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July 18, 2002

Ms. Carol Mitten, MAI
Chairperson
Members of the Zoning Commission
Zoning Commission of the District of Columbia
One Judiciary Square, Room 220
441 Fourth Street, NW
Washington, D.C. 20001

Re: Appearance as *Amicus Commissionis* in ZC Case 02-06 – Text
Amendment to the Neighborhood Commercial Overlay District –
Limitation for Eating and Drinking Establishments

Honorable Members of the Commission:

This letter serves to set out comments that I will offer in the above-captioned case from me to you as *amicus commissionis*. My request to participate in this matter in this fashion arises from the confluence of the following:

- Along with Commissioner John Parsons, I sat the initial Neighborhood Commercial (“NC”) text and map case, some of the provisions of which are now subject to refinement and amendment; both of us also participated in the same manner in an earlier case clarifying discontinuance and abandonment and other issues in properties that are or become non-conforming (Case 81-17).
- I live near, but not adjacent to, all three of the zones initially zoned with the Neighborhood Commercial (“NC”) overlay provisions: Woodley Park (“WP”), Cleveland Park (“CP”), and Macomb-Wisconsin (“MW”).
- While I live nearby, my proximity is at sufficient distance to insulate me from direct and indirect consequences of any decision you might render.
- I have provided commentary on some of the background to and issues arising in the code as adopted to staff of the Department of Consumer and Regulatory Affairs (DCRA), participating in at least one meeting that Agency convened June 7, 2000.
- I have provided perspective on this issue to those asking me for it from time to time, mostly in the same time frame as the meeting DCRA convened.
- I do not now have, nor have I ever had, any “representational” relationship with any stakeholders in the issue from any side: retailers as owners, retailers as tenants, owners of any other kind, residents, community associations, the Advisory Neighborhood Commission, or any of its Commissioners. Indeed, while I have a lifetime “ban” on accepting any such relationship on all *contested* matters on which I directly passed judgment during my two terms on the Commission, I do not generally represent anyone on issues arising from any case in which I had been involved.

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EXHIBIT NO. 13
Exhibit 13

- At the time I met with DCRA and others, I was employed on a part-time basis by the law firm of Holland & Knight LLP, which then had no interest in the matter at hand.
- One attorney, *now* with Holland & Knight LLP, represents one party who is interested in this matter. However, at the time the meeting with DCRA took place, the attorney then and now involved was a partner of a different law firm and the party interested in the matter was then a client of that other firm.
- Effective February 28, 2002, I ceased being an *employee* of the law firm of Holland & Knight LLP, becoming, instead an independent consultant to the law firm and its clients, a professional also providing consultation to others.
- I have not collaborated with that attorney or his client in forming the observations and recommendations set forth below. I have, however, shared early drafts of this with both the Office of Planning and their consultant; their consultant provided me with some reactions, which I considered and incorporated.

My objective is to have an end result that is rational, clear, administratively feasible, and efficient.

To that end, I offer the following:

Observations	Recommendations
• Some, and possibly most, of the present situation arises from the fact that at some point after the existing regulations were adopted, critical measurements to maintain current information on the threshold status of each NC-zoned area relative to its percentage of "food service establishments" apparently lapsed. • It also appears that some building permits and Certificates of Occupancy were sought and approved without complete consideration of the restrictions and limitations established by the Commission	• Obtain, from DCRA in this and other cases establishing new zone districts or changing aspects of existing ones, a statement as to whether they have at the time, or will have when made effective, the resources needed to administer the requirements under consideration. • Ask DCRA to suggest ways in which these existing and proposed regulations could be cast in a fashion that would not outstrip DCRA's administrative capacity or postpone effective dates until resources needed are provided, allocated, and applied. (Consider adopting a similar policy on all zoning rules?)
• In part because of this, certain provisions in the adopted regulations that become crucial as the threshold limit is reached were not illuminated by experience, practice, or appeals before "the pot boiled over."	• Request, after new regulations of this nature are established, for a report to the Commission from the Zoning Administrator about implementation of changes and identification of problems, if any, encountered.

