

To: Carol J. Mitten, Chairman DC Office of Zoning
From: George Idelson, President, Cleveland Park Citizens Association
Subject: Overlay
Date: December 3, 2002

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I have enclosed a copy of a follow-up letter to Ellen McCarthy on Overlay Issues in the Cleveland Park Neighborhood District. We think we offer a rational and fair way to bring the shopping center into compliance and to get this matter behind us. I hope it is helpful.

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ZONING COMMISSION
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November 27, 2002

Ms. Ellen M. McCarthy
Deputy Director for Development Review and Coordination of Planning
Office of Planning
801 North Capitol Street, NE, Suite 4000
Washington, DC 20002

Dear Ms. McCarthy:

Many thanks for taking time on Friday afternoon to exchange views on Commercial Overlay issues in Cleveland Park. Here is our understanding of the substance of our dialogue, which covered so-called "grandfathering" of restricted and mixed use establishments (RUE.s* and MUE.s).

The Issue

The Commercial Overlay placed a reasonable cap on RUEs in the Cleveland Park shopping center to encourage a diverse shopping experience and minimize the growing impact of traffic, parking, noise and trash on the neighborhood. The Comprehensive Plan underscores the restricted nature of this shopping center. It is to be primarily a neighborhood shopping area, not a destination, as Adams Morgan has become. Indeed, Adams Morgan is rude testimony to how impacted a neighborhood can become without such protections. Current congestion on Connecticut Avenue, and the surge in the number of vehicles within Cleveland Park further validate the wisdom of the planners.

The Overlay, in effect since 1989, is no secret. Its terms are quite clear. Permits are not to be issued to RUEs for more than 25 percent of the lincol frontage in the two-block shopping center on Connecticut Avenue. Realtors, developers and citizens are well aware of the restrictions. Regrettably, the one party least attuned to Overlay requirements has been the agency charged with enforcing them: the Department of Consumer and Regulatory Affairs. DCRA has consistently ignored the 25 percent cap in issuing permits. The result is not only that the cap has been exceeded, but that it was done with illegally issued permits. Though frequently reminded** of its lapses, the

agency has continued to flout the regulation, thus encouraging developers to seek illicit permits, souring citizen respect for government, and embarrassing zoning and planning officials.

The current situation is intolerable. What to do about it is the question.

The Solution

A false solution: Faced with a desire to "balance" the public interest versus business proclivities, zoning officials have seized upon a false solution involving a novel interpretation of the law and a proposed rewrite of the Overlay to legitimize the interpretation. We see this at best as a misreading, at worst as a contorted effort to fit a round peg into a square hole. Here is the premise as we understand it:

1. A *Certificate of Occupancy*, the key document issued by DCRA, determines whether an RUE may open and do business. A number of permits – plumbing, electrical, etc. – must first be issued before the CofO is granted. Zoning officials have recently suggested that the CofO for an RUE, indeed for any kind of business, does not expire when the establishment goes out of business, but rather has a life of its own. In other words, "once a restaurant, always a restaurant" is the operating premise, even though the space remains unoccupied and unleased. Thus, the only break in an endless succession of restaurants would occur if the succeeding lessee were not a restaurant. Were it a tailor, say, a succession of tailor shops would thus inherit the right to the CofO.

The problem with this interpretation of a CofO is that it is a pure concoction. The law governing CofO's (11 DCMR 3203.1) provides that "...no person shall use any structure land or part of any structure or land for any purpose... until a certificate of occupancy has been issued *to that person* [italics added] stating that the use complies with the provisions of this title..." Further, (11 DCMR 3203.8) states: "[a]ny use which is authorized by a certificate of occupancy may be established and continued pursuant to the terms of the certificate and the provisions of this title *in effect on the date that the certificate is issued* [italics added], subject to the following conditions: ... (c) Any amendment of the use authorized by the certificate shall comply with the provisions of this title *in effect on the date that the certificate is amended* [italics added]."

In other words, a CofO is not only use specific, it is person and date specific. A new applicant starts from scratch. He must comply with the law like everyone else. Were there any further doubt, one need only to read the CofO itself. The life and death of a CofO are spelled out in no uncertain terms on the face of the document:

THIS DOCUMENT SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, ONLY for the premises, or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or other purposes under ANY Conditions. ANY CHANGE in the type of business, ownership of business, or part of premises listed therefore, will render this Certificate VOID and a NEW Certificate must be obtained.

