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THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

**PUBLIC NOTICE OF
INTENT TO ADOPT STANDARD OPERATING PROCEDURES
FOR IMPLEMENTING TITLE 11 DCMR CHAPTER 13
“NEIGHBORHOOD COMMERCIAL OVERLAY DISTRICT”
LIMITATION FOR EATING OR DRINKING ESTABLISHMENTS**

This document sets forth the proposed operating procedures to be utilized by the Department of Consumer and Regulatory Affairs (DCRA), Building and Land Regulation Administration (BLRA), for measurement of the linear street frontage in the Neighborhood Commercial Overlay Districts established pursuant to Chapter 13 of the Zoning Regulations, including the linear street frontage devoted to Eating or Drinking Establishments. It also sets forth the Zoning Administrator's proposed determinations with respect to a number of issues that have arisen in implementing the regulations, and the proposed standard operating procedures adopted by the Zoning Administrator and DCRA for implementation of the regulations.

1. Total Linear Frontage In Overlay District By Neighborhood

Title 11 DCMR §1302.5 provides that:

“Restaurants, fast food restaurants, delicatessens, carry-outs, and similar eating or drinking establishments [hereinafter referred to collectively as Eating or Drinking Establishments] . . . shall occupy no more than twenty-five percent (25%) of the linear street frontage within a particular NC Overlay District, as measured along the lots that face designated roadways in the particular district.”

Similarly, 11 DCMR §1309.4 places a 50% linear street frontage limitation on Eating or Drinking Establishments in the Eighth Street Southeast Overlay District.

The linear distance is measured in feet. Pursuant to the regulations, the total linear distance (or “denominator”) is “measured along lots which face the designated roadways.” The “designated roadways” are the roads in the “designated use areas” as identified in §1306.3 for the Cleveland Park Overlay District, §1307.3 for the Woodley Park Overlay District, §1308.4 for the Macomb-Wisconsin Overlay District and §1309.5 for the Eighth Street Southeast Neighborhood Commercial Overlay Districts (hereinafter the NC Overlay Districts).

Twenty-five percent (25%) of that linear distance represents the maximum allowable street frontage for Eating or Drinking Establishments (the “numerator”) in the Cleveland Park, Woodley Park and Macomb-Wisconsin Overlay Districts. Fifty

percent (50%) of that linear distance represents the maximum allowable street frontage for Eating or Drinking Establishments (the "numerator") in the Eighth Street Southeast Overlay District, and half of that 50% or 25% represents the maximum allowable linear street frontage for fast food restaurants.

The treatment of corner lots and upper and lower level establishments is set forth below in Sections 3 and 4.

The linear distance of each designated roadway shall be based on the certified and recorded information of the Surveyor's Office for the District of Columbia; measured to the zone district boundary line of each commercial zone district within the Overlay.

2. Total Existing Linear Frontage for Eating or Drinking Establishments

Determination of the existing total linear frontage for Eating or Drinking Establishments shall be based on the existing records of Certificates of Occupancy for such uses by address verified through field observations. Measurements will be taken of: 1) the linear frontage for such uses that are currently in operation at the time of the study, and 2) the linear frontage for such uses that have been discontinued, provided the vacated space(s) has not been issued a Certificate of Occupancy for a use other than an Eating or Drinking Establishment since being vacated and provided it has not been vacated for a period in excess of three years.

3. Corner Lots

Where an Eating or Drinking Establishment occupies a corner lot facing on two designated roadways, both of the street frontages shall be counted for the purposes of enforcing the 25% limitation set by §1302.5(a) or the 50% limitation set by §1309.4. The plain language of this section refers to "designated roadways" [emphasis added]. It does not suggest that only one designated roadway should be included in the measurement when two designated roadways are involved. To include only one designated street, at the choice of the owner, would have the effect of artificially decreasing the linear frontage of Eating or Drinking Establishments included in the calculation, so as to negate the applicable 25% or 50% limitation and allow more Eating or Drinking Establishments in a particular NC Overlay District.

4. Treatment of Eating or Drinking Establishments Above and Below Ground Level

For purposes of enforcing the limit set by §1302.5(a), only Eating or Drinking Establishments occupying the ground level or portions of the ground level of a building will be factored in the count. This interpretation is consistent with the regulations.

Title 11 DCMR §1300.3(b) states that one of the purposes of the NC Overlay Districts is “to encourage retention and establishment of a variety of retail, entertainment, and personal service establishments . . . at ground level, so as to meet the needs of the surrounding area residents . . .”

