

Cleveland Park Citizens Association

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August 21, 2005

Ms. Carol J. Mitten
 Chair
 DC Zoning Commission
 441 4th Street, NW
 Suite 210 South
 Washington, DC 20001

Dear Ms. Mitten:

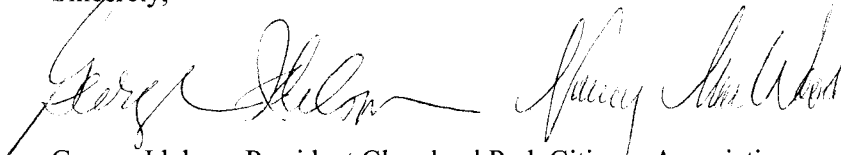
Cleveland Park's Neighborhood Commercial Overlay District (NCOD) is more important to our community today than when it was enacted in 1989. The balance of stores in Cleveland Park is threatened by persistent pressure from developers who would gladly turn the two blocks on Connecticut from Macomb to Porter Streets, into another "restaurant row."

Hence, the notion in the proposed text amendment that the Overlay is somehow "unworkable" or "unenforceable," and should be abandoned, is most disturbing. All the more so, since it appears to be based on a false premise. The solution to making the present Overlay both workable and enforceable, is accomplished through a few simple text changes, as explained in the attached material.

The comments and the resolution of the Cleveland Park Citizens Association spell out our proposal. (Note: ANC 3C has a parallel resolution.) We offer them as a gift to our city – a solution instead of a problem, where everyone wins. The Commission, DCRA and the community are relieved of a long-standing, unresolved issue. And residents are assured that their shopping center remains viable, diversified, and manageable.

If the Commission, on September 8, chooses to embrace our proposal and were to schedule another hearing to consider it, that would be a positive outcome and we would look forward to participating.

Sincerely,



George Idelson, President Cleveland Park Citizens Association
 Nancy MacWood, Chair, ANC 3C

Cc: All Zoning Commissioners
 Dr. Patrick Canavan, Director, DCRA
 Jennifer Steingasser, Office of Planning

ZONING COMMISSION
District of Columbia
 CASE NO. 02-06
 EXHIBIT NO. 44 **ZONING COMMISSION**
 District of Columbia
 CASE NO. 02-06
 EXHIBIT NO. 44

August 21, 2005

**CASE NO. 02-06 (Text Amendments to Neighborhood Commercial Overlay
District: Limitation for Eating or Drinking Establishments)**

**COMMENTS BY
THE CLEVELAND PARK CITIZENS ASSOCIATION**

Hearing Date, Thursday, September 8, 2005

I. Background

In November 1989, the Zoning Commission enacted Chapter 13, "Neighborhood Commercial Overlay District." Its primary purpose was to prevent restaurants and bars from overwhelming and crowding out other needed and appropriate businesses in neighborhood commercial areas, and to help maintain a diversity of such other businesses and affordable upper-storey housing. Unfortunately, serious logical errors were made in the drafting of key parts of Chapter 13.

The Zoning Administrator, 15 years ago, should have come right back to the Zoning Commission and pointed out defects in the regulation that make it impossible to administer the requirements of Section 1302.5 in a practical and reliable way. But the DCRA was at that time so dysfunctional that it was unaware of the Overlay District. The failure to administer the Overlay continued for over a decade, until the Starwood development in Cleveland Park evoked widespread citizen protest, including assertions that the proposed development would exceed the NCOD limitation. DCRA, partially in cooperation with the Cleveland Park Citizens Association and ANC 3C, then made some measurements. In so doing, they discovered that the Overlay required making subjective judgments about what should be counted and how it should be counted.

The Zoning Commission in December 2002, recognizing the existence of confusion, tasked the Corporation Counsel with producing a proposed replacement or amended text. It failed however, to isolate the true source of confusion and to address the dysfunction at DCRA.

