

OUTLINE OF TESTIMONY TO THE ZONING COMMISSION

CASE NO. 08-06-1 ZONING REGULATIONS REWRITE HEIGHT

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I. Introduction

- A. Distinction between original notice of hearing published in the DC Register on May 23, 2008, and subsequent Office of Planning (OP) reports
- B. Discussion keyed to OP report, dated September 15, 2008

II. Overarching policy issues

A. Whether to incorporate into Zoning Regulations clarifications of the Act of 1910

- 1. Zoning Regulations are not the place to interpret the Act of 1910
 - a) OP describes confusion about the Act and its application but that is not the case
 - b) Many of the modifications suggested by OP are directly contrary to decades of interpretation and application of the Act
- 2. Regulations and Act have completely different underlying regulatory schemes for height
 - a) Act controls by width of street

ZONING COMMISSION
District of Columbia

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EXHIBIT NO. 26

- b) Regulations control by zone district
 - 3. Act was adopted before there was a Zoning Commission or any zoning regulations
 - 4. Other District statutes, codes and regulations affect development but are not included in the Zoning Regulations; e.g.:
 - a) Subdivision regulations
 - b) Historic landmark controls
 - c) Environmental regulations
 - 5. Regulations include general statement that between zoning and other regulations, more restrictive controls
- B. Rationale for encouraging expansive rather than restrictive interpretation of height regulations
 - 1. Regardless of the Regulations, Act imposes limits on height of buildings
 - 2. Any interpretations of the Regulations and Act can only be done within the framework of what the Act allows
 - 3. All surrounding jurisdictions (Fairfax, Arlington and Alexandria, Virginia and Prince George's and Montgomery Counties, Maryland) allow greater heights and have taller buildings
 - 4. No reason for the District to be restrictive rather than expansive in applying height controls within the limits of the Act
- C. Effect on existing buildings – creation of nonconformities
 - 1. Proposed regulations contain substantial differences from existing regulations and applications thereof
 - 2. Many differences create more restrictive regulations or change current interpretations in more restrictive manner (e.g., exterior walls, point of measurement, what constitutes a building)

3. Proposed regulations will create nonconformities in many areas for little gain in the regulatory context

III. Frontage on multiple streets (Recommendation A.1)

A. Concept:

1. Width of any street abutting property line may be used to determine maximum height
2. No requirement for presence of an entrance for a building to front on any particular street

B. Comment: Agree

IV. Buildings confronting Federal Reservation or Open space (Recommendation A.2)

A. Concept:

1. For a building abutting a public open space or reservation, width of any single right-of way not divided by the open space or reservation may be used to determine permitted height
2. May only use street that is adjacent and parallel to a side of the open space or reservation

B. Comments:

1. **This provision should not be part of the Zoning Regulations since it relates exclusively to the Act of 1910**
2. **Zoning Regulations do not define height in relation to width of streets**
3. **This is contrary to consistent interpretation of the Act**
 - a) **Have been allowed to measure across the full width of the space or reservation, including streets on both sides, to determine the width (see discussion by the D.C. Court of Appeals in *Techworld Development v. D.C. Preservation League* (648 F. Supp. 106 (D.D.C., 1986, at 121, attached as Exhibit 1); examples include:**
 - (1) **Army-Navy Club at 17th and I Streets**
 - (2) **McPherson Building at 15th and I Streets**

(3) Techworld itself, on K Street between 7th and 9th Streets

- b) Have not been allowed to use a street which is not in front of the building (i.e., have not been able to use a street which abuts a side of the space or reservation but is not in front of the building)**

- 4. When a property confronts a triangular reservation, rule has been to allow the diagonal avenue to be used as the street the width of which serves as the basis for determining the permitted height; we assume that rule is incorporated in the concept set forth above**

V. Residence and business streets (Recommendation A.3)

A. Concept:

1. Residence street is one where the entire block face is zoned residential or where any part of the block face is located in a low to moderate residential zone
2. Business street is any other block face

B. Comments:

1. Have always understood that a portion of a street takes the character (business or residence) from the zoning applicable to the private property immediately adjacent (see the Opinion of the Corporation Counsel, March 6, 1962, attached as Exhibit 2)
2. Where part of a block face is zoned commercial and part is zoned residential, then part of the street is a business street and part is a residence street
3. Where opposite sides of the street are zoned differently, then each half of the street takes on the appropriate designation
4. If there are incompatibilities caused by adjacent zone districts, that can be cured by changing the zoning or requiring some kind of step-down within the zone district

VI. Single vs. multiple buildings (Recommendation A.4)

- A. Building is a structure with a roof supported by columns or walls for the shelter, support or enclosure of persons, animals or tangible property
- B. When separated by common division walls, each portion shall be deemed a separate building unless there is open access between all portions on at least half the floors
- C. Two physically separate structures cannot be combined to form a single building through any type of physical connection, including a trellis, walkway, garage or tunnel
- D. Comments:**
 - 1. Significant deviation from current regulations, which require only a connection at one level at or above the main floor**
 - 2. Open access across half of the floors is problematic**
 - a) Mixed use projects would likely have different floor-to-floor heights and therefore upper floors would not align**
 - b) Many buildings have been built with separate tower over a single connected base**
 - (1) The Westbridge, at Pennsylvania Avenue and M and 26th Streets (when it was built, it was held out as the optimum example of mixed use development in the West End)**
 - (2) The Watergate**
 - (3) Columbia Plaza, at Virginia Avenue and 23rd Street**
 - (4) The Towers apartments at New Mexico and Cathedral Avenues**
 - 3. Combining separate portions of buildings into a single building allows no greater height than could be achieved if the site was built all at once**

VII. Location of bottom measuring point (Recommendation B.1)

A. Concept:

1. Option 1: street chosen for the width to determine the maximum height must be the street from which the height is measured
2. Option 2: any street may be used for the point of measurement

B. Comments:

1. **This provision should not be part of the Zoning Regulations since it relates exclusively to the Act of 1910**
2. **Zoning Regulations do not define height in relation to width of streets**
3. **Option 1 is directly contrary to the language of the Act and the consistent way it has been applied**
 - a) **Two different sections of the Act, one for the width and one for the measuring point**
 - b) **Opinion of the Corporation Counsel, April 28, 1950, the District's chief legal officer whose opinion was binding on all District employees and agencies**
4. **Favor retention of option 2**

VIII. Elevation of bottom measuring point (Recommendation B.2)

A. Concept

1. Measure height from midpoint of building property line
2. Elevation determined by level of curb plus gradient of 2% up to a maximum of 12 inches

B. Comments/questions:

1. **Zoning Regulations now require measurement from the curb opposite the middle of the front of the building**
2. **Act requires measurement from the sidewalk**

- 3. No reason to change the current Regulations ("If it's not broken, don't fix it.")**
- 4. Does the OP proposal mean measuring from the midpoint of the building or the midpoint of the property line?**
- 5. There is no reason to impute a measuring point; a surveyor or civil engineer can determine and certify the precise measuring point**

IX. Natural grade (Recommendation B.3)

A. Concept

1. Natural elevation or natural grade is that which existed prior to the issuance of first permit for building in question
2. Where natural elevation is interrupted by a bridge, viaduct, embankment, ramp, abutment, tunnel or other type of artificial elevation, height to be measured from either:
 - a) A street frontage not affected by the artificial elevation; or
 - b) A level determined by the Zoning Administrator to represent logical continuation of surrounding street grade not affected by discontinuation of natural elevation

B. Comments:

- 1. Height should be based on the finished grade, rather than on the grade existing before construction begins**
 - a) It is common for construction to remove existing curbs and replace them with curbs that may not be at the same elevation (could be higher or lower)**
 - b) District has often rebuilt streets and changed curb grades as a result; DDOT controls setting of the curb elevations**
 - c) For projects outside of the central area, site development frequently changes grades across the board, especially for larger sites; using pre-development grades may make no sense to the actual conditions upon which development is to occur**

- d) Provision could be included to preclude extreme manipulations in grade
2. Expands the current definition, which is limited to bridge or viaduct
3. Need to be sure that, for the development over the Center Leg Freeway, which will be built on a platform over the roadway and which will restore F and G Streets to the existing grades to the east and west but will be built on the platform, height can be measured from the curbs on the new street grades and not the existing condition before the first permit is issued (i.e., not from the grade at the bottom of the freeway)
4. "Ground elevation that existed prior" is at variance with not being able to measure off an embankment
5. Distinguish bridge or viaduct (where there is air below) from embankment, abutment or ramp (where there is solid ground below)

X. Top measuring point (Recommendation B.4)

A. Concept:

1. Measure to top of roof including parapet or any other continuation of exterior walls
2. If below the limit permitted by the Act of 1910, may exclude parapet or balustrade up to 4 feet

B. Comment/question:

1. What about tower, dome or other architectural feature which is an extension of the exterior walls?
2. Support exclusion of parapet up to 4 feet (1 foot increase from current Regulations) but only if consistent with the Act

XI. Classification of roof structures (Recommendation C.1)

A. Concept:

1. Identifies three classes of features which may exceed normal height limits:
 - a) Ornamental features

- b) Utilitarian features
- c) Amenity features
- 2. No structures for human habitation shall be constructed on a roof unless otherwise authorized by District law or regulation

B. Comments/question:

- 1. **Current practice allows roof structures for purposes expanded beyond the literal language of the Act (see the Opinion of the Corporation Counsel, July 27, 1953, attached as Exhibit 3)**
- 2. **Have doubts whether amenity features can include permanent enclosed space for human occupancy if over the limit of height under the Act**
- 3. **Can an architectural embellishment, other than a spire, tower, dome, pinnacle or minaret, exceed the limit of height under the Regulations if not in excess of the limit of height under the Act?**

XII. Height, width and massing of roof structures (Recommendation C.2)

A. Concepts

- 1. Space enclosed by walls shall be limited to 40% of roof area
- 2. Enclosing walls need not be vertical or of uniform height
- 3. Multiple roof structures are permitted
- 4. Utilitarian and amenity features may not exceed 20 feet above the roof
- 5. Ornamental features may not exceed 30 feet above the roof, but BZA may approve more as a special exception
- 6. If approved as a special exception, utilitarian and amenity features could be enclosed within an ornamental feature without meeting the setback requirements

B. Comments/question:

- 1. **Support allowing multiple roof structures and walls that are not vertical or are of unequal height**

2. **Support increasing height of roof structures from 18 feet, 6 inches to 20 feet**
3. **Don't understand rationale for 40% limitation, if meet all setback requirements**
4. **Oppose establishing a maximum height of 30 feet for ornamental features and requiring BZA approval above that**
 - a) **Effect on religious institutions (e.g., National Cathedral, Shrine of Immaculate Conception)**
 - b) **Absence of limit in current Regulations has not led to any apparent abuses ("If it's not broken, don't fix it.")**
 - c) **What standards would the BZA apply?**

XIII. Setbacks for roof structures (Recommendation C.3)

A. Concepts

1. Utilitarian and amenity features must be setback 1:1 from:
 - a) Exterior walls
 - b) Any wall that is setback from and facing a lot line; and
 - c) Any lot line wall built higher than the greater of the neighboring building's actual height or the matter-of-right height
2. Certain elements exempted
3. BZA may approve relief as a special exception

B. **Comments/question:**

1. **Clarify that "facing a lot line" means without any intervening building**
2. **Clarify that roof structure setback requirements do not apply to elements which are entirely below the limit of height in a particular zone**
3. **Clarify that a safety railing around a roof deck is permitted**

4. **Why should a building's height be determined by the height of an adjacent building, which may change and is not under the control of the building at issue?**

XIV. Exterior wall (Recommendation C.4)

- A. Concepts: an exterior wall is one which faces a public street, alley or area dedicated to the District for the public use of pedestrians or vehicles

B. Comments:

1. **Same term, "exterior wall," has been interpreted differently in the Act and the Regulations**
2. **Under the Act, 'exterior wall' has meant a wall facing a street (see Report of the Zoning Advisory Council, July 15, 1958, attached as Exhibit 4)**
3. **The District should not be precluding the BZA from granting setback relief from other than a street wall**
4. **OK to apply concept to street or alley under the Regulations but should not apply to easement areas**

XV. Conclusions

- A. Remain committed to the Act of 1910 and to working within the limitations established by the Act
- B. The Regulations should not be amended to attempt to incorporate "interpretations" or "clarifications" of the Act
- C. There are a lot of changes proposed in the notice (which we have been told is not the focus of this hearing but is still out in the public record) which require closer examination and scrutiny
- D. The changes which decrease requirements and add greater flexibility to do thing in more creative ways are generally good things
- E. The reverse is also true: The changes which increase requirements and provide less flexibility are generally not good things

- F. The notion of not fixing things which are not broken should be adhered to; there are things which are not justified and which seem to be changed for the sake of change (or perhaps because other jurisdictions do them and therefore the District should also)**

Attachments

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tacking the accuracy of the Department values, to show by a preponderance of the evidence what the accurate values are.