Section 1302.1 dictates any building “in a designated use area” is required to provide “retail and service establishments on the ground level according to the requirements of this section . . .” This provision makes the ground level limitation applicable to §1302.5(a), the subsection that includes the restriction on the linear street frontage for Eating or Drinking Establishments.

Section 1302.4 provides that the designated uses listed in §1302.2 (including a variety of businesses, such as: laundries, pet shops, optical stores, photo shops, as well as, eating or drinking establishments pursuant to §1302.2(a), “shall occupy no less than 50% of the gross floor area of the ground level” of such buildings.

A review of the regulatory history of Chapter 13 also confirms that the intent of the regulations was to regulate establishments at ground level. The “ground level floor” is defined in §1302.4(b) as “the floor that is nearest in grade elevation to the sidewalk.” Therefore, the current regulations adopted by the Zoning Commission place no limit on Eating or Drinking Establishments on the second floor or higher, or below ground level.

5. Treatment of Eating or Drinking Establishments Currently in Operation in Neighborhood Commercial Overlay Districts.

The District of Columbia has not published an official measurement (or methodology for measurement) of the Eating or Drinking Establishments within the Commercial Overlay Districts since the adoption of the Neighborhood Commercial Overlay District Regulations in 1989. In some Overlay Districts, the linear street frontage devoted to Eating or Drinking Establishments may already exceed 25%. Further, it may be difficult to determine which Eating or Drinking Establishment(s) caused the excess linear street frontage. Therefore, the Zoning Administrator will not seek revocation of Certificates of Occupancy which have been issued to Eating or Drinking Establishments by DCRA, based upon exceeding the allowable linear street frontage. Revocation of Certificates of Occupancy at this juncture would impose a hardship on business owners who relied upon issuance of the Certificate of Occupancy by the District.

In any NC Overlay District where the applicable 25% or 50% limitation has been exceeded, DCRA will seek to achieve compliance with the NC Overlay District restrictions through attrition as set forth below in Section 8.

6. Treatment of Vacated Eating and Drinking Establishments

A recurrent question, which has arisen in implementing the regulations, is what occurs when an Eating or Drinking Establishment is discontinued, vacated, or temporarily closed for remodeling or renovations, or where there is a change in ownership.

Section 1301.1 provides that the "NC Overlay District is mapped in combination with the underlying zone district and not instead of the underlying district." §1301.2 provides that all uses permitted in the underlying zone shall be permitted in the Overlay District, except where there is a conflict with the provisions governing the NC Overlay Districts. Therefore, Eating or Drinking Establishments in the commercially zoned districts remain "matter of right" or conforming uses, subject, however, to the restriction that the linear street frontage cannot exceed 25% of the street frontage in the Cleveland Park, Woodley Park or Macomb-Wisconsin Overlay Districts or 50% of the street frontage in the Eighth Street Southeast Overlay District.

Pursuant to §3203.8, any use, which is authorized by a Certificate of Occupancy, may be continued pursuant to the terms of the certificate and the provisions of the Zoning Regulations in effect on the date the certificate is issued. Any amendment of the use authorized by the certificate is required to comply with the regulations in effect at the time the certificate is amended. Further, pursuant to §118.1.2 of the DC Construction Code (12A DCMR), where there is a change in ownership of a structure that has "an existing valid Certificate of Occupancy, a new Certificate of Occupancy shall be issued in the name of the new owner (without reinspection), provided there is no proposed change in use or increase in occupancy load."

Therefore, even when the total linear street frontage of Eating or Drinking Establishments in a particular NC Overlay District is at or exceeds the applicable 25% or 50% limitation, an existing Eating or Drinking Establishment, which has been issued a valid Certificate of Occupancy for that purpose, may continue that use indefinitely and may change ownership or be renovated, or remodeled, or replaced by another Eating or Drinking Establishment use, subject to the limitations set forth below:

- There can be no extension or enlargement of the linear street frontage. If an Eating or Drinking Establishment wishes to extend or expand its linear street frontage, it must apply to the Board of Zoning Adjustment for special exception approval pursuant to 11 DCMR §§1304 and 3104.
- If there is a change in the use to a non-Eating or Drinking Establishment, the right to maintain the linear street frontage encompassed by the Certificate of Occupancy is terminated. There is no right to reopen an Eating or Drinking Establishment at the same location in the future. If the property owner, tenant, and/or business owner wishes to reestablish an Eating or Drinking Establishment again in the future, it can only do if there is available linear street frontage for additional Eating or Drinking Establishments within the Overlay District.

