c/o Capital Yacht Club
1000 Water Street, SW
Washington, DC 20024
March 13, 2003

Jerrily R. Kress, FAIA
Director
District of Columbia Zoning Commission
441 4th Street, NW, Suite 210 South
Washington, DC 20001

Re: Zoning Commission Case # 02-42 (Text Amendment – Waterfront Open Space Zone District).

Dear Ms. Kress:

My name is Robert McKeon, and I am a citizen of the District of Columbia. I am hear today to testify on Zoning Commission Case Number 02-42 (Text Amendment – Waterfront Open Space Zone District). I will testify to the following: 1) it is illegal to zone Federal land; 2) Zoning Reservation 343 as W-0 violates the Legacy Plan; 3) W-0 cannot be applied to the Southwest Waterfront due to notice defects and illegal spot zoning; and, 4) the last minute and non-noticed addition of a substantive C-R amendment must be withdrawn.

On January 24, 2003, the Zoning Commission advertised in The Washington Times the notice of this hearing as required by 11 DCMR § 102.8. Said notice stated that the proposed W-0 zone would apply to either Reservation 343 or Parcel 0169, Lot 0111. Reservation 343 is the Anacostia Park and it is owned by the National Park Service. Parcel 0169, Lot 0111 is the land-locked property abutting Anacostia Park east of the Anacostia River north of Benning Road, NE and west of Kenilworth Avenue, NE. Parcel 0169, Lot 0111 is owned partly by WMATA and partly by PEPCO.

Reservation 343 is a Federal interest, owned by the National Park Service. To that extent, imposing the new zone will violate the Home Rule Act and Federal law. Contrary to the assertions of the Office of Planning, the District cannot zone persons who are permitted to use National Park Service land. When the land is ever sold to a non-Federal entity, the Office of Planning may then seek to promulgate regulations affecting the land sold. Until such time, it is illegal to zone Reservation 343 since it continues to be a Federal interest.

The Legacy Plan of the National Capital Planning Commission ("NCPC") comprises Phase I of Washington Waterfronts. On page 15 of Phase I, NCPC calls for opening a working boat yard/marina on the west side of the Anacostia River where the former Anacostia Marina was located. The proposed regulations contravene such planning of Federal interests since the re-installation of such boat yard/marina would no longer be by right. Pursuant to DC Official Code

ZONING COMMISSION
District of Columbia
CASE NO.02-42
EXHIBIT NO.38

§ 2-1002(a)(2), "The Mayor shall be responsible for coordinating the planning activities of the District government and for preparing and implementing the District elements of the comprehensive plan [... .] The Mayor's planning responsibility shall not extend to federal or international projects and developments in the District, as determined by the Commission [... .]" NCPC has determined that a marina/boat yard should be re-opened in the Anacostia Marina site, and therefore the proposed regulations would be illegal.

In *Crystal Bay Marina v. Sweden*, 939 F.Supp. 839, 842 (N.D. Okla. 1996), the court held that a local zoning ordinance as applied to a marina on Federal land is pre-empted by the Supremacy Clause of the US Constitution. "Among the powers unconditionally delegated to Congress by the Property Clause [of the US Constitution] is the authority to control occupancy and use of public lands. *Id.* Pursuant to the National Park Service Concessions Management Improvement Act of 1998 ("NPS Act"), 16 USC § 5952, *et seq.*, the National Park Service is expressly permitted to lease or allow occupancy of its land for uses as regulated by the NPS Act. Therefore the proposed regulation, as it is intended to apply to Reservation 343 or any other National Park Service land, is pre-empted by Federal law.

The proposed regulation cannot be applied to the Southwest Waterfront due to notice defects. In the January 24, 2003 newspaper notice, the Zoning Commission stated that the proposed regulations would apply to Reservation 343 and Parcel 0169, Lot 0111. If this zone were to apply elsewhere, then interested parties will not have been afforded an opportunity to comment and participate in the regulatory process. Please see *Gerstenfeld v. Jett*, 374 F.2d 333 (DC 1967). The Zoning Commission must act fairly since there is not a political process to act as a check on the Zoning Commission's actions. *Citizens Association of Georgetown v. Zoning Commission of the District of Columbia*, 392 A.2d 1027, 1039 (DC 1978). In the instant case, fairness would require limiting application of the proposed W-0 zone to those properties listed in newspaper notice for which zoning is not pre-empted by Federal law.