Burlington Northern Railroad Co. v. Bair, 766 F.2d at 1226.

The railroad has not met its burden. The only evidence it offered was not satisfactory to the Court for the reasons given above. The Court concludes, on the basis of the evidence presented and by giving deference to the assessments of the Department of Revenue that the assessed values and market values of all other commercial and industrial property are the same.

CONCLUSION

The Court in this ruling has attempted to set forth principles, specific figures, findings of facts and conclusions of law that will enable the parties, by using their expertise, to arrive at the four factors to be included in the formula set out above. The computation will reveal whether the ratio of the assessed value of the railroad's real property to its true market value is at least 5% greater than that ratio of all other commercial and industrial property in Iowa, as identified herein.

As the Court cannot determine at this time which is the prevailing party, the Court directs the plaintiff to take the responsibility for the preparation of an Order for Judgment in accordance with this Ruling and Order and submit the same to the defendant for comment or approval. Any questions about the Ruling and Order may be submitted to the Court.

IT IS SO ORDERED.



TECHWORLD DEVELOPMENT CORP.,
et al., Plaintiffs,

v.

D.C. PRESERVATION LEAGUE, et
al., Defendants.

D.C. PRESERVATION LEAGUE, et
al., Plaintiffs,

v.

INTERNATIONAL DEVELOPERS,
INC., et al., Defendants.

UNITED STATES of America, Plaintiff,

v.

TECHWORLD HOTEL ASSOCIATES,
et al., Defendants.

Civ. A. Nos. 86-0252, 86-0266
and 86-0837.

United States District Court,
District of Columbia.

Aug. 5, 1986.

The District of Columbia city council passed two acts closing portion of street and transferring title of that portion of the street to developers who planned to create international trade center covering two city blocks. Preservationists filed suit for declaratory and injunctive relief against developers, several D.C. government officials, and the National Capital Planning Commission. The developers also filed action seeking declaration as to legality of the project. Two actions were consolidated. The Department of the Interior filed action to quiet title to street in question. This action was consolidated with the other two. Title insurance company intervened. All parties filed motions to dismiss or for summary judgment. The District Court, Bryant, Senior District Judge, held that: (1) the closing acts were valid exercises of the council's authority under the Home Rule Act; (2) Congress, by authorizing the council to close city streets, did not make councilmen "officers of the United States" and thus closing acts were not invalid under the appointments clause; (3) implied covenant

did not exist requiring developers to proceed as planned unit development; and (4) the District of Columbia Historic Landmark and Historic District Protection Act did not apply to construction of the international trade center.

So ordered.

1. District of Columbia §22

Acts, which were passed by the District of Columbia city council closing portion of particular street and transferring title to that portion of the street to developers, who planned to create international trade center covering two city blocks on that portion of the street, were valid exercises of council's authority under the Home Rule Act, even though the HRA prohibited council from passing Acts concerning "functions or property of the United States" and even though title to street in question was vested in the United States. D.C.Code 1981, §§ 1-211 et seq., 1-233(a)(3).

2. Constitutional Law §58

Congress, by authorizing the District of Columbia city council to close city streets, did not make councilmen "officers of the United States," and councilmen, who passed acts closing portion of particular street and transferring title to that portion of the street to developers who planned to create international trade center covering two city blocks on that portion of the street, did not exercise significant Federal authority; therefore, acts were not invalid under the appointments clause. U.S.C.A. Const. Art. 2, § 2, cl. 2.

3. District of Columbia §8

Implied covenant, that developers would proceed as planned unit development and seek Zoning Commission approval for proposed international trade center covering two city blocks, did not exist, even though developers stated to the city council when proposing plan that they would proceed as PUD, where council imposed five express covenants in connection with transfer of title to portions of street to developers for the center without mentioning any

covenant to proceed as PUD and where mayor and city council were satisfied that all conditions of transfer were satisfied.

4. Health and Environment §25.5(8)

Closing of portion of particular street in the District of Columbia and transferring title to that portion of the street to developers who planned to create international trade center covering two city blocks on that portion of the street was not federal "undertaking," for purposes of the National Historic Preservation Act; therefore, fact that the advisory council on historic preservation was not given opportunity to provide nonbinding recommendations concerning the closing did not invalidate the closing. D.C.Code 1981, § 7-422; National Historic Preservation Act, §§ 1, 106, as amended, 16 U.S.C.A. §§ 470, 470f.

See publication Words and Phrases for other judicial constructions and definitions.

5. Zoning and Planning §570

Issue concerning maximum height permissible under the Height of Buildings Act for international trade center, which was to cover two city blocks in the District of Columbia, was ripe for resolution, even though local authorities had not yet issued construction permit allowing developers to rise to any specific height, where developers made clear their intention to build center to height of 130 feet and where federal Government and preservationists had made equally clear their position that such height was unlawful. D.C.Code 1981, § 5-405.

6. Zoning and Planning §764

Preservationists, who sought to prevent developers from constructing international trade center in the District of Columbia to height of 130 feet, had no right of action under the Height of Buildings Act. D.C.Code 1981, § 5-405.

7. Zoning and Planning §764

Federal Government's property interest in property, which was neighboring property to proposed site for international trade center in the District of Columbia, provided basis for Government to have

right of action under the Height of Buildings Act to prevent developers from building center to height of 130 feet. D.C.Code 1981, § 5-405.

8. Zoning and Planning ¶253

Determination of the corporation council, that the Height of Buildings Act permitted proposed international trade center in the District of Columbia to be 130 feet high, was based on consistent, demonstrable, administrative practice and was reasonable and consistent with language of the HBA; therefore, alternative interpretations of the HBA did not provide basis to overturn corporation council's determination. D.C.Code 1981, §§ 1-361, 5-405.

9. Health and Environment ¶25.5(8)

Description in the D.C. inventory of historic sites of street vista was so flawed that it was impossible to know what was described; therefore, the District of Columbia Historic Landmark and Historic District Protection Act did not apply to construction of international trade center on portion of that street and mayor was not required to refer all future construction permits for the international trade center to the Historic Preservation Review Board for its comments. D.C.Code 1981, §§ 5-1001 et seq., 5-1002(6), 5-1005(b).

Maureen E. Mahoney, Eric A. Stern, Latham, Watkins & Hills, Washington, D.C., for D.C. Preservation League and Committee of 100 on the Federal City.

William G. Thomas, Roy Niedermayer, Nancy E. Lasater, Thomas & Fiske, Washington, D.C., for Techworld.

John H. Suda, James R. Murphy, Robert J. Harlan, Jr., Office of Corp. Counsel, Washington, D.C., for District of Columbia.

James T. Draude, Lynn Johnson, F. Henry Habicht, III, Land & Natural Resources Div., U.S. Dept. of Justice, Washington, D.C., for Federal defendants.

MEMORANDUM

BRYANT, Senior District Judge.

BACKGROUND

The present action arises from the attempt of a group of real estate developers, including International Developers, Inc., Techworld Realty, Inc., Techworld Development Corp., and FF Realty Corp., to create Techworld. Techworld is a proposed International Trade Center for high technology and information industries, in downtown Washington. It will include 700,000 square feet of showrooms, a conference center with 150,000 square feet of meeting space, a 800 room convention hotel, 70,000 square feet of retail, restaurant and public service facilities, underground loading facilities, and a garage for 2,000 cars.

The project will be located on two city blocks on the south side of Mt. Vernon Square, between Seventh and Ninth Streets and K and I Streets, Northwest Washington. The portion of Eighth Street running through the middle of the project will be converted to a pedestrian plaza with shops and restaurants. Approximately 75 feet above this plaza a five-story bridge will connect the top five stories of the main structures on either side of Eighth Street, unifying the entire project into one large building. The entire building is planned to rise to a height of 130 feet.

In order to realize their conception of integrating Eighth Street into Techworld, the developers sought to have it closed by the city of Washington, and to have title to the street transferred to them. Title to Eighth Street was vested in the United States government. The Street and Alley Closing Procedures Act of 1982 (the "'82 Act"), D.C.Code § 7-421, et seq. (1985 Supp.), provides a mechanism whereby the D.C. City Council may be petitioned to pass legislation closing streets in the city and transferring title. Pursuant to the '82 Act, the developers filed an application with the Surveyor of the District of Columbia to close Eighth Street between I and K Streets, and an alley on the Techworld site. The Surveyor solicited comments from a

broad spectrum of city agencies, including the Fire and Police Departments, the Department of Environmental Services, the Office of Planning, and the Department of Housing and Community Development. Each of these groups reviewed the proposal and, recommended the Council grant the application. The National Capital Planning Commission, a federal agency, also approved the street closing. The Historic Preservation Review Board opposed.

These agencies made several suggestions as to limitations and conditions which should be placed on the developers, to insure the street closing would be advantageous to the city. Apparently in response to some of the concerns raised, the City Council imposed five covenants to run with Eighth Street, as a condition to the closing. The Council demanded an easement for emergency vehicles, a 45,000 square foot easement for pedestrian circulation, and another easement to preserve the view between along Eighth Street and the Carnegie Library at Mt. Vernon Square to the north and the Museum of American Arts/National Portrait Gallery to the south. The Council also required the developers to commit themselves to the basic components of the project they had presented, and to install a sprinkler system. At the request of the Council, the developers worked out the language for these covenants together with the D.C. Office of Planning.

In April 1984, Mayor Barry forwarded the application to the City Council. The Council's Committee on public works held hearings on the application, at which many interested groups expressed their opinions. Included were neighborhood groups from nearby Chinatown, the D.C. Chamber of Commerce, and the University of the District of Columbia. The Deputy Mayor for Economic Development, representing the Mayor's Office, enthusiastically supported the project, writing that:

We are very excited about this major investment and exciting project in the downtown area. The short and long term benefits of this mixed-use develop-

ment, the diverse activities and proposed target tenant population make it even more exciting and attractive. This project will enable the District to diversify its economic base and achieve a goal that underlies all of our economic development plans.... I strongly hope this development project and its many beneficial contributions will be able to proceed promptly.

Moore Committee Report, Techworld Group Exhibit 8, at 7.

The Committee found that the project will have a "positive fiscal impact" on the District. It will provide 330 full time jobs during construction, and over 1,300 jobs after completion. (The developers anticipate 6,800 full time jobs will be generated by 1989). Sixty-six percent of these jobs will go to District residents. The Committee also anticipated \$22,000,000 in tax revenue for the District during construction, and over \$15,000,000 annually thereafter.

In its final report, dated September 26, 1984, the Committee reported favorably on the proposed legislation, and recommended Eighth Street be closed.