Please note that the use of caps for emphasis is exactly as it appears on the document. Where then does the "immortality" notion come from? "From the Corporation Counsel," we are told. But is it based on case precedents? We have seen none, nor have we been promised any. We doubt they exist.

The rewrite of the Overlay ("text amendment") under consideration by the Zoning Commission would, among other things, change the law to "grandfather" a restaurant CoFO for three years. But, if the "once-a-restaurant, always-a-restaurant" premise were already valid, why would it be necessary to rewrite the law? "To make it clearer," we are told. But could it be any clearer? Ultimately, the text amendment is based on a false premise and would merely provide a loophole for some applicants who wish to circumvent the Overlay restrictions and override attrition, the fair and legal way to achieve compliance.

A second concoction is the premise that the three year window for continuance of a *nonconforming* use can be applied as an analogy to *noncompliant* uses in the Overlay district. Under this analogy, an existing restaurant that becomes nonconforming with new code changes is permitted to continue. When it goes out of business, a three year window opens allowing another restaurant to come in and enjoy the same immunity. But even using this analogy, recent permits issued to restaurants in the Overlay district, especially in the Starwood block, would be illegal. All or most of these cases would violate 11 DCMR 2002.4, the nonconforming regulation, which cleans the slate once a structural change is made. Structural alterations, such as Starwood has made, would invalidate any immunized nonconforming use:

2002.4 Ordinary repairs, alterations, or modernizations may be made to a structure or portion of a structure devoted to a nonconforming use. Structural alterations shall not be allowed, except those required by other municipal law or regulation; ...

Even if the analogy is offered as a way of dealing with ambiguities in the law, it fails. Once again the law is clear. It is also unneeded, since the zoning regulations provide a precise path for dealing with cases where inability to continue a noncompliant use would create an inequity (i.e. the special exception process).

A real solution: There is a way to balance the interests of the contending parties without rewriting the law to justify past mistakes. If followed, it would do justice, ease tension with the community, and raise the credibility of city officials:

1. The goal remains to cap RUE frontage at 25 percent. If it made sense in 1989, it makes even more sense today.
2. No permits leading to a CofO, as well as the CofO itself, shall be granted until the percentage falls sufficiently below 25 percent to be accommodated within the cap.
3. The "Special Exception" remains the tried and true way for zoning regulators and the community to deal with seeming inequities with compassion and common sense.
4. What about noncomplying permits, already granted, which would lead to a CofO? The zoning administrator has expressed strong reservations about rescinding such permits. We empathize with this position, but since no CofO can be issued until the ambiguity about how to count mixed-use establishments is resolved and the precise measurement agreed upon, these permits should be revoked and no new ones issued. The grantees of the revoked permits along with others seeking RUE permits would be free to apply for special exceptions.
5. All developers and lessors would be treated equally. Here, too, a simple solution presents itself. Were an applicant denied a permit because it exceeded the cap, the application could be held until the percentage falls below 25 percent and enter a queue with other potential lessees. Permits would be granted first come first served.

Finally, the mixed use establishment issue (MUE), and a solution:

Unfortunately, the Overlay does not provide a clear way to count establishments that are licensed for restricted as well as unrestricted uses (a grocery store, for instance) under one roof. Perhaps the drafters of the law were daunted by the complexities of developing a formula involving sales volume, square footage and other variables. We have proposed a much simpler, almost self-enforcing formula. If the MUE has a counter and/or a table with chairs for serving customers, it is an RUE. Otherwise it is a MUE.

Thank you again for your openness. We hope we have helped to clarify the issues and our position.

*1302.5 Restaurants, fast food restaurants, delicatessens, carry-outs, and similar eating or drinking establishments shall be subject to the following limitations:

(a) These uses 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 the face designated roadways in the particular district.

**The agency file will bear this out. Two examples, include: CPCA, July 1, 2001 to Ms. Theresa D. Lewis, Dep. Dir. Operations, DCHA and CPCA, March 8, 2002 to Mr. Olutoya Bello, Acting Zoning Administrator, Bldg. & Land Use Admin.

Very truly yours,

George Idelson,
President
(signed)

Peter Espenschied,
First Vice Chairman
(signed)

cc: Council members Catania, Mendelson, Schwartz, Grahm, Fenty, Patterson, Ambrose,
and Chavous; Robert Kelly, Zoning Administrator; Nancy MacWood, Chairman, Advisory
Neighborhood Commission 3C.