The two basic issues that were left in a confused state of affairs by the original drafting defects were: (1) the listed categories were so broad that they included businesses plainly not meant to be included, and (2) there were no clear and unambiguous criteria for determining which properties were to be counted against the 25% limitation. The Corporation Counsel's proposal not only offers no solution to either of these primary problems, but also generates several additional sources of confusion. If adopted, it would bog down and paralyze the whole overlay process.

In short, the Overlay was never enforced largely because of uncorrected, and unnoticed, drafting errors. However, the errors are easily corrected. Enforcement need be neither difficult nor complex. With a few simple text changes, the confusion disappears and the Overlay becomes virtually self-enforcing.

II. Defects of the existing Neighborhood Commercial Overlay District regulation

The first disabling defect in the existing regulation is the inclusion of delicatessens and carryouts in the limitation category. A profusion of delicatessens and carryouts is not the reason the Overlay was promulgated. The problem is with restaurants and taverns, which, because they pay higher rentals, crowd out more moderate rentals that result in a balanced retail mix.

Second, the regulation does not deal with whether to include or exclude establishments that are a mixture of limited and non-limited businesses (e.g. grocery store with a delicatessen) and does not establish any criteria for identifying the businesses that are to be included.

In addition, the regulation fails to take into account that opening an eating or drinking establishment is not an instantaneous process; there is usually an extended period of time between leasing or constructing premises, renovating, and being ready to apply for a Certificate of Occupancy and business license. A percentage limitation (as contrasted with a flat, prescribed use limitation – the usual form of zoning limitation) requires that there be a means for applicants to determine from the beginning whether they are within the limitation -- to prevent making an investment in a planned business, and then being prohibited from opening.

III. Defects of the proposed text amendment to the Neighborhood Commercial Overlay District regulation

Case No. 0206 (Text Amendments to Neighborhood Commercial Overlay District; Limitation for Eating or Drinking Establishments)

The Zoning Commission of the District of Columbia hereby gives notice of its intent to hold an additional public hearing at the above-stated date, time and place concerning Zoning Commission Case No. 02-06.

The amendment responds to the application processing concerns brought to Zoning Commission's attention by the Zoning Administrator and the Department of Consumer and Regulatory Affairs. It is intended to provide uniform procedures for determining linear street frontage usage by eating and drinking establishments in the Neighborhood Commercial Overlay Districts.

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The record in this proceeding reflects that the administrative process of determining such usage has proven to be complex and burdensome for the agency. It also leaves neighborhoods at a constant tipping point between when these establishments are allowed by special exception or by right. In recognition of these circumstances, the Commission wishes to hear public testimony concerning whether it would be preferable to no longer make the status of these uses dependent upon a measurement, but, instead designate whether the uses are permitted by right or through special exception approval with respect to each existing and proposed NC Overlay District. Testimony should not advocate for matter of right or special exception status within a particular location. The Commission will only go on to hear such recommendations if, after a decision meeting, it elects to proceed with this alternative.

This is a prescription for chaos.

Matter of right – Would abandon all effort to limit bars and restaurants, which would inevitably lead to expansion of their percentage of street frontage, as they pay higher rents and are therefore more attractive to landlords. This will produce more parking congestion, street and sidewalk trash, sanitation problems, and noise.

Special Exception -- Would be chaotic. Every restaurant and bar needs a special exception? Intolerably burdensome for the BZA and for applicants and for neighbors -- a windfall for lawyers, who could work full time at the BZA.

Because this approach would be an alternative to the current procedures, the Commission also invites testimony with respect to the following amendments to Section 1302.5 of the Zoning Regulations. Additions to the existing text of 11DCMR 1302.5 are shown in bold and deletions in strikethrough.

1302.5 Restaurants, fast food restaurants, delicatessens, ~~carry-outs~~, **bar or cocktail lounges**, and similar eating or drinking establishments, **occupying all or part of the ground floor level of a building**, 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 that face designated roadways in the particular district;

Delicatessens -- Would perpetuate the inclusion of delicatessens, which is irrelevant to the stated purpose of the Overlay.