In November 1984, the Council voted unanimously to close the street and transfer title to the developers. It passed two acts, the Eighth Street Closing Acts, effecting the closing and transfer. Transfer of title was conditioned upon the developers executing and recording the five covenants previously agreed to. The developers executed and recorded them with the D.C. Recorder of Deeds on November 16. The Mayor signed the Acts on November 29. As required by the District of Columbia Self-Government and Governmental Reorganization Act, D.C.Code § 1-211 et seq., the Eighth Street Closing Acts were forwarded to both houses of Congress for a mandatory 30-day review period. Congress did not exercise its right to veto the legislation, and at the end of the 30 days, the Acts became law.

Throughout these lengthy proceedings leading up to the Eighth Street closing, the developers expressed their intention to apply to the Zoning Commission as a Planned

Unit Development ("P.U.D."). P.U.D. approval allows a structure to exceed or otherwise vary from the regulatory limits established in zoning regulations. The developers specifically sought Zoning Commission authorization to exceed the regulatory density limits, and to obtain a waiver of the set-back requirement fronting on Mt. Vernon Square.

Beginning November 1984, the Commission held extensive hearings on the P.U.D. application. The Commission granted the application, but in its June 21 order, it established 37 conditions regarding Techworld's use, height, design, employment of minorities, and construction. The Commission required that one-third of Techworld be used as a trade center perpetually, and imposed strict ratios of showroom, display and office floor areas which the developers must employ.

This last condition was especially onerous to the developers, as it interfered with efforts to obtain financing. They therefore withdrew their P.U.D. application, determining to proceed with Techworld under the mandated regulatory zoning limitations, including the proscribed density and set-back limitations. The design the developers intend to proceed with, however, does not differ significantly from the design approved by the Zoning Commission.

The D.C. Preservation League and the Committee of 100 on the Federal City, are organizations concerned with protection of landmarks and the historic character of the District. They are also dogged opponents of Techworld. They testified in opposition at the hearings on the Eighth Street Closing Acts, and at the Zoning Commission hearings. On October 1985, they wrote to the regional Director of the Department of the Interior's National Capital Region, arguing that the Eighth Street Closing Acts were an unlawful appropriation of United States property. The preservationists demanded in their letter that the Department immediately move to reclaim the street, and they threatened a mandamus action if the Department refused. The preservationists also persistently threatened the de-

velopers and D.C. Government officials with a lawsuit to halt Techworld's development.

These threats came to fruition on January 28, 1986, when the preservationists filed suit for declaratory and injunctive relief against the developers, several D.C. Government officials, and the National Capital Planning Commission. They also sued the Department of the Interior for mandamus relief, as they promised in their October letter. The same day the preservationists filed their complaint, the developers filed an action seeking a declaration as to the legality of the project, in order to remove the cloud of legal uncertainty which had arisen. These two actions were consolidated on February 5.

On March 28, apparently in response to the preservationists mandamus action, the Department of the Interior filed an action to quiet title to Eighth Street. The preservationists thereafter consented to having the mandamus claim dismissed. The federal government action was consolidated with the other two. On March 29, 1986, the Lawyers Title Insurance Co., which has insured the developers' good title to Eighth Street, intervened into the consolidated actions. Finally, the court has received three amicus briefs all in favor of the Techworld project.

All parties have filed motions to dismiss or for summary judgment. The preservationists and the federal government have contrived several arguments to demonstrate how either the developers or the District of Columbia government have violated the law in the course of developing Techworld. Several arguments challenge the City Council's authority to pass the Eighth Street Closing Acts. The government argues that the City Council's closing the street violated a provision of the Home Rule Act. The preservationists argue that the Council's action was unconstitutional. The preservationists also argue that the developers' decision to withdraw their P.U.D. application violated an implied covenant imposed by the Eighth Street Closing Acts. The preservationists also claim the

procedures leading up to the passage of the Acts were deficient for failure to follow the requirements of the National Historic Preservation Act.

Besides these claims concerning the closing of Eighth Street, the federal government argues that the proposed 130 feet height of Techworld violates the Height of Buildings Act. And the preservationists argue that all permits issued by the Mayor in connection with Techworld must conform to the procedures of a local District of Columbia historic preservation law.

We address each of these arguments in turn, and, for the reasons stated below, grant summary judgment for each one in favor of the developers and the District of Columbia.

THE HOME RULE ACT

[1] The District of Columbia Self-Government and Governmental Reorganization Act, D.C. Code §§ 1-211 et seq., commonly known as the Home Rule Act, creates the D.C. local government and vests it with authority to pass legislation. The federal government argues that the Eighth Street Closing Acts are invalid extensions of the Council's authority under the Home Rule Act. The government specifically refers to this provision:

The Council shall have no authority to ... [e]nact any act, or enact any act to amend or repeal any act of Congress which concerns the functions or property of the United States....

Section 1-233(a)(3). Because title to Eighth Street was vested in the United States, the government argues the Eighth Street Closing Acts are acts concerning United States property within the meaning of the Home Rule Act's prohibition and, therefore, are void.

The government's argument only is plausible if one considers the above-quoted language in total isolation, and casts a blind eye to more than 50 years of congressional delegation of street closing authority to local D.C. government. This history, considered together with the treatment Congress has continued to give street closings performed by the Council under the Home

Rule Act, exposes the glaring superficiality of the government's argument. Congress never intended the Home Rule Act to circumscribe the street closing authority D.C. governments have so long enjoyed.

The Constitution grants Congress plenary authority over the District of Columbia. Art. I, § 8, cl. 17. The Supreme Court recognized early on that Congress would need to establish a municipal governing body, to be responsible for matters which are characteristically local in nature.

They [original proprietors] must also have contemplated that a municipal corporation must soon be created to manage the concerns, and police, and public interests of the city; and that such a corporation would and ought to possess the ordinary powers for municipal purposes which are usually confined to such corporate bodies. Among these are certainly the authority to widen or alter streets, and to merge and in many instances to dispose of public property, or vary its appropriation.

Van Ness v. City of Washington, 29 U.S. (4 Pet.) 232, 281, 7 L.Ed. 842 (1830).

Authority over the streets of the city is a paradigmatic municipal function; the sort of function one should expect a municipality to have. As the Supreme Court stated over 100 years ago:

... the care and superintendence of streets, alleys, and highways, the regulation of grades, and the opening and closing of old streets, are peculiarly municipal duties. No other power can so wisely and judiciously control this subject as the authority of the immediate locality where the work is to be done.... [T]he general judgment of the country has always accepted the municipal organization as the one subject to the least objection for the execution of this duty. *In inquiring, therefore, where the power was vested in a particular case, we should expect to find that it was given to the municipality.*

Barnes v. District of Columbia, 91 U.S. (1 Otto) 540, 547, 23 L.Ed. 440 (1875) (empha-

sis added). It is unsurprising, then, that Congress also viewed the power to close and dispose of streets in the District of Columbia as a municipal power, and that it chose to delegate that municipal power to the municipal government it had created. Congress performed this delegation by passing the Street Readjustment Act of 1932, D.C.Code § 7.401 et seq. ('32 Act).

Prior to 1932, each street closing required the Commissioners of the District to obtain an individual piece of legislation from Congress. That the local District government did not have the authority to close its own streets without congressional consent was deemed "manifestly inappropriate," by the National Capital Park and Planning Commission, which encouraged Congress to pass the '32 Act. S.Rep. No. 688, 72d Cong., 1st Sess. 3 (1932). Congress agreed that the D.C. government should have the power to close D.C. streets, because that is a characteristic municipal power enjoyed by other city governments:

The object of this bill is to give the District Commissioners the same power and authority that the city councils already have in various cities of the country.

75 Cong.Rec. 287 (1932) (Remarks of Cong. Patmar).

But Congress passed the '32 Act and empowered the D.C. government to close streets not out of some altruistic desire to vest the city government with more prestige; rather Congress wished to spare itself the chore of having to take up such banal, parochial matters as whether to close some street in the District. The congressional deliberations leading up to the passage of the '32 Act reveal Congress was of one mind: the Act was needed to rectify the ridiculous fact that the national legislative body for the entire United States had to stop all its business and consider a request by a city commissioner to close a street.

Representative of such sentiments are the remarks of Congressman Underhill:

It is ridiculous to take the time of Congress with such things, when we have so little time to consider matters of great importance. Each time the necessities of the District require that an alley be closed or a street opened or some little minor matter of detail attended to in the conduct of the affairs of the District, which should be taken care of not by the Commissioners, but by some superintendent of streets or some head of a department, it is ridiculous to have to bring such things before the Congress and have it act upon them. I hope this bill will pass and, in consequence, that Congress will be relieved of these minor details, which have no place in this body.

75 Cong.Rec. 287 (1932).

In the same vein, Congressman Black stated:

It is highly absurd that the Congress of the United States, carrying on its shoulders the weighty problems of the country, should have to pass separate acts every time the District Commissioners require a blind alley to be closed in Washington, or some side street that does not mean anything.

Id.

The Act was passed over no significant objection. It gave the local D.C. government the authority to close streets in its discretion, and to transfer title to those streets. Significantly, it provided that when title to the street in question is vested in the United States, the local government still may close it and still may transfer or dispose of that title, "to the best advantage of the locality and the properties therein and thereby affected...." D.C. Code § 7-401. Congress believed the street closing was no less local, and no more worthy of congressional attention, because title to the street is vested in the United States.

This street closing power was exercised by the city government at least ten times from 1932 to 1967. See Appendix to Memorandum of Intervenor Lawyers Title Insurance Corporation ("Intervenor's appendix"). In 1967, the form of local govern-

ment was changed, but the street closing authority was expressly passed on to the new government, which continued to exercise it at least five times until 1973. See Reorganization Plan No. 3 of 1967, 81 Stat. 948, § 402 (168) (1967); Intervenor's appendix.

In 1973 Congress again restructured the District government, by passing the Home Rule Act. The Home Rule Act delegates to the present District government all powers which had been granted the previous government. D.C.Code § 1-227(a). At the time this Act was passed, the street closing authority had been in place for many years, and had frequently been exercised. That authority, then, continues to be enjoyed by the present government, unless, in passing the Home Rule Act, Congress specifically intended to revoke it.

It is highly unlikely that Congress intended to revoke a municipal authority like street-closing in the context of a law intended to relieve Congress of its municipal responsibilities over the District. As the Home Rule Act states, its purpose is to: relieve Congress of the burden of legislating upon essentially local District matters.

D.C.Code § 1-201(a). The Home Rule Act is designed to accomplish in a broader way the same thing the '32 Street-Reorganization Act was designed to accomplish: to spare Congress the chore of considering municipal matters. As Senator Eagleton stated:

I believe it is not in the interest of this body, nor is it in the interest of the citizens of the United States we are elected to represent, or even of the citizens of the District of Columbia, that the time of the United States Senate be spent preparing, holding hearings, considering and debating matters that are purely local in nature. Rather, as your committee proposes in this bill, Congress should delegate the making of these local regulations to a body elected by the citizens of the District of Columbia....

Home Rule for the District of Columbia, 1973-1974, Background and Legislative

History of H.R. 9056, H.R. 9682, and Related Bills Culminating in the District of Columbia Self-Government and Governmental Reorganization Act, Pub.L. 93-198, 93d Cong., 2d Sess. at 2755 ("History"). Congress expressed no regret at imposing its municipal authority on the local District government:

Happily, [Congress] will not be concerned with sanitation commissions, and with closing alleys and determining whether or not one can fly kites. It will be concerned only with those broader aspects of oversight of the District of Columbia Government. That is what the Congress of the United States is for, not to be a city council, so long as the Federal interest is protected, and I submit it aptly is.

History at 2177-78.