- If the Eating or Drinking Establishment is closed for a period in excess of three (3) years regardless of the reason (for example, change in ownership, renovations, seeking new tenant), the right to maintain the linear frontage for use as an Eating or Drinking Establishment within the Overlay District is terminated. This period may be extended, at the discretion of the Zoning Administrator, for up to one (1) additional year, if application for an extension of time is made prior to the expiration of the 3 years from discontinuance of the use, and if the applicant can demonstrate both extraordinary circumstances causing the delay and undue hardship if the extension is not granted.

DCRA officials have given serious consideration to the question of how to treat an Eating or Drinking Establishment which has been discontinued, closed, or vacated and adoption of the 3-year limitation. DCRA has sought to carefully balance the interests of the affected property or business owner with the interests of residents of the neighborhood and others who would like to establish an Eating or Drinking Establishment in the neighborhood. While an Eating or Drinking Establishment is a conforming use in the underlying commercial district, it is also a restricted use in the Overlay District and therefore is analogous to a nonconforming use as described in 11 DCMR §2000.2. The Department has therefore proposed a 3-year limitation, similar to that which applies to nonconforming uses.

7. Principal v. Accessory Uses

Pursuant to 11 DCMR §1300.3, one of the principal purposes of the NC Overlay District is to “encourage retention and establishment of a variety of retail, entertainment, and personal service establishments . . . to meet the needs of the surrounding area residents, workers and visitors . . .” The regulations limit Eating or Drinking Establishments and banks, financial institutions and travel agencies in an effort to maintain this mix.

The Zoning Regulations define an “accessory use” in 11 DCMR 199.1 as: “a use customarily incidental and subordinate to the principal use, and located on the same lot with the principal use.”

DCRA officials have given serious consideration to various proposed “accessory” uses in the context of the NC Overlay Districts. Examples of such proposed “accessory” uses have been a fast food restaurant at a gas station and a delicatessen in a grocery store.

The Zoning Administrator has concluded that in order to properly implement the meaning and intent of the linear street frontage limitations in the NC Overlay Districts, all linear street frontage devoted to Eating or Drinking Establishments should be properly counted. Therefore, the Zoning Administrator will not exclude an Eating or Drinking Establishment from the count simply because it occupies the same premises as a gas station, grocery store, billiard parlor, or other non-Eating or Drinking Establishment.

A use shall be deemed a principal use if it is reflected, or is required to be reflected, on the Certificate of Occupancy.

8. Achieving and Maintaining Compliance

As stated above, where the linear street frontage devoted to Eating or Drinking Establishments currently exceeds the applicable 25% or 50% linear street frontage limitation, the Zoning Administrator will strive to achieve compliance through attrition. This will occur when an Eating or Drinking Establishment is closed for over three years, or there is a change in use to a non-Eating or Drinking Establishment.

Further, once the applicable 25% or 50% limitation on linear street frontage has been reached, an application for a Certificate of Occupancy or building permit to open a new restaurant with street frontage will be denied. Likewise, once the applicable 25% or 50% limitation has been reached, an application for a Certificate of Occupancy or building permit to extend the linear street frontage of an existing Eating or Drinking Establishment, will be denied. In either case, the applicant may appeal to the Board of Zoning Adjustment for special exception approval under 11 DCMR §1304, in accordance with the conditions specified in 11 DCMR §3104.

It has been requested that DCRA adopt a process in order to allow persons or companies who wish to establish an Eating or Drinking Establishment in an NC Overlay District to signify their interest to the Department and to be recognized on a kind of waiting/priority list which would enable them to have a first right of refusal for space which may become available, subject to their ability to negotiate a lease or purchase of the available space. DCRA is prepared to consider the details of how such a waiting list might operate after this policy and methodology document is finalized and the measurements for Eating or Drinking Establishments in the NC Overlay Districts have been published.

The Zoning Administrator will accept written comments on the foregoing Proposed Standard Operating Procedures for Implementing Title 11 DCMR Chapter 13, for a period of thirty (30) days from the date of this publication. A 30-day notice will also be mailed postage pre-paid by first class mail to the affected Advisory Neighborhood Commissions. Comments should be mailed by first class mail or hand-delivered to Mr. Olutoye Bello, Acting Zoning Administrator, Building and Land Use Administration, Suite 2000, Department of Consumer and Regulatory Affairs, 941 N. Capitol Street, NE, Washington, DC 20002 on or before March 10, 2002. Once comments have been received and considered, the Zoning Administrator and DCRA will publish the Procedures in final form. DCRA will also publish the Department's final measurements of the linear street frontage in the NC Overlay Districts including the linear street frontage presently devoted to Eating or Drinking Establishments. Please note that the NC Overlay Regulations in 11 DCMR Chapter 13 were adopted by the District of Columbia Zoning Commission and that only the Zoning Commission has the authority to amend the language of the regulations.