Bar – should be Bars

...occupying all or part... – Would count all the frontage of 2nd floor restaurants which have 1st floor street entrances. Presumably not an intended result. To count only the ground floor frontage (e.g., entrance stairway) of 2nd floor restaurants, insertion should be made in (a): “... (25%) of the *ground floor level* linear street frontage within ...”

- (b) The linear square footage of each designated roadway shall be based upon the certified and recorded plats in the Office of the Surveyor, measured to the Zone District Boundary line of each commercial zone district within the overlay;

Linear square footage – Meaningless. Should be linear street frontage.

- (c) The total linear street 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;

The Certificate of Occupancy does not contain frontage information. Also, Certificates of Occupancy do not identify specific business categories that correspond dependably to the designated restricted uses of the NCOD. Therefore, their use would

necessitate the exercise of subjective judgments as to what properties are included – opening the way to confusion and litigation. In addition, the C of O is an inapplicable tool for determining the current use of a property because a C of O does not have a stated expiration date and there exists no current system for canceling a C of O when a business leaves the premises. (In contrast, see CPCA's proposal below; use of the business license is appropriate because business licenses have fixed termination dates and therefore do not persist in the record when the business is gone.)

- (d) If an eating or drinking establishment occupies all or part of the ground floor level of a corner lot facing two or more designated roadways, the linear street frontage for each designated roadway shall be included for purposes of determining compliance with 1302.5(a);

Needs clarification. Should read: "...the ground floor level linear street frontage for the establishment's frontage along each designated roadway....

- (e) An eating or drinking establishment that occupies the same premises as a gas station, grocery store, billiard parlor, or other non-eating or drinking establishment shall be subject to the twenty-five percent (25%) linear street frontage limitation within a particular NC Overlay District if the eating or drinking establishment use is reflected upon or is required to be reflected upon the Certificate of Occupancy and the eating or drinking use occupies all or part of the ground floor level;

This passage seems to be saying that a non-restaurant or bar business, such as a gas station, grocery store, or billiard parlor, that has an eating or drinking use on its premises, shall be counted as if it were all restaurant or bar. This approach is counterproductive. If the business were a gas station with a small convenience store that sells hot dogs, or a supermarket with a deli in the back, it would fill up the percentage with businesses that were never meant to be in the restricted class and thereby keep out actual restaurants. This would undermine the purpose of the Overlay.

As a practical matter, it should be noted that this multiple-use problem mostly disappears with the removal of delicatessens from the restricted uses. (See Section IV below.) Use of the Certificate of Occupancy adds nothing to clarify the situation.

- (f) The linear street footage of a property shall be excluded from the measurement of eating and drinking establishment uses if the property has not been used as an eating or drinking establishment for three (3) years; or until a certification of occupancy is issued for a different use, whichever occurs first;
- (g) Notwithstanding the foregoing, the linear street footage of a property included in the measurement of eating and drinking establishments on [the effective date of this amendment], which is not being used for that or any other purpose on that date, shall continue to be included in the measurement for ____ year(s) after [the effective date of this amendment] or until a certification of occupancy is issued for a different use, whichever occurs first;

(f) and (g) together would prescribe the inclusion of vacant properties, to the exclusion of an actual restaurant, which would be kept out unless it wanted to pay the price at one of those vacant properties – a gift to the owners of those vacant properties, and an

incentive for them to refuse to rent to non-restaurant businesses.
This would subvert the primary purpose of the Overlay.
Linear street footage – Should be linear street frontage

- (h) If the measurement of linear street frontage occupied by eating and drinking establishments is not updated after a one-year period, it shall be assumed that the linear street frontage occupied by eating and drinking establishments exceeds the applicable percentage limitation, until a subsequent update indicates otherwise;

Result: DCRA negligence would automatically freeze all issuing of C of O's and new business licenses, for restaurants and bars in the NCOD.

- (i) In the absence of evidence to the contrary, the Zoning Administrator may assume that an eating or drinking establishment use was discontinued on the date on which the Department of Consumer and Regulatory Affairs first observed the discontinued use;

This would cause dates of reference to be recorded on random occasions, unless DCRA maintained a burdensome program of frequent field checks.