In 1932, Congress granted the local D.C. government authority to close streets and transfer title because it believed such closings are local matters, undeserving of congressional attention. In 1973 Congress passed the Home Rule Act to relieve Congress of the burden of legislating on local matters. It would be bizarre to read the Home Rule Act as reclaiming for Congress the burden of deliberating on local street closings. If Congress intended to repossess this one local function, in the course of passing a law divesting itself of local responsibilities, one would expect to find some reference in the legislative history to this exceptional effect, or some concern that street closing authority is one local responsibility Congress should reclaim. There is no such reference.

The history up to the passage of the Home Rule Act concerning street closing authority in the District definitively demonstrates Congress' desire that the local government affect street closings and transfers of title. The subsequent history of street closings effected since the passage of the Act conclusively demonstrates Congress' ongoing satisfaction with the local government's exercise of that authority.

Under the Home Rule Act, each act passed by the City Council must be forwarded to both houses of Congress for review. The legislation does not become effective for 30 days, during which time, Congress may veto it. D.C. Code 1-233(c)(1). (The Council also may pass emergency legislation which has provisional effect for 90 days, still subject to congressional review and veto. *Id.*) Between the effective date of the Home Rule Act and 1982, several street closings were performed by the City Council. See *Intervenor's Appendix*. Each closing was forwarded to Congress for review. None was ever objected to or vetoed.

In 1982, the City Council passed the Street and Alley Closing Procedures Act of 1982, D.C. Code § 7-421 et seq. (1985 Supp.). This law altered the procedures by which the Council may close streets. This law, too, was sent to both houses of Congress, which thereby were confronted directly with a law reaffirming the City Council's street closing authority. Congress showed no objection and allowed that legislation to become law.

Since the passage of the Closing Procedures Act, several more streets have been closed under the new procedures, including Eighth Street, at issue here. See *Intervenor's Appendix*. Each of these closings also was forwarded to Congress, which had the opportunity to review, object to, and veto each closing individually. In every case Congress allowed the street closing to take effect, and expressed its tacit approval. See *Alaska Airlines v. Donovan*, 766 F.2d 1550, 1556 (D.C. Cir. 1985).

Over 50 years ago Congress determined it had no desire to consider street closings in the District of Columbia, and it authorized the local government to close streets and transfer title. Over 50 years of practice have reaffirmed that commitment. The Federal government in this case cannot point to one expression of congressional desire to repossess that authority. Congressional satisfaction with the present scheme has never been clearer than since the passage of the Home Rule Act, under

which Congress has individually reviewed each street closing. The delegation of street closing authority has become so accepted over time, that even federal agencies seeking to close a street for their own purposes have petitioned the City Council for a street closing act. See Memorandum of the District of Columbia, exhibits 1, 2 and 3. In the face of all this, how the Federal government can maintain that in passing the Home Rule Act, Congress intended to revoke street closing authority, is nearly beyond comprehension.

In support of its argument, the government only can point repeatedly to the language in the Home Rule Act which prohibits the City Council from passing any acts concerning the "functions or property of the United States." D.C. Code § 1-233. The District of Columbia Court of Appeals considered that language in another case, and arrived at an interpretation of it which is persuasive, consistent with the tenor of the Home Rule Act, and sensible in the context of street closings.

In *District of Columbia v. Greater Washington Central Labor Council, AFL-CIO*, 442 A.2d 110 (D.C. 1982), a union challenged the City Council's passage of a workman's compensation act for the District. As the old workman's compensation law had been passed by Congress, was administered by the Secretary of Labor, and was adjudicated in federal courts, the union argued workman's compensation in the District was a federal matter, and that the new law affected a "function of the United States," and was invalid. The court rejected this argument, finding that the language of the Home Rule Act, § 1-233, was included to "safeguard the operations of the federal government on the national level." *Id.* at 116. The court quoted the following language from the legislative history:

The functions reserved to the federal level would be those related to federal operations in the District, and to property held and used by the federal government for conduct of its administrative, judicial, and legislative operations; and for the

monuments pertaining to the nation's past.

Id.

This court agrees that the limitation of § 1-233 is included to ensure that the local government does not encroach on matters of national concern. It withholds authority over property used by the United States in connection with federal governmental functions, and over property of national significance. The Council may not concern itself with the Lincoln Memorial, or the White House, or with the United States Court-house. The closing of a small street in Northwest Washington, however, is precisely the sort of local matter Congress wishes the D.C. Council to manage.

Congress did not intend, by the language of § 1-233, to revoke the District government's traditional authority to close streets and transfer title to streets in the District, even where title is vested in the United States. The Eighth Street Closing Acts, which were individually reviewed by Congress and which Congress allowed to become law, are valid exercises of Council authority under the Home Rule Act.

THE APPOINTMENTS CLAUSE

[2] The preservationists argue that the Eighth Street Closing Acts run afoul of the Appointments Clause of the United States Constitution, art. II, § 2, cl. 2. The Appointments Clause provides that "Officers of the United States" must be nominated by the President, and that the more important presidential nominees must also be confirmed by the Senate. (Inferior officers need not be confirmed.) They rely entirely on one line in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), which states that,

... any appointee exercising significant authority pursuant to the laws of the United States is "an Officer of the United States," and must, therefore, be appointed in the manner proscribed by [the Appointments Clause].

Id. 424 U.S. at 126, 96 S.Ct. at 685. The preservationists argue that when the District of Columbia Council closed Eighth Street, it exercised significant federal au-

thority, which under *Buckley* only may be exercised by one appointed pursuant to the Appointments Clause. Because the City Council is elected, not appointed, the Eighth Street closing must be declared invalid.

The preservationists' argument is based on one line cavalierly plucked out of an extraordinarily lengthy and complex case. Even a brief investigation of *Buckley* reveals it addressed facts and significant federal concerns completely absent from the present case. The holding and reasoning of *Buckley* simply have little or nothing to do with the City Council closing a one block section of Eighth Street.

Buckley involved a challenge to a Federal law establishing rules governing national elections and establishing a commission to monitor and administer those rules on an ongoing basis. Congress reserved for itself the right to appoint some members of the commission. This arrangement was challenged on the basis that Congress was encroaching on the sphere of the executive branch of government by appointing Federal officials with "wide-ranging rulemaking and enforcement powers with respect to the substantive provisions of the Act." *Buckley*, 424 U.S. at 118, 96 S.Ct. at 682. The appellants argued that presidential appointment, "is the exclusive method by which those charged with executing the laws of the United States may be chosen." *Id.*

This proposition was accepted by the Court. The Court discussed the importance of the Appointments Clause to maintaining the separation of powers, and the concern of the framers that the legislative branch not "aggrandize itself" at the expense of the other branches. *Id.* 424 U.S. at 129, 96 S.Ct. at 687. Congressional appointment of the Federal Election Commission was invalid because the commissioners exercised executive authority, specifically, "enforcement power, exemplified by ... discretionary power to seek judicial relief." *Id.* 424 U.S. at 138, 96 S.Ct. at 691. This duty to enforce the laws through legal

action is one especially entrusted to the President. *Id.*

The Court remained clear, however, that not all congressional appointments violate the Appointments Clause.

Insofar as the powers confided in the Commission are essentially of an informative nature, falling in the same general category as the powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them.

Id. The Court concluded that Congress may make appointments

... in aid of the functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not "Officers of the United States."

Id. 424 U.S. at 139, 96 S.Ct. at 691.

The present case, concerning the closing of Eighth Street by the City Council, presents no separation of powers problems. Congress has plenary authority over the District of Columbia. U.S. Const., art. I, § 8, cl. 17, and it is indisputable that Congress could, if it chose, pass an act closing Eighth Street. Finding its responsibility over municipal matters onerous, however, Congress delegated the authority to close streets to the local government. Each such action must, under the Home Rule Act, be individually reviewed and allowed to pass by Congress. This merely amounts to a delegation of authority to the Council to initiate legislation, which always must be reviewed by Congress. The Council "operates merely in aid of Congressional authority to legislate." *Id.* 424 U.S. at 141, 96 S.Ct. at 692. The Appointments Clause does not prohibit Congress from delegation of legislative authority, so long as Congress does not attempt to extend its power beyond its legislative domain. As Congress can pass the Eighth Street Closing Acts itself, the Appointments Clause does not forbid it from allowing the City Council to pass it, subject to congressional review.

See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 501, 99 S.Ct. 740, 761, 58 L.Ed.2d 740 (1979); *United States v. Sharpnack*, 355 U.S. 286, 78 S.Ct. 291, 2 L.Ed.2d 282 (1958).

Furthermore, the authority conferred on the City Council is not federal authority which must be performed by "Officers of the United States." Congress has a unique "dual authority" over the District of Columbia: it may legislate as the Federal legislative body, as it does for the 50 states, or it may legislate as the state legislative body. *Keller v. Potomac Electric Co.*, 261 U.S. 428, 443, 43 S.Ct. 445, 448, 67 L.Ed. 731 (1922).

Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes.... [T]he power of Congress under Clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Article I, § 8.

Palmore v. United States, 411 U.S. 389, 397-98, 93 S.Ct. 1670, 1676, 36 L.Ed.2d 342 (1972). *See also District of Columbia v. Thompson Co.*, 346 U.S. 100, 109, 73 S.Ct. 1007, 1012, 97 L.Ed. 1480 (1952).

The power Congress has given the local government over streets in the District falls within this second, unique power of Congress to legislate over the District as a state legislature. As discussed in the previous section, Congress plainly believed in passing the 1932 streets closing legislation that its authority over the city streets—including those with United States title—was a purely municipal authority. And the Home Rule Act also is legislation conferring ordinary municipal powers on the municipal government, not federal power.

When the City Council acts to close a city street it is not exercising any significant federal authority, pursuant to any law of national application. Rather, it acts as a municipality, pursuant to a congressional law unique to the District of Columbia. By authorizing the City Council to close city streets, Congress does not make the councilmen "Officers of the United States." None of the concerns of *Buckley v. Valeo* are implicated. The Appointments Clause is aimed at federal appointments of common national significance. It is inapplicable to this case.

THE ZONING PROCEEDING

[3] Throughout the proceedings leading up to the passage of the Eighth Street Closing Acts, the developers represented that they intended to build Techworld as a Planned Unit Development ("P.U.D."). This meant they would seek Zoning Commission approval, rather than proceeding under the normal "matter-of-right" regulations, which require no approval. The developers did undergo the Zoning Commission proceedings at considerable expense, but when the Zoning Commission restrictions were imposed, the developers found them prohibitively burdensome. They thereafter withdrew their P.U.D. application, and elected to proceed as a matter-of-right.

The preservationists argue that because the developers stated to the City Council that they would proceed as a P.U.D., that the court should find the Council transferred title to Eighth Street with an implied covenant that development must proceed as a P.U.D. This court should also find that by proceeding as a matter-of-right, the developers have violated that implied covenant, and that it should be enforced as a condition of the developers continuing further.

Neither the Eighth Street Closing Acts nor the 1982 Closing Procedures Act mention anything about zoning requirements on their face. The preservationists concede this, but argue this court should find that the Council intended this implied covenant

when it passed the Eighth Street Closing Acts.

The preservationists must find this argument an uncomfortable one to make. A nonlawyer might think that if the Council and the Mayor did intend an implied covenant which was not honored, that they would be the ones complaining. But they are satisfied. The Council and the Mayor are before this court arguing there is no such covenant. Their presence here was necessitated by the lawsuit brought against them by the preservationists, who seem determined to prove to the Council and the Mayor that they did intend a covenant, whether they think so or not.

Present statements by the Council and the Mayor of their intent in passing the Closing Acts are not dispositive of legislative intent. Common sense dictates, however, that this court note that the Council and the Mayor, two years after the passage of the Closing Acts, believe the Acts were satisfactorily complied with, and that they request the court to so find.