Observations	Recommendations
• The core of the case involves uses regulated, or to be regulated, by §1302.5, namely “<i>Restaurants, fast food restaurants, delicatessens, carry-outs, and similar eating or drinking establishments</i>” (italics showing terms defined within §199.1 of the <i>Zoning Regulations</i>), all of them implicitly viewed as principal uses, not as <i>accessory uses</i>. • The uses regulated fall within the range of a simple term, such as “food service establishments,” which, if defined would add clarity to the regulation.	• Create a term such as “food service establishment” for the purposes of Chapter 13, adding it to a new section 1399, akin to other Chapter-specific definitions elsewhere in the <i>Regulations</i>. • Declare whether the NC overlay regulations have any bearing on <i>accessory uses</i>; to me, the scope of the NC regulations should not relate to any accessory use whatsoever.
• Regulating a narrow range of uses under an all-encompassing term would clarify the Commission’s intent as any such regulated use changes ownership or form to another use still within the four corners of the regulated use.	• Create a term such as “food service establishment” for the purposes of Chapter 13, adding it to a new section 1399, akin to other Chapter-specific definitions elsewhere in the <i>Regulations</i>.
• The present regulations offer no suggestion as to the Commission’s view of the appropriateness of allowing a “drive in restaurant” (first permitted as a matter of right in C-2-A zoned areas, see §721.3(r)) or a <i>food delivery service</i> (first permitted as a matter of right in C-2-B zoned areas, see §721.3(s)) within any NC overlay area • Note that the definition of <i>food delivery service</i> itself declares it as a form of “. . . restaurant, delicatessen, or fast food restaurant. . . (see §199.1).	• Provide appropriate clarifications.

Observations	Recommendations
• Another essential element of the present and proposed regulatory framework is “designated roadways.”	• Maintain this focus • Define the term
• “Street frontage,” particularly along “designated roadways,” is a core element of the present and proposed regulatory framework.	• Maintain this focus.
• Linear street frontage measurements should be an element of both the numerator and denominator in determining proportion of uses and limits thereon. • Linear street frontage measurements can be determined from records in the Office of Surveyor for “designated roadways” and, for overall distances in which the overlay is mapped, from the Office of Zoning. • Linear street frontage for each use that occupies all of a given record or assessment and taxation lot can likewise be obtained from the Office of the Surveyor. • However, historic Certificates of Occupancy themselves should not be expected to bear information on the frontages by use, just the address and/or lot and Square of the property. • Only when a given lot that has frontage that is not entirely within the realm of a “food service establishment,” is there a need to allocate frontage between or among uses on the (ground) floor facing a “designated roadway.”	• Maintain this focus. • Use official information exclusively when available and sufficient to complete a calculation. • Add specifications to this effect to proposed §1302.5(c) and clarify that the Certificates of Occupancy are a basis to establish which property records and their measurements are to be included one way or another, not that the C of O is the only source of such information (but that it would be allowed, if so noted). • Allow allocations of measurements only when the circumstances so require, and then require the Zoning Administrator to document the basis of the allocation so that the decision can be examined, if needed, by interested parties or the Board of Zoning Adjustment on appeal.

Observations	Recommendations
Street frontage can, and may in at least once case, exist (or be seen as existing) on more than one "ground floor level" of a building on a lot facing two or more designated roadways, each of which has regulated establishments.	Clarify whether the <i>regulations</i> apply only to the street or streets on which the larger amount of regulated establishment does or is proposed to exist, or if the regulation applies as well to more than one ground floor if a case can be made for that (see Ordway Street face of building on NW corner of Ordway and Connecticut Avenue).
The present rules provide no guidance on transfer of rights as ownership changes, as tenancy changes, or as restricted uses may move within a given lot	Provide appropriate clarifications.
The present NC rules provide no explicit guidance on abandonment or discontinuance.	Provide an explicit reference to principles already established elsewhere in the <i>Zoning Regulations</i>, e.g. Chapter 20 and §2005.
- The present rules provide for a range of uses, all allowed, but limited to some (considerable) degree in overall presence. The various food service establishment uses regulated are not, in any sense, non-conforming uses.	Clarify that any situation that now exists in which a use is part of a larger array of such uses in a given NC overlay district that has, for whatever reason, exceeded the levels allowed without seeking or obtaining the approvals required from the Board of Zoning Adjustment, is in no way to be deemed "non conforming."