- (j) An applicant for a certificate of occupancy for an eating or drinking establishment who wishes to have the property's street frontage included in the measurement of such uses shall demonstrate, to the satisfaction of the Zoning Administrator, that the property has been used as a lawful eating or drinking establishment at some time during the three-year period preceding the date of the application;

(1) It is not up to the applicant to persuade the Zoning Administrator that a property is or is not subject to the NCOD limitation. That determination must be made by the ZA based on objective criteria that are applied equally to all establishments within the NCOD. (2) This sentence follows from (f) and (g), which would allow applicants to avoid the percentage limitation on restaurants and bars if they occupied premises that previously had been occupied by a restaurant or bar even if the percentage limitation would be exceeded by this applicant. Inevitably, the percentage of properties included in the initial (baseline) measured percentage would never come down, even if it were initially over 25%. It is essential that the misplaced notion of "grandfathering" restaurant occupancy, originally introduced by a developer's attorney to evade the Overlay, and which has no legitimate roots anywhere in the Zoning code, must be definitively dismissed from consideration. What matters is only whether the new business falls under the restricted category and, if so, whether the addition of the new business would result in a total frontage that exceeds the percentage limitation.

- (k) Whenever the measured linear street frontage devoted to existing eating or drinking establishment uses equals or exceeds the applicable percentage limitation, no new certificates of occupancy may be issued for: (i) new eating or drinking establishments that would occupy any or all of the street frontage of the ground floor level of a building; or (ii) the expansion of an existing eating or drinking establishment that occupies such space, unless the square footage to be occupied by the new or expanded use is already included with the measurement of such uses;

Clarity and precision of language, so necessary to understanding and enforcement, is not to be found here. (In phrase (ii), there is no antecedent for “such space.”) In phrase (ii), if the drafter does mean “square footage” (i.e., area) that would be added by expansion upward (i.e., to a second storey) or rearward, which would not change the occupied street frontage, then this provision could be interpreted as meaning simply that the owner would be entitled to get the new C of O he would need to continue operating – even though the current Overlay measurement is, and will continue to be, over the limit.

But, if “square footage” was inadvertently used to mean “street frontage,” (as was done in (b)), then the meaning of (ii) depends on the drafter’s apparent reliance on provisions (f) and (g), which give significance to a history of prior restaurant occupancy of the space into which the current restaurant is expanding.

This provision would create a backdoor way of evading the Overlay limitation, and could encourage abusive tactics, such as pressuring an adjoining restaurant owner to sell or transfer his lease in order to facilitate an expansion that would otherwise be barred. It would undermine the process of attrition when the limitation has been exceeded, and it would tend to enshrine the overage as acceptable. An expansion that is prevented by the Overlay limitation might qualify for a legitimate special exception under Sec. 1304, and that would be the appropriate procedure to follow.

It should be noted that a possible result of phrase (ii), presumably unintended, is that a restaurant owner gets a building permit to expand into adjoining non-restaurant premises, and does so, thus automatically voiding his existing C of O. Because the limitation has been exceeded, he is now ineligible to get any new C of O, and must close the restaurant. To re-open he would have to obtain a Special Exception.

- (l) Whenever existing linear street frontage devoted to eating or drinking establishment use is less than the applicable percentage, no certificate of occupancy shall be issued for a proposed eating or drinking establishment use if the addition of the total linear street frontage to be occupies [sic] would cause the applicable percentage limitation for the NC Overlay District to be exceeded; and

Since a C of O is applied for only when a business is physically ready for operation, refusal of a C of O would come after the business owner has renovated the property – an extremely abusive result.

- (m) Except for a fast food restaurant, such uses may be applied to fulfill the requirements of 1302.4; provided, that when such uses are so applied, they shall remain subject to the provisions of paragraph (a)-(1) of this subsection.