The weakness of the preservationists' posture reflects the weakness of their substantive position. Five explicit covenants were imposed on the developers by the Council as conditions for closing Eighth Street. These covenants concern access for emergency vehicles, pedestrian circulation, fire safety, and preservation of the view between the Carnegie Library, to the north of Eighth Street, and the National Portrait Gallery to the south. The covenants were duly filed by the developers with the D.C. Recorder of Deeds. As the Council imposed five express covenants, it is highly unlikely they intended a sixth which they forgot to include. The doctrine of *expressio unius est exclusio alterius* suggests that if the Council intended a sixth covenant, they would have expressed it with the other five. See *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed.2d 646 (1974).

This is especially true because the five covenants which were imposed were re-

sponsive to concerns raised before the Council by the many groups testifying before it. One suggestion made by opponents of Techworld was that the Council not close Eighth Street until after the Zoning Commission acted on the P.U.D. See Moore Committee Report, Techworld exhibit 8, at 4. Further, the City Office of Planning originally recommended that the closing be contingent upon P.U.D. approval. *Id.* at 6. Thus the very covenant the preservationists now argue was implied, was placed squarely before the City Council at the time it imposed the five express covenants. Its failure to include a sixth enacting these suggestions must be deemed a deliberate rejection of the idea. Cf. *National Railroad Passenger Corp.*, 414 U.S. at 458, 94 S.Ct. at 693.

The full weakness of the preservationists' argument, however, becomes clearer with an understanding of the regulatory zoning scheme in the District of Columbia. Title 11 of the D.C. Regulations provides for various, specific limitations on development in differently zoned areas in the city. If a developer remains within these limitations, he may proceed as a matter-of-right; that is, without Zoning Commission proceedings. The Zoning Commission proceeding is employed if a developer wishes to exceed the matter-of-right limitations. As the preservationists state in their papers, "the P.U.D. regulatory process requires Zoning Commission approval, whereas matter-of-right development does not." Preservationists Reply Memorandum at 10.

Under this system, the choice whether to proceed as a P.U.D. or as a matter-of-right is the developers'. The Director of the D.C. Office of Planning testified to this before the Council:

You can't force someone to go forward with a PUD or a matter of right development.... In other words, you have a piece of property. I can't force you to come down to the Zoning Commission and do anything. It's only if you want to get certain things done.

May 22, 1984 hearing before City Council, Preservationists exhibit 36, at 9. The cove-

nant the preservationists argue was intended would create a radical exception to this regulatory scheme. It would mean the Council took away the developers' choice, and committed the developers to go through the Zoning Commission, even if they intend to proceed within the normal regulatory limitations. It is unclear what such a proceeding would even consist of, as the purpose of P.U.D. applications is to obtain authorization to vary matter-of-right limitations.

If the Council intended to impose such a unique burden on the Techworld developers, one which carves out a peculiar exception to the regulatory scheme, one would expect to find some clear evidence of this intent. Indeed, as the Council was made aware of the strictly voluntary nature of P.U.D. proceedings, if they wished to make them mandatory for Techworld, they would have discussed and acted upon this in some concrete way. There is no evidence that the Council intended such exceptional treatment for Techworld. Rather, the evidence shows that the Council was apprised that Zoning Commission proceedings are voluntary, and took no steps to change that.

The Techworld developers originally sought P.U.D. approval to achieve greater density than the zoning regulations allow, and to obtain a waiver of the set-back requirement fronting on Mt. Vernon Square. By withdrawing their P.U.D. application, the developers have given up their intention to exceed the regulatory limitations and have submitted themselves to them. Absent some clear indication that the Council specifically forbade such an otherwise permissible course of action, this court declines the preservationists' invitation to fashion an exception to the zoning regulations.

THE NATIONAL HISTORIC PRESERVATION ACT

[4] The preservationists level one final argument against the procedural validity of the Eighth Street closing, based on the National Historic Preservation Act of 1966, 16 U.S.C. § 470 et seq. ("NHPA"). The NHPA provides that federal agencies re-

sponsible for a federal "undertaking" involving certain historic areas, must allow the Advisory Council on Historic Preservation a "reasonable opportunity" to make a nonbinding comment. The only federal agency involved with the Eighth Street closing is the National Capital Planning Commission ("NCPC") which, pursuant to the '82 Closing Procedures Act, made a nonbinding recommendation to the City Council during the Council's deliberations. In practical terms, the preservationists argue that before the NCPC made its nonbinding recommendation to the City Council, it should have given the Advisory Council a reasonable opportunity to provide a nonbinding recommendation to it. The NCPC's failure to do so invalidates the entire Eighth Street closing.

In legal terms, whether the Eighth Street closing triggers the NHPA depends on whether the NCPC participation transformed this purely local proceeding into a federal "undertaking", within the meaning of the statute. Section 470f of the Act provides:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470v of this title a reasonable opportunity to comment with regard to such undertaking.

A federal undertaking is where a federal agency has direct or indirect jurisdiction over a project involving the expenditure of federal funds, or the issuance of a federal license. The only role the NCPC had in

this case was to make a nonbinding recommendation to the Mayor. See D.C.Code § 7-422. The Mayor is free to follow or ignore the recommendation as he sees fit. The NCPC neither approves the expenditure of federal funds, nor issues any federal license in connection with the street closing. On its face, section 470f plainly is inapplicable to the NCPC in the context of the Eighth Street closing.

In its papers, the preservationists concede that the "limited" language of section 470 does not support their argument. See Preservationists Reply Memorandum at 21. They rely instead on the purportedly broader definition of undertaking in the regulations, 36 C.F.R. § 800.2(c). In 1980, when Congress passed amendments to the NHPA, a House Committee referred to the regulatory definition as "acceptable." See H.Rep. No. 1457, 97th Cong., 2d Sess. 45 (1980), U.S.Code Cong. & Admin.News 1980, p. 6378. The preservationists contend that Congress thereby endorsed a broader application of the NHPA than it originally intended.

This proposition—that a remark by a House Committee constitutes formal congressional adoption of a new statutory definition—is dubious under any circumstances. But in the present case it is utterly preposterous. In 1980 the entire Congress amended the NHPA to include an explicit, statutory definition of undertaking. This definition states that, "undertaking" means any action as described in section 470f of this title." Section 470w(7). Rather than adopt any new definition of undertaking, Congress explicitly reaffirmed the original language of section 470f. The language of that section—which the preservationists acknowledge does not support the argument—is dispositive.

Furthermore, the regulatory definition of undertaking only corroborates the conclusion that the Eighth Street closing is no federal undertaking. The language of § 800.2(i) clearly requires a level of federal involvement in local projects far deeper than the NCPC's modest role in the Eighth Street closing. A local project only be-

comes a federal undertaking when a federal agency lends its "... approval, sanction, assistance, or support...." *Id.* Examples of such federal involvement include projects directly undertaken by the agency, projects supported by federal loans or contracts, projects licensed by the agency, or projects proposed by the federal agency for congressional funding or authorization. *Id.* The regulation requires the federal agency be substantially involved in the local project, either with its initiation, its funding, or its authorization, before a local project is transformed into a federal undertaking.

Again, the NCPC's only role in a street closing in the District of Columbia is to provide the Mayor with a nonbinding recommendation. This minimal participation is insufficient to trigger the NHPA. The NCPC is correct in its own assessment, which it provided the Justice Department in a litigation report:

... when the NCPC has a purely advisory role, as it does with review of street and alley closings, it does not consider the act an "undertaking" requiring compliance with section 106 of the NHPA.

NCPC Litigation Report, Techworld exhibit 17, at 4.

THE HEIGHT OF BUILDINGS ACT

The developers intend to build Techworld to a height of 130 feet. The height of buildings in the District of Columbia is regulated by the relevant provision of the Height of Buildings Act of 1910, ("HBA"), which provides:

(a) No building shall be erected, altered, or raised in the District of Columbia in any manner so as to exceed in height above the sidewalk the width of the street, avenue, or highway in its front, increased by 20 feet; but where a building or proposed building confronts a public space or reservation formed at the intersection of 2 or more streets, avenues, or highways, the course of which is not interrupted by said public space or reservation, the limit of height of the building shall be determined from the

width of the widest street, avenue or highway.

D.C.Code § 5-405. The federal government and the preservationists argue that the HBA limits the maximum height of Techworld to 110 feet. The developers, the government, and the preservationists all seek a declaration as to the maximum permissible height of Techworld.

[5] Two preliminary concerns must be addressed before proceeding to the merits. First, the Corporation Counsel argues for the District government that this issue is not yet ripe for resolution because the local authorities have not yet issued a construction permit allowing Techworld to rise to any specific height. But this case is ripe because the developers have made plain their intention of building Techworld to 130 feet, most recently in the complaint in this action. The federal government and the preservationists have made equally plain their position that such a height is unlawful. All parties request a determination, and "there is a substantial controversy, between parties of adverse legal interests, of sufficient immediacy and reality." *Lake Carriers' Association v. MacMullan*, 406 U.S. 498, 506, 92 S.Ct. 1749, 1755, 32 L.Ed. 257 (1972), quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941).

Second, the developers argue the enforcement provision of the D.C.Code § 5-408 gives the D.C. Corporation Counsel exclusive authority to bring suit to enforce the HBA, and that therefore neither the preservationists nor the federal government have a right of action.

[6, 7] The developers are correct that there is no general private right of action for the HBA, and therefore the preservationists' claim must be dismissed. But the federal government stands on a different footing. It owns Mt. Vernon Square, adjoining the Techworld site. The statute indirectly authorizes a neighboring property owner, such as the government, to bring an action to enforce the HBA. See D.C. Code §§ 5-426, 5-418(a). Furthermore, the federal government has the general right

to initiate suits to protect the interests and property of the United States. *United States v. Jacinto Tin Co.*, 125 U.S. 273, 279, 8 S.Ct. 850, 853, 31 L.Ed. 747 (1888). In this case, the government's property interest in Mt. Vernon Square provides a basis for it to bring an HBA claim.

[8] Even though the government may bring an action in this case, Congress explicitly entrusted the Corporation Counsel with primary responsibility for enforcing the HBA. In addition, the Corporation Counsel is the chief legal advisor for the District, with authority to enforce the D.C. Code. See D.C.Code § 1-361. Therefore, opinions rendered by the Corporation Counsel concerning the application of the HBA are entitled to substantial deference, and should only be overturned by this court if they are plainly unreasonable or contrary to legislative intent. *Chevron, U.S.A. v. National Resources Defense Council*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1983); *Williams v. Washington Metropolitan Transit Company*, 472 F.2d 1258, 1264 (D.C.Cir.1972).

The Corporation Counsel has issued two opinion letters in which it states the HBA permits Techworld to be 130 feet high. It also argues the same position before the court in this case. It presents two distinct justifications for its opinion. Because the government has failed to show how either of these justifications is unreasonable or contrary to the legislative intent, this court upholds the Corporation Counsel's determination.

(a) *The General Rule*

The general rule of the HBA is that a building may be built to a height equal to the width of the street on which it fronts plus 20 feet. In applying the HBA, the Corporation Counsel may request a determination of the width of a fronting street, from the Surveyor of the District of Columbia. To determine this width, the Surveyor either checks the recorded width, or if no width has previously been recorded, he makes an official determination by referring to the King Plats of the City. See

Deposition of D.C. Surveyor Ralph B. Sheaffer, U.S. exhibit 10, at 12-13. The King Plats are the definitive First Survey of the District of Columbia; prepared by Nicholas King in 1803. *Id.* at 14. King, a contemporary of L'Enfant, was the first surveyor of the District. *Id.*

When a fronting street forms part of a public traffic circle, square, or other public space, the Surveyor determines its width by measuring full across the entire public space depicted on the plat. *Id.* at 35-36; Opinion Letter of Deputy Corporation Counsel, Oct. 1984, U.S. exhibit 3, at 2. He has on several occasions deemed the official width of such streets to be not less than 110 feet, even where the width of the street considered without the public space is less. The Corporation Counsel has employed such determinations on several occasions in approving building heights. See *id.* at 2-3.