Observations	Recommendations
• The present rules contemplated administration in a manner that would have sent some applications to the Board of Zoning Adjustment once the allowed limits had been reached. So far, this has not happened. • Consequently, some businesses and owners apparently have facilities that are operating above the limit allowed. • It will not be easy (or fair) to determine who these are and what they should expect that is any different from kindred uses in that NC district. • Those property owners and their tenant businesses with valid Certificates of Occupancy, even if issued in error, should not be penalized for any failure of the Government. Rather, the uses allowed should be able to continue indefinitely, with the rights to that use on that lot in the degree so allowed being "vested" until the property no longer exists or becomes another use. • Rights for reuse within the realm of a food service establishment should continue as though validly established for all such uses now established or "in the pipeline" (e.g., having a valid building permit). • Additional expansion above presently exceeded threshold levels should require review by and approval of the Board of Zoning Adjustment, with opportunity for input from affected ANCs and others wishing to express themselves.	• Determine relevant policies and set forth in regulation or <i>dicta</i> in accompanying Order, as warranted.

Observations	Recommendations
While the existing general discontinuance rules provide for a so-called “three-year” rule, it is not absolute and never contemplated the circumstance where a cloud was put over a property from issues pending decision; the rule was only intended to cover time the owner could have acted <u>within</u> but did not.	Clarify in appropriate manner.
- While guidance is provided as to both measurement and expansion in various places, no mention is made of the treatment of any <i>mezzanine</i> that now exists or might come to exist for food service establishments in NC overlay districts. - As presently defined, <i>mezzanine</i> does not count as a “story” and thus might be seen as not counting to the allocation of mixed frontage situations even if reached only from a ground floor that is subject to the present and proposed regulations.	Clarify measurement issues as warranted relating to <i>mezzanines</i>.
Present rules do not specify any limits on configurations of lots or assessment and taxation lots such as to defeat intent and purpose of NC overlay districts.	Resist temptation to over-regulate but advise Zoning Administrator to inform Zoning Commission if any pattern emerges that appears to be working to defeat purpose and intent of this (or any other) regulation.

The NC system of controls was fashioned to respond to issues about character of neighborhood shopping districts. While reasonably motivated, some of its provisions are now known to be unclear. Moreover, that overlay – and likely others – has not been continuously or consistently implemented in an environment with sufficient resources or authority¹ to carry it out, a shortcoming that only the Mayor and Council can fully resolve over time. In the meantime, the Commission must be mindful that it adopt regulations that do not overtax the resources that are available such that basic zoning principles are functionally ignored, jeopardizing the entire regulatory environment.

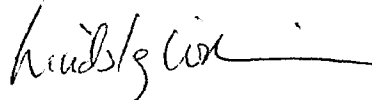
¹ It is my understanding that the maps and measurements needed to effectively regulate the provisions of the NC overlay as originally adopted were maintained within the Office of Planning, not the Office of the Zoning Administrator. As key staff from both the Office of Planning and Office of Zoning Administrator retired or resigned, a system that had at least sufficed initially apparently withered.

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In summary, assuming DCRA can assure you that they have and will allocate the resources needed to implement and enforce the provisions of Chapter 13 as you determine to amend it, I recommend that you amend the rules generally along the lines of the Notice, also generally concurring with the recommendations of the Office of Planning. I also suggest you consider the additional points mentioned above.

Thank you for hearing the case and working to achieve a sound system of base zone districts and overlay districts within the District of Columbia.

Respectfully,

A handwritten signature in black ink, appearing to read "Lindsley Williams", with a long horizontal flourish extending to the right.

Lindsley Williams