Conclusion: The proposed text amendment solves no problems, and would introduce many new ones. Its “grandfathering” of restaurant space is a poison-pill that would hurt small businesses (restaurants and non-restaurants alike) and would hurt the community, and would solely benefit large landowners. It should be taken off the table.

IV. Solution to the NCOD problem

What follows is a resolution by the Cleveland Park Citizens Association that calls for a change in the Overlay text to more narrowly and clearly define the Overlay limitation and to use the business license as the sole designator of what is to be counted as an eating or drinking establishment. Terms such as delicatessen or carryout, which appear in the current regulation, are removed. If a business has a license as a restaurant or tavern, it is counted; if not, it is not counted. A simple procedure is provided to give applicants an early assurance that they will be able to open their business.

C-R3-110103: Resolution on the Neighborhood Commercial Overlay District

Adopted November 1, 2003

(Proposed text modifications for the Neighborhood Commercial Overlay District provisions of the Zoning Regulations, for the purposes of making the scope of the Overlay clear and unambiguous, simplifying its administration, and making its status transparent to the public and to potential permit applicants.)

WHEREAS the purposes of the Neighborhood Commercial Overlay District were to encourage and facilitate the presence of neighborhood commercial services and small retail businesses, by limiting the total frontage occupied by eating and drinking establishments, which generally pay higher rents and are therefore more attractive to landlords, and further to limit the amount of parking congestion, street and sidewalk trash, sanitation problems and noise which often accompany these establishments; and

WHEREAS the language of the Zoning Regulations as adopted contains ambiguities which have inhibited administration of the Overlay, and

WHEREAS the inclusion of delicatessens and carry-outs in the language of the Overlay is inconsistent with its basic purposes as stated above, now therefore be it

RESOLVED that the Cleveland Park Citizens Association supports adoption of the following proposal to be transmitted to the Zoning Commission, and authorizes its president and his designees to work with appropriate officials, including those of Advisory Neighborhood Commission 3-C, to seek its adoption or the adoption of substantially similar language:

(The following changes apply to Section 1302.5 (11 DCMR 1302.5).)

Delete the first sentence of Sec. 1302.5, and replace with the following:

“1302.5 Eating and drinking establishments are defined as those establishments that have a current “Restaurant” business license, and/or an “Alcoholic Beverage” license allowing on-premises sales (CR [restaurant], CT [tavern], Class D [restaurant]). Such establishments, to the extent of their ground-level street frontage, shall be subject to the following limitations:”

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After subparagraphs (a) and (b), add the following new subparagraphs:

(c) The Zoning Administrator shall maintain a current record of (1) the total amount of street frontage attributable to eating and drinking establishments, and (2) the percentage that amount is of the total frontage within the Overlay District. This record shall be based exclusively on the current outstanding restaurant and alcohol licenses, as described above. This record shall be made accessible to anyone upon request during normal business hours.

(d) No work permits (construction, electrical, plumbing, etc.) shall be issued for any property within the Overlay District if the intended use is a new eating or drinking establishment, or an expansion of the frontage of an existing such establishment, until and unless the Zoning Administrator finds that the addition of this establishment's frontage will not cause the total eating and drinking establishment frontage to exceed 25% of the total frontage within the Overlay District."

V. Critical Numbers (as of January 2003)

3746 linear feet -- Total frontage per DCRA measurement April-May 2002 and BLRA measurement May 4, 2001. *(The denominator for the percentage calculation.)*

920 linear feet -- Restaurant and tavern frontage per CPCA measurement January 18, 2003. *(The numerator for the percentage calculation.)*

24.56% -- Total restaurant and tavern frontage percentage, per CPA January 18, 2003. *(920 divided by 3746 = 24.56%)*

25 % -- Total percentage of allowable frontage for eating and drinking establishments in Overlay District.

30 -- number of licensed restaurants and/or taverns. (Note: some restaurants appear to have no licenses filed at DCRA. Note also: ABRA licenses are not on file at DCRA.)

0.82 -- average number of restaurants per percentage point.