The Farragut Building on Farragut Square is 130 feet high, and the new Army-Navy Club will be 130 feet high, even though the actual widths of the streets they front on are less than 110 feet. The Prudential Building on McPherson Square will reach a height of 130 feet, even though it fronts on a street less than 110 feet wide. In all these cases, the Surveyor determined the widths of the fronting streets to be not less than 110 feet, because of their locations on public spaces, and the Corporation Counsel has relied on these determinations in applying the HBA. See *id.*; Sheaffer deposition exhibits B, C, and D.

The Corporation Counsel applied this consistent administrative practice to Techworld. Techworld fronts on the south side of Mt. Vernon Square, a public space. Accordingly, the Corporation Counsel opined that K Street fronting the Techworld site is not less than 110 feet wide, a determination consistent with the depiction of the Square on the King Plat. The maximum allowable height of Techworld is 110 feet plus 20 feet, or 130 feet. '84 Opinion Letter at 2-4.

That this interpretation reflects a consistent, demonstrable administrative prac-

tice, further adds to the weight of the Corporation Counsel's opinion. See *Udall v. Tallman*, 380 U.S. 1, 17, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1964). The pernicious result of undoing this longstanding practice would be to expose at least three other buildings in downtown Washington to HBA claims.

The government argues the Corporation Counsel's '84 opinion should be discounted because it apparently was drafted by a law firm retained by the Techworld developers. This argument has no bearing on the opinion's authoritative status. Once the Corporation Counsel signed and issued the '84 opinion, it became the official position of the city, just as if this court signed a proposed order submitted by the government, that order drafted by the government would become the official order of the court.

More to the point, the government also argues the Corporation Counsel's opinion is unreasonable because of its reliance on the King Plats. The Plats were drafted before the existence of "public reservations," which are areas appropriated by the Federal government. Many public spaces depicted on the King Plats are now public reservations, including Mt. Vernon Square. Because the Plats do not reflect the public reservations, they cannot be used to determine street widths of public spaces.

A public reservation, however, is only a jurisdictional concept. As the D.C. Surveyor stated:

U.S. reservations are merely numbers for inventory purposes, so the Park Service can identify and make reference to a piece of ground that it has jurisdiction over.

Sheaffer deposition at 15. The existence of federal jurisdiction over an area depicted on a plat does not disturb the accuracy of the dimensions on the plat. The existence of public reservations make no difference to the Surveyor's determinations of the distances and proportions reflected on the plat.

The King Plats remain the definitive survey of the District of Columbia. The Sur-

veyor is fully justified in using them to determine street widths. Furthermore, the Corporation Counsel need not go out with a yardstick and measure the width of the street himself. He is fully justified in relying on the determination of the expert surveyor of the District. The Corporation Counsel's opinion regarding the application of the HBA to Techworld is consistent and reasonable, and this court has no reason to disturb it.

(b) *The Public Reservation Exception*

In the '84 and '85 opinion letters, the Corporation Counsel provided another justification for its determination that Techworld may rise to 130 feet. The HBA provides an exception to the general rule, which provides that when a building fronts on a public space or reservation,

Formed at the intersection of two or more streets, avenues or highways, the course of which is not interrupted by said public space or reservation, the limit of height of the building shall be determined from the width of the widest street, avenue, or highway.

D.C.Code § 5-405. In the opinion of the Corporation Counsel, Techworld satisfies this exception, because it fronts on Mt. Vernon Square, a public reservation formed by the convergence of several streets.

Specifically, the Corporation Counsel found that the course of K Street is uninterrupted. This is because K Street enters the Square on one side, travels without a break around the Square, and emerges from the opposite side. See '84 Opinion Letter at 2. Also, the "course" of K Street is its direction or compass heading. K Street enters and exits Mt. Vernon Square on the same heading; it shows no displacement of its axis, and so its course is uninterrupted. See '85 Opinion Letter at 2; *Black's Law Dictionary*, 424 (Rev. 4th ed., 1969).

This analysis of the course of K Street is consistent with that of the D.C. Surveyor. He testified that the course of K Street, as

well as the courses of Massachusetts Avenue and New York Avenue, are uninterrupted, because there is no break in their alignment going into and coming out of the Square. See Sheaffer deposition at 29-30.

K Street converges with Seventh and Ninth Streets, which also are uninterrupted. Therefore, the Corporation Counsel believes Mt. Vernon Square is a public reservation, formed by the intersection of two or more streets, the courses of which are not interrupted by the Square. The Corporation Counsel used the public reservations exception to calculate the maximum permissible height of Techworld. The width of K Street at its widest point entering the Square allows a height of 130 feet. See '85 Opinion Letter at 2-3.

The government disagrees with this analysis, and argues that the course of K Street is interrupted by Mt. Vernon Square, because traffic on K Street must skirt around the Square in order to pass it. That is, because K Street bends around Mt. Vernon Square, the government argues its course is interrupted, and that the public reservations exception does not apply.

Once again, the government misconceives this court's role in reviewing the Corporation Counsel's opinion. See *Chevron, U.S.A.*, 467 U.S. at 845, 104 S.Ct. at 2783. That opinion will only be overturned if the government demonstrates it is plainly unreasonable or contrary to legislative intent. Instead of such argument, the government merely offers an alternative interpretation of the HBA. This court finds the Corporation Counsel's interpretation reasonable, and consistent with the language of the HBA. There is no basis on which to overturn it.

THE HISTORIC LANDMARK AND HISTORIC DISTRICT PROTECTION ACT

[9] In their final claim, the preservationists argue that Techworld is subject to the District of Columbia Historic Landmark and Historic District Protection Act, D.C. Code § 5-1001 et seq. ("HLHDPA"). The HLHDPA provides, *inter alia*, that prior to issuing permits to alter the exterior of a historic landmark, the Mayor must refer

the permit application to the Historic Preservation Review Board for its comments. Section 5-1005(b). In their complaint, the preservationists argued the Mayor's issuance of an excavation permit without first seeking the Board's comments was a violation of the HLHDPA. In their papers, however, they admit an excavation cannot alter a vista, which is the purported landmark, and they restrain themselves to arguing that the Mayor must refer all future construction permits to the Board for their nonbinding recommendation.

The HLHDPA applies to historic landmarks which it defines as sites listed in the D.C. Inventory of Historic Sites. Section 5-1002(6). That inventory lists hundreds of entries, one of which is the "Eighth Street Vista from Mt. Vernon Square to National Archives." See Inventory, Techworld exhibit 15. Because of this listing, the preservationists argue that the HLHDPA applies to Techworld, which lies on Eighth Street south of Mt. Vernon Square.

The listing upon which the preservationists rely, however, contains an inscrutable inaccuracy. "Vista" means view. See *Webster's New International Dictionary* 2851 (2d ed. 1945). There simply is no view down Eighth Street, from Mt. Vernon Square to the National Archives, as the Inventory describes. The National Portrait Gallery is on Eighth Street between these two sites, and it completely obscures the view. One cannot possibly see the Archives from Mt. Vernon Square, nor can one see the Square from the Archives—the Portrait Gallery is in the way. The Inventory, therefore, describes a view that does not exist. It is impossible to know what is meant by the listing.

The preservationists argue there is such a thing as an "interrupted vista," and that the Inventory describes an interrupted vista running from Mt. Vernon Square, through the Portrait Gallery, and on to the Archives. The evidence in the record, however, is sorely deficient in demonstrating such an oxymoronic concept. The preservationists point to a report by the Historic

Preservation Review Board, which discusses the arrangement of the buildings along Eighth Street but which does not discuss the concept of an interrupted vista. Preservationists exhibit 10, at 2-3. They also refer to a hopelessly muddled passage by an expert witness who testified before the D.C. Zoning Commission; a passage which explains nothing at all. Preservationists exhibit 21.

The preservationists also argue that because the Eighth Street vista was included in the Inventory by a panel of experts, they must have known what they meant. But this begs the question: by describing something which does not exist, the court cannot know what they meant. It is also true that the Eighth Street vista listing was merely one of hundreds, and the fact that it is so inscrutable suggests the compilers of the Inventory were not always able to exercise a constant degree of care.

Because the description in the Inventory of the Eighth Street vista is so flawed that it is impossible to know what is described, the HLHDPa does not apply to Techworld.



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,

v.

STATE OF MISSOURI, DEPARTMENT OF SOCIAL SERVICES, DIVISION OF AGING, Defendant.

No. 86 MISC 77.

United States District Court,
E.D. Missouri, E.D.

Aug. 29, 1986.

Equal Employment Opportunity Commission petitioned for enforcement of two subpoenas duces tecum served on state agency pursuant to charge filed by termi-

nated employee contending that state discriminated against her on basis of race. State moved to dismiss enforcement petition on ground that court did not have jurisdiction to consider it. The District Court, Limbaugh, J., held that EEOC could compel state to respond to subpoenas duces tecum, though only Attorney General could bring discrimination action.

Motion dismissed; petition sustained.

1. Administrative Law and Procedure
⌘465

Civil Rights ⌘34

Equal Employment Opportunity Commission was entitled to compel state department of social services to respond to subpoenas duces tecum arising from Title VII complaint made by terminated employee alleging racial discrimination, in that pertinent provision of National Labor Relations Act allowed investigating agency to seek information from "person," term which, unlike "employer" did not exclude state governments. National Labor Relations Act, §§ 1 et seq., 2(2), 11, as amended, 29 U.S.C.A. §§ 151 et seq., 152(2), 161; Civil Rights Act of 1964, §§ 701 et seq., 710, as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-9.

2. Administrative Law and Procedure
⌘464

Civil Rights ⌘34

Equal Employment Opportunity Commission had authority to bring subpoena enforcement action against state agency pursuant to investigation made under Title VII alleging racial discrimination in employment, though only Attorney General of United States could actually file civil complaint in federal district court. Civil Rights Act of 1964, § 706(e), as amended, 42 U.S.C.A. § 2000e-5(f)(1).

Robert Johnson, E.E.O.C., St. Louis, Mo.,
for plaintiff.

90-14-3003✓

~~90-14-3009~~~~90-15-2467~~

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Orande

No. 86-5630

September Term, 1986

C.A. No. 86-00252

Techworld Development Corporation, et al.

v.

D.C. Preservation League, et al.

Committee of 100 on the Federal City,

Appellant

United States Court of Appeals
For The District of Columbia Circuit

FILED JUN 2 1987

And consolidated cases

GEORGE A. FISHER
CLERK

BEFORE: Wald, Chief Judge
Mikva and Buckley, Circuit Judges

ORDER

Upon consideration of appellants' motion to vacate judgment and the opposition thereto, it is

ORDERED by the court that the appeals be dismissed. It is

FURTHER ORDERED by the court that the motion to vacate judgment be granted for the reasons set forth in the accompanying memorandum. The judgment of the district court on appeal herein is vacated and the case is remanded to the district court with instructions to dismiss the cases as moot.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 14.

Per Curiam

80-5 MJ 2-1007 1981
JUN 10 1987

0022000

90-1-4-3003

DEPARTMENT OF	
3	JUN 3 1987
LANDS	

Departmental File

Nos. 86-5630, 86-5631, 86-5632, 86-5633 - Techworld Development Corp., et al. v. D.C. Preservation League, et al.