If the Zoning Commission were to find nonetheless that it could apply the proposed regulation to the Southwest Waterfront, then preliminary application of the zone thereto would constitute spot zoning or inverse condemnation. In the District, there has been little development in case law concerning spot zoning. The cases mainly state that in order for there to be illegal spot zoning, the Zoning Commission's action (1) must pertain to a single parcel or limited area and (2) must be inconsistent with the comprehensive plan. *Daro Realty v. District of Columbia Zoning Commission*, 581 A.2d 295, 299 (DC 1990). The District has never been faced with a situation where the map is changed in favor of a very restrictive zone such as the proposed W-0 zone for purposes of eventual or imminent condemnation. The appraisal following the condemnation would reflect very low property values due to the institution of the restrictive W-0 zone. After condemnation is successful, the zone would again be changed but this time to a CR zone, permitting massive commercial and residential development. In *Peacock v. County of Sacramento*, 271 Cal. App. 2d 845 (3rd App. D. 1969), a land owner was faced with a very similar and real scenario where the county illegally spot zoned his land for eventual condemnation for expansion of an airport.

The proposed amendment to chapter 6 must be deleted because no proper notice to amend that chapter of the zoning regulations was ever given. Neither of the "corrected" notices published in the DC Register on January 24, 2003 and February 7, 2003 included in their summaries that Chapter 6 of Title 11 DCMR would be amended. Pursuant to 11 DCMR § 102.9, said notices must contain a summary of the proposed amendment. The substantive amendment of a chapter of the zoning regulations necessarily merits inclusion in the summary, which did not happen. The proposed amendment to Chapter 6 of Title 11 DCMR is neither technical nor conforming; it is a substantive addition and fundamental change which should have been included in the summary to provide notice to interested parties. *Castle v. McLaughlin*, 270 F.2d 448, 451 (DC 1959).

The proposal to institute a W-0 zone on the part of the Office of Planning represents gross mismanagement or an illegal action.

For the foregoing reasons, I urge the Zoning Commission to abandon this proposal.

Sincerely,



Robert W. McKeon, Jr.

DISTRICT OF COLUMBIA REGISTER AUG 3 0 2002

ENROLLED ORIGINAL

A CEREMONIAL RESOLUTION

14-282

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

July 2, 2002

To recognize the Capital Yacht Club in Southwest Washington, D.C., in its 110th year of preservation and progress for America's National Waterfront, as well as for its longstanding service and participation in the waterfront community of Southwest Washington, D.C.

WHEREAS, the Capital Yacht Club was founded in 1892, on the Washington Channel in Southwest Washington, DC., shortly after Major General Peter Conover Haines renovated the waterway system then supplying the nation's capital;

WHEREAS, members of the Capital Yacht Club have contributed their vessels to serve in the national defense in both world wars, and consistent with that tradition turned over their facilities to support District police and rescue personnel on September 11, 2001;

WHEREAS, the Capital Yacht Club has actively supported important charities throughout its 110 year presence in Southwest Washington, D.C., including the Easter Seals "Cruise for Kids" and the Cure for Cancer Walk;

WHEREAS, the Capital Yacht Club contributes to the local economy of tourism, including its widely anticipated Annual Parade of Lights event in support of the District of Columbia's Cherry Blossom Festival, the Christmas Parade of Lights, and the yearly Blessing of the Fleet flotilla;

WHEREAS, the Capital Yacht Club supplies volunteers to the United States Coast Guard and District police units in support of security efforts on America's National Waterfront, such as its "Eyes on the Potomac" program;

WHEREAS, the Capital Yacht Club encourages boating safety on the Potomac River in conjunction with Flotilla 22 of the United States Coast Guard Auxiliary; and

WHEREAS, the Capital Yacht Club sponsors several important functions for law enforcement and fire and rescue officials each year, including the Annual Police and Fire

Departments Family Picnic.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Capital Yacht Club Involvement and Support of the Washington Waterfront Community Recognition Resolution of 2002".

Sec. 2. The Council of the District of Columbia finds this a most appropriate time to recognize the Capital Yacht Club for its community involvement and support, and for its contributions to the betterment of America's National Waterfront.

Sec. 3. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.