VI. Computation Method

A simple arithmetic spreadsheet along the lines of the following would provide the necessary running data to keep the count current. All business in the NCOD would be listed and the total percentage (%) of all businesses would always add up to 100%. Percentages of licensed restaurants and bars would appear again in the R/B % column. Data would reflect the current situation. The resulting total in the R/B % column would appear at the bottom of the percentage column. The "License Designation" entries will be either "Restaurant" or "Tavern," depending upon the designation.

COMPUTATION CHART*

Square & Lot	Address	Frontage	%	Business Name	License Designation	R/B %	License No.	Exp. Date
00/00	000	000	1.04	J. Jones	Restaurant or Tavern	.04	000	00/00/00

* It should be noted that one percentage point equals 37.5 feet of frontage.

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VII. Pertinent Documents

- a. Neighborhood Commercial Overlay District (Title 11, Chapter 13 of the DC Municipal Regulations)
- b. Composite data collected by Cleveland Park Citizens Association, January 18, 2003. Includes: Name of eating or drinking establishment, address, license, and frontage in feet.

Submitted by:
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This document dated August 19, 2005

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Cleveland Park Neighborhood Commercial Overlay District, CPCA composite data				
NAME	ADDRESS	BUS. LIC.	C OF O	ABRA LIC FRONTAGE (Feet)
Palena	3529	R	Palena LLC, 8/00	CR01 22
Brothers	3515	R	Cleveland Corp. 1/02	CR01 25
Whatsa Bagel	3513	R	Whatsa Bagel CP, 6/92	0 25
Sala Thai	3507	R	Green Tea Gp., 4/02	CR01 25.5
Uno Chicago B&G	3501	R	PizzeriaUno, 7/92	CR02 138
Yan Yu	3435	R cancelled?		CR01 62
Park Bench Pub	3427	R	CYGS LLC, 5/99	CR01* 38
Atomic Billiards	3427	R	Atomic Billiards, Inc. 3/93	CT01 5
Bricks Tavern	3421	R	YI Restaurant LLC, 10/02	CT02 19
Nam Viet	3419	R	YI Restaurant LLC, 10/02	CR01 19
Aroma Co.	3417	R	Aroma, Co., 1/70	CT01 15
Firehook Bakery	3411	R	Firehook Bakery, 3/98	CR01 15
McDonalds	3407	R	McDonalds Corp., 8/95	0 25
Spices	3333	(No license)	Yanlim Inc., 7/01	CR02 18
Lavandou	3321	R	Snoopy Donut, 1/99	CR01 20
Nanny O'Brien's	3319	R	Nanny O/B Inc., 2/93	CT01 20
Vace Deli	3315	D	Vace Inc., 4/90	Class B
Amernick's	3313	R	F&A Bakery, 11/90	0 20.5
Ardeo	3311	R cancelled?	Ardeo LLC, 9/01	CR02 20
Bardeo	3309	(No license)	Ardeo LLC, 9/01	CR02 20
Four Provinces	3410, 12	(No license)	(No C of O)	CT02 46.5
Byblos Deli	3412	R	CHFP Inc.?, 2/92	0 34
Starbucks	3420	R	Starbuck Corp., 11/93	0 21.5
Alero and Yanni's	3500	R	Los Amgos of DC, 2/89	CR01 80
Yanni's	3502	R	YRG Inc., 5/03	CR01 18.5
(Vacant)	3506	R	Melayu Inc., 9/93	CR01 18.5
			Karma Java, 12/02	
			Timtida, filed 1/00	
Indique Bombay	3512	(No license)	Daskin Inc., 12/02	CR02 37
same	3514	R	(No C of O)	CR02
Sorisso (under constr)	3516	(No license)	Caffe Italiano, 5/75	33
same	3518		??	CR02**
Subway	3520	R	Subland Inc., 12/02	0 14
Ivy's Place	3520	R	Ivys Place Inc., 6/98	Class D 15
Yenching Palace	3522	(No license)	(No C of O)	? 50
same	3524	R	(No C of O)	CR03
				920
Best data available as of January 18, 2003				
This document dated August 19, 2005				