MEMORANDUM

In 1984, Techworld Development Corp. (Techworld) and other real estate developers filed an application with the District of Columbia (District) to close Eighth Street, NW, to allow development of the Techworld project - a proposed International Trade Center for high technology and information industries. Despite opposition from various groups, including the Committee of 100 On The Federal City (Committee) and the D.C. Preservation League (DCPL), the City Council voted to close the street and transfer title to the developers. As required by the District of Columbia Self-Government and Governmental Reorganization Act, D.C. Code § 1-211 et seq., the Eighth Street Closing Acts, D.C. Act No. 5-206 and D.C. Law No. 5-148, were forwarded to both houses of Congress for a mandatory 30-day review period. Congress did not exercise its veto and the Acts became law.

Three actions were filed in the district court: (1) the Committee and DCPL filed suit for declaratory and injunctive relief seeking, inter alia, a determination that the Height of Buildings Act, D.C. Code § 5-405(a), limits the height of the Techworld project, the D.C. Council lacks authority to transfer title to Eighth Street from the United States to the Techworld parties, and any delegation of authority to dispose of federal property, such as Eighth Street, to elected D.C. officials violates the Appointments Clause of Article II, §2, of the Constitution; (2) Techworld filed an action seeking a declaration

as to the legality of the project; and (3) the United States filed an action seeking a judgment (a) quieting title to Eighth Street in the United States on the ground that under the Home Rule Act the D.C. City Council lacked authority to vest title to the street in private parties and (b) declaring that the planned height of the Techworld project violates the Height of Buildings Act.

On August 5, 1986, the district court entered judgment adverse to all the claims of the United States and the Committee. Specifically, the district court held that the D.C. Law transferring title to Techworld did not violate the Self-Government Act and that authority to close and convey streets is among the powers granted the Council by Congress. The court also held that delegation of congressional authority over street closings to the District's legislature does not violate the Appointments Clause of the Constitution. Finally, the court held that the District had correctly interpreted and enforced the Height of Buildings Act.¹

On October 30, 1986, the President signed the Continuing Appropriations Act for Fiscal Year 1987, Public Law 99-591, which contained a provision "reaffirm[ing]" the City Council's power to close and convey Eighth Street. See 132 Cong. Rec. H10656 (daily

1. The district court also held that: the Eighth Street Closing Acts contained no implied covenant that Techworld must be developed as a Planned Unit Development; the National Historic Preservation Act, 16 U.S.C. § 470, does not apply to the Eighth Street Closing; and that Techworld is not subject to the Historic Landmark and Historic District Protection Act, D.C. Code § 5-1007.

ed., Oct. 15, 1986). On November 7, 1986, the United States and the Committee executed a settlement agreement with Techworld to which the District is not a party. In the agreement, Techworld, the United States, and the Committee agreed to compromise and settle all claims against each other.

As a result of the congressional action and the ensuing settlement agreement, appellants now move this court to vacate the district court judgment. Appellants argue that these cases are now moot due to the enactment of the congressional legislation and the settlement agreement. We agree.

In United States v. Munsingwear, Inc., 340 U.S. 36 (1950), the Supreme Court stated:

The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in Duke Power Co. v. Greenwood County, 299 U.S. 259, 267, to be "the duty of the appellate court." That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.

340 U.S. at 39-40. This court has generally followed that rule. See, e.g., Aviation Enterprises, Inc. v. Orr, 716 F.2d 1403, 1407-08 (D.C. Cir. 1983); Douglas v. Donovan, 704 F.2d 1276, 1280 (D.C. Cir. 1983).

The District relies on one recent case in this circuit, Center for Science in the Public Interest v. Regan, 727 F.2d 1161, 1165 (D.C. Cir. 1984), to argue that where a district court decision becomes moot "not by 'happenstance' but by the deliberate action of the losing party before the district court,"

this court should refuse to vacate the decision. Center for Science involved the rescission by the Department of the Treasury of requirements for alcoholic beverage labeling. The district court found the rescission invalid, and ordered the Department to set a new effective date for the labeling requirement. The Department appealed only from the "effective date" portion of the order; however, several industry group intervenors appealed the substance of the decision. Pending appeal, the Department adopted new superseding rules, and the appeal became moot. This court dismissed the appeal, and vacated that portion of the order setting the "effective date." This court, however, refused to vacate the substantive portion of the order (which the Department had not appealed), finding that appellate review was prevented "by the deliberate action of the losing party before the district court, the Treasury." Id. at 1165.

Center for Science does not control the instant case. In Center for Science, the only reason for the Treasury's adoption of new superseding rules was the adverse district court decision. Center for Science involved a deliberate, unilateral action by an agency to supersede its own rules in order to moot the case. In the instant case, however, an independent intervening congressional act reaffirmed the District's transfer of title which undoubtedly formed the impetus for appellants' desire to settle with all parties (except the District). It is clear that the congressional act caused the parties to settle which in turn mooted the action. Therefore, Center for Science is not persuasive precedent for departing from the Munsingwear

doctrine in this case.

The absence of a concrete title dispute over particular property would make any decision by this court on the home rule and appointments clause issues merely an advisory opinion. Consequently, because these cases have become moot, we are forced by the prescription of Munsingwear to dismiss the appeals, vacate the judgment below and remand with directions to dismiss the cases as moot. See United States v. Munsingwear Inc., 340 U.S. 36 (1950).

File 77

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

SEP 22 1987

TECHWORLD DEVELOPMENT
CORPORATION, et al.,

plaintiff,

v.

D.C. PRESERVATION LEAGUE,
et al.,

Defendants.

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

C.A. No. 86-0252 90-1-4-3003 ✓

And consolidated cases

C.A. No. 86-0266 90-1-4-2999 ✓

C.A. No. 86-0837-90-1-5-2467 ✓

ORDER

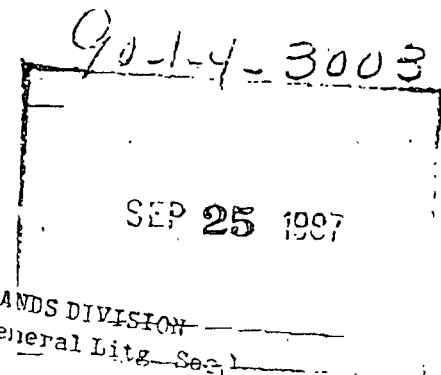
This court, in accordance with the order of the United States Court of Appeals for the District of Columbia Circuit filed June 2, 1987, hereby

ORDERS that these cases be dismissed as moot.

William B. Bryant
WILLIAM B. BRYANT
SENIOR UNITED STATES DISTRICT JUDGE

September 22, 1987

GENERAL LITIGATION DIVISION
1987 SEP 25 AM 11:30



March 6, 1962

IN RE: Supplemental opinion concerning the permissible height of buildings in the Columbia Plaza Project Area. (CCO: 799.1 - Columbia Plaza)

COMMISSIONERS OF THE DISTRICT OF COLUMBIA

Gentlemen:

In an opinion dated December 20, 1961, concerning three questions raised by Colonel Thomas K. Fullerton, Assistant to the Engineer Commissioner, I expressed the view that the Zoning Commission of the District of Columbia is without authority to denominate a street as a "business street" within the meaning of the second paragraph of section 5 of the Act approved June 1, 1910 (36 Stat. 452), as amended (sec. 5-405, D. C. Code, 1961 ed.), and that the use of the term "business street or avenue" in that provision of law has reference to a "business street" denominated as such by the Commissioners under the authority of the Act of July 1, 1898, as amended (secs. 7-1205 and 8-108, D. C. Code, 1961 ed.). I stated in that opinion that, in view of this, the Zoning Commission is without authority to adopt section 7511.1 of the Zoning Regulations of the District of Columbia, reading as follows:

"7511.1. For the purpose of administering these regulations that portion of the Act referred to in Section 7510 designating certain streets as 'business streets', is interpreted to mean those sides and portions of any street located in a Special Purpose, Commercial, or Industrial District." (Italics omitted)

I have considered further the problem of reconciling the Zoning Act of June 20, 1938 (secs. 5-412 through 5-428, D. C. Code, 1961 ed.) with the provisions of the Act of June 1, 1910 (secs. 5-401 through 5-409, D. C. Code, 1961 ed.), regulating the height of buildings, and the last proviso in section 2 of the Act of July 1, 1898, as amended (secs. 7-1205 and 8-108, D. C. Code, 1961 ed.), insofar as the provisions of these Acts relate to the denomination of "business streets". As a result of this consideration, I am of the view that the applicable provisions of these three Acts can be construed so as to retain in the Commissioners the authority to denominate "business streets" for the purpose of allowing the use of public space thereon for business purposes, while at the same time allowing the Zoning Commission to consider streets located in a Special Purpose, Commercial, or Industrial District as "business streets or avenues" for the purpose of determining whether buildings located on such streets or avenues may be built to a maximum height of 130 feet.

The Act of June 1, 1910, supra, in the first three paragraphs of section 5, makes the following distinctions:

"No building shall be erected, altered, or raised in the District of Columbia in any manner so as to exceed in height above the sidewalk the width of the street, avenue or highway in its front, increased by twenty feet; . . .

"No building shall be erected, altered, or raised in any manner as to exceed the height of 130 feet on a business street or avenue as the same is now or hereafter may be lawfully designated, . . .

"On a residence street, avenue, or highway no building shall be erected, altered, or raised in any manner so as to be over ninety feet in height at the highest part of the roof or parapet, . . ."

It should be noted from the foregoing that Congress, by the Act of June 1, 1910, classified the streets of the District of Columbia as "residence street(s)" and "business street(s)". Further, the effect of the first three paragraphs of section 5 of the Act of June 1, 1910, is that on streets other than residence streets buildings may rise to a maximum height of 130 feet, except as such height may be reduced by the application of the first paragraph of such section, fixing the maximum height of a building at the width of the street plus twenty feet.

With the enactment of the Act of March 1, 1920 (41 Stat. 500), establishing a zoning system for the District of Columbia, the method of controlling the height of buildings constructed in the District was changed. The Zoning Commission, created by the first section of such Act, was required by section 2 of the Act to --

" . . . divide the District of Columbia into certain districts, to be known, respectively, as height, area, and use districts, and . . . adopt regulations specifying the height and area of buildings thereafter to be erected or altered therein. . . ."

By the following proviso this section of the Act of March 1, 1920, limited the authority of the Zoning Commission in establishing the height of buildings:

" . . . Provided further, That the permissible height of buildings in any district shall not exceed the maximum height of buildings now authorized upon any street in any part of that district by the Act of Congress approved June 1, 1910, and amendments thereto, regulating the height of buildings in the District of Columbia. . . ."

I am of the opinion, therefore, that the Zoning Act of March 1, 1920, and particularly the language I have set forth above, was intended by the Congress to authorize the Zoning Commission,

created by that Act, to consider as a "business street or avenue" any street or avenue located in a district zoned other than residential. I am impelled to this belief by reason of the fact that Congress may be presumed to have recognized the distinction it had made in section 5 of the Act of June 1, 1910, supra, as between a "residence street" and a "business street". Thus, when in section 2 of the Act of March 1, 1920, supra, the Congress referred to "any street in any part of that district" it recognized that the Zoning Commission would be dealing with some districts which contained "residence streets" and other districts which contained "business streets".

And while the language of section 6 of the Zoning Act of June 20, 1938 (which supersedes all but the first section of the Zoning Act of March 1, 1920) varies to a degree from the language set forth in the above-quoted proviso of section 2 of the Act of March 1, 1920, by its use of the phrase "in any part of the District of Columbia" in lieu of "in any part of that district", nevertheless I am of the view that the slight change in the language of such section 6 of the Act of June 20, 1938, does not alter the situation.

Accordingly, I am of the opinion that whenever the Zoning Commission, acting under the authority of the Act of June 20, 1938, as amended, zones any area of the District of Columbia for a use other than a residential use, all of the streets within such area become "business streets" within the meaning of section 5 of the Act approved June 1, 1910, supra. This is not to say that the Zoning Commission has, by its action, denominated such streets as business streets within the meaning of the Act of July 1, 1898, as amended, supra, so as to permit the use of public space on such streets for business purposes. I am of the view that under existing law only the Commissioners can lawfully denominate a street or portion of a street as a "business street" on which use may be made of the public space for business purposes. Nevertheless, insofar as determining the maximum permissible height of buildings is concerned, I am of the view that when the Zoning Commission zones an area as residential, on the one hand, and as special purpose, commercial, or industrial, on the other hand,

in the first case those provisions of section 5 of the Act of June 1, 1910, relating to a "residence street" will apply in determining the permissible height of buildings on such streets, and in the second case, those provisions of section 5 of the Act of June 1, 1910 relating to the height of buildings on a "business street" will apply.

As noted earlier, section 7511.1 of the Zoning Regulations of the District of Columbia, under the caption "Streets Denominated Business Streets" states that --

"For the purpose of administering these regulations that portion of the Act referred to in Section 7510 designating certain streets as 'business streets', is interpreted to mean those sides and portions of any street located in a Special Purpose, Commercial, or Industrial District."

I am of the view, however, that the foregoing language is not an apt statement of the situation. In my opinion a better statement is the following:

"Section 7511 - Business Streets

"7511.1. Each street or portion of street within a Special Purpose, Commercial, or Industrial District is a 'business street' within the meaning of section 5 of the Act referred to in section 7510, for the purpose of determining the maximum height of any building which may be constructed on property abutting such street or portion of street."

In conclusion, I am of the view that while only the Commissioners have authority to denominate a street or portion of street as a "business street" for the purpose of allowing the use for business purposes of sidewalk space on any street or portion of street, the Zoning Commission has authority under the Act of June 20, 1938, to provide by regulation that any street or portion of street located in a special purpose, commercial, or industrial

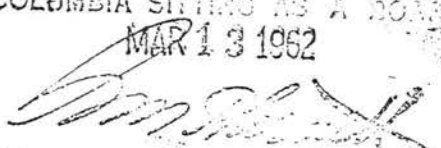
use district is a business street within the meaning of section 5 of the Act of June 1, 1910, supra, for the purpose of determining the maximum height of buildings built on any such street or portion of street.

Respectfully submitted,

/s/ Chester H. Gray

CHESTER H. GRAY
Corporation Counsel, D. C.

2-27-62

NOTED BY THE COM.
MISSIONERS OF THE DISTRICT OF
COLUMBIA SITTING AS A BOARD
MAR 13 1962

SECRETARY

C
O
P
Y

G.F. 5-112

Jul. 27, 1953

TO: THE COMMISSIONERS

IN RE: Whether penthouses may be constructed above the height limits established by the Act of Congress approved June 1, 1910, regulating the height of buildings, for purposes other than to cover elevator shafts; and whether the presence of an operating engineer in such penthouses constitutes "human occupancy" within the meaning of such Act.

There have been referred to this office for an opinion certain questions which have been raised by the Chief Engineer of the Department of Inspection, relating to the permissible use of penthouses constructed above the height limits established by section 5 of the Act of Congress approved June 1, 1910 (36 Stat. 452, as amended; sec. 5-405, D. C. Code, 1951 ed.). These questions may be expressed briefly as follows:

1. May the Act of June 1, 1910, permitting the construction of "penthouses over elevator shafts" to a greater height than any limit set by the Act, be construed to permit the construction of penthouses for the purpose of housing air-conditioning equipment, heating equipment, and perhaps other kinds of equipment which ordinarily might be located within a building?
2. Does the phrase "human occupancy" as used in the Act of June 1, 1910, in connection with the construction or use of penthouses, preclude the presence of an operating engineer in penthouses containing air-conditioning or heating equipment, including boilers?

The answers to the foregoing questions depend upon an interpretation of the last paragraph of Section 5 of the Act of June 1, 1910, the pertinent part of which reads as follows:

"Spires, towers, domes, minarets, pinnacles, penthouses over elevator shafts, ventilation shafts, chimneys, smokestacks, and fire sprinkler tanks may be erected to a

greater height than any limit prescribed in the Act when and as the same may be approved by the Commissioners of the District of Columbia: Provided, however, That such structures when above such limit of height shall be fire-proof, and no floor or compartment thereof shall be constructed or used for human occupancy above the top story of the building upon which such structures are placed: And provided, That pent houses, ventilation shafts, and tanks shall be set back from the exterior walls distances equal to their respective heights above the adjacent roof:
* * * * *

In connection with the first of the above questions, however, it is also necessary, in construing the statute, to consider any long-standing administrative interpretations of the statute with respect to the construction of penthouses for other uses than "over elevator shafts", inasmuch as the "long-continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration * * * * * constitutes an invaluable aid in determining the meaning of a doubtful statute." Sutherland, Statutory Construction, sec. 5103. It might be said that the phrase "penthouses over elevator shafts" is plain and unambiguous, permitting the construction of penthouses only over elevator shafts, and that therefore there is not need for administrative construction of this phrase. But it may hardly be said that Congress, by the use of this phrase, intended, for example, to prohibit the construction of penthouses over stairways leading to the roof of a building, as is commonly the practice in the construction of buildings, and as was the practice at the time the Act of June 1, 1910 was enacted, according to persons in the Department of Inspection having knowledge of the construction practices at that time.

It would appear, therefore, that the phrase "penthouses over elevator shafts", rather than being plain and unambiguous, has required interpretation by the officials of the District of Columbia charged with the administration of the statute containing the phrase. The Director of Inspection over the years has interpreted the statute as permitting the construction over the height limit of penthouses to provide shelter for air-conditioning equipment such as water towers, evaporative condensers, and air-conditioning fans. The question now arises, however, in the light of changed construction practices, whether the Director's interpretation of the statute may extend to permitting the construction of penthouses to shelter heating equipment including boilers. Much of the air-conditioning and heating equipment in use today requires the services of operating engineers, and the presence of operating engineers in penthouses constructed above the permissible height limit also involves an interpretation of the meaning of the phrase "human occupancy", as used in the Act of June 1, 1910.

In connection with the consideration of both of the questions discussed in this opinion, it is of interest to consider the intent of the

Congress in enacting the Act of June 1, 1910. Strangely enough, although it is commonly believed that the purpose of the Act was to preserve the skyline of the city and to prevent the overshadowing of the Capitol by excessively tall buildings, it would not appear that the Congress, at the time it was considering the bill that later became the Act of June 1, 1910, had such a purpose in mind. Rather, according to a statement by one of the sponsors of the bill during debate in the House of Representatives, the principal concern of the Congress involved the lack of fireproofing on the "upper or mansard stories" of buildings then constructed, and the sponsor stated "this act is for the purpose of requiring that buildings of a certain height shall be of fireproof material throughout." Congressional Record, Vol. 45, p. 4535.

Another consideration of the Congress during its debate on what later became the Act of June 1, 1910, would appear to relate to matters of light and ventilation, as the following exchange during the debate would indicate:

"MR. CAMPBELL (a sponsor of the bill) The buildings on Pennsylvania avenue would be limited to the height provided for in this bill (160 feet).

"MR. SIMS. Now, why should they be permitted to be, say 30 feet higher on Pennsylvania avenue than any other business street or otherwise in the city?

"MR. CAMPBELL. It is the widest street in the city.

"MR. SIMS. Is not New York avenue fully as wide?

"MR. CAMPBELL. No; Pennsylvania Avenue is the wider.

"MR. SIMS. Is it the object and purpose of regulating the height of buildings in the District of Columbia that the height of buildings should be regulated on each street in reference to the width of that particular street?

"MR. CAMPBELL. We are far below the limit of height that could be provided for on Pennsylvania Avenue when we provide for 160 feet." (Cong. Record, Vol. 45, p. 6799; parenthetical notations added)

Accordingly, it would seem that the last paragraph of section 5 of the Act of June 1, 1910, should be construed in the light of the intent of the Congress in enacting the Act; i.e., in terms of fireproofing and of light and ventilation.

On this basis, therefore, it would appear that the 61st Congress, insofar as penthouses were involved, was not concerned so much with the

use to which such penthouses would be put as with the fireproofing of such penthouses, and it would seem there was no objection on the part of Congress to the construction of fireproof penthouses above the height limit, just so such penthouses were (1) set back from the exterior walls, apparently for reasons of light and ventilation, and (2) were not constructed or used for human occupancy.

The term "human occupancy" moreover, perhaps should be construed in the light of the intent of the Congress in enacting the Act. The Congress, in specifically recognizing the necessity for elevator machinery above the height limit, obviously did not intend that no elevator machinery repairman could enter the penthouse over such machinery for the purpose of repairing it. Yet in one sense this is "human occupancy" of such a penthouse.

The term "occupancy" means, to quote Webster's New International Dictionary, 2nd Edition, the "act of taking or holding possession". An "occupant", to quote the same authority, is "one who occupies or takes possession; one who has the actual use or possession of a thing"; "occupy" means "to take or enter upon possession of; to hold possession of, to hold or keep for use; to use"; while "occupation" means "actual possession or control". I am of the view, therefore, that the prohibition of "human occupancy", in the last paragraph of section 5 of the Act of June 1, 1910 was intended by the Congress to prevent the use of enclosed space above the height limit for residential, office or business purposes, either by the owner of a building or by any tenant holding under him, but was not intended to preclude the use of such space in connection with the maintenance of such building and the operation of its utilities. I am of the view, therefore, that the last paragraph of section 5 of the Act of June 1, 1910, does not prohibit the presence of building maintenance personnel in fireproof structures constructed above the permissible height limit.

In summation, I caused a study to be made of the Act approved June 1, 1910, and the legislative history of such Act, with particular reference to the last paragraph of section 5 of such Act, as a result of which I have concluded that the phrase in such paragraph, "penthouses over elevator shafts", may be construed to include penthouses over stairways leading to the roof and penthouses over other utilities necessary in connection with the operation of a building, but not to include penthouses to be used for residential, office or business purposes. Further, I have concluded that the term "human occupancy" as it is used in such paragraph should be construed to preclude the construction or use of penthouses for residential, office or business purposes, but not to preclude the presence in such penthouses of building maintenance personnel charged with the operation and maintenance of the building's utilities.

The memorandum of the Chief Engineer of the Department of Inspection also refers to paragraph numbered 1 of Section XIII of the Zoning Regulations of the District of Columbia, as amended, which reads as follows:

"1. The provisions of the Act of June 1, 1910, as to spires, towers, domes pinnacles (sic), penthouses over elevator shafts, ventilation shafts, chimneys, smoke stacks, and fire-sprinkler tanks shall continue in full force and effect, except that on buildings hereafter erected the Commissioners of the District of Columbia shall not approve the construction of fire-sprinkler tanks, water towers, or housing for air conditioning to a height in excess of 130 feet measured from the level of the curb opposite the middle of the front of the building. Fire sprinkler tanks, water towers, or housing for air conditioning equipment may be erected or enlarged on buildings existing prior to December 1, 1944 as provided under Section XXIII of these regulations. (As amended Dec. 1, 1944 and Feb. 25, 1948.)"

This regulation of the Zoning Commission, as has been pointed out in the memorandum of the Chief Engineer of the Department of Inspection, would appear to have a double effect. First, it imposes a limitation on the Act of June 1, 1910, since it prohibits the construction of fire-sprinkler tanks and water towers above 130 feet, although the June 1, 1910, Act specifically permits fire-sprinkler tanks above the 130-foot height limit, and may be construed to permit water towers above that limit. But more important, the regulation would appear to delimit the Act of June 1, 1910, by impliedly authorizing the construction of housing for air conditioning equipment above any height limit established by the June 1, 1910, Act, with the exception of the 130-foot height limit. It would appear, therefore, that the Zoning Commission, like the Director of Inspections, has construed the phrase "penthouses over elevator shafts" to permit the construction of housing for air-conditioning equipment above all height limits