regulation of Height, June 20, 2008, p. 31.

The current definition of building height in the definition § 199.1 would be eliminated. That definition provides the measuring point for many residential buildings, including in the current R-1-A zone. In its apparent zeal to try to incorporate the Height Act into the zoning regulations, OP has created an anomaly. I can best demonstrate this by pointing to my own house, and the one across the street, which was the subject of a BZA case interpreting measuring point.

If a building height is limited to 40 feet, the current definition says:

> In those districts in which the height of building is limited to forty feet (40 ft.), the height of the building may be measured from the finished grade level at the middle of the front of the building to the ceiling of the top story.

Under OP's proposal, building height is always measured from the curb. My house is well below street grade, with the roof about at curb level. Under OP's proposal, I can add 40 feet on top of my 2 stories. My across the street neighbor, whose house sits 15 feet above curb level, could only build to a 25 foot height.

OP was told this throughout the Working Groups and the Task force, and their answer was "don't worry, we aren't changing anything." But they did, despite being warned of the problem. Unfortunately, this has been a consistent problem in OPs regulation rewrite.

USES

OP has made a fundamental change in uses allowed in residential zones. Basically anything goes, as long as you cannot show it to be a public nuisance. Our late and beloved Committee of 100 Chair, Barbara Zartman, always used to pint to the problem of the home occupation of a "recreational masseuse" perhaps better known as the world's oldest occupation, which is allowed by OPs new approach. And I'm sure a more formidable list of yet to be imagined uses can be thought of.

But the bigger issue is that in residential zones there is no requirement that permitted uses must not displace the primary use of a residence. Under OP's approach, a home occupation can displace a residential use, thus changing the character of the intended primary use. We must prevent across-the-board conversions of residences into businesses for transients or other business uses. If we do not, the zones will become meaningless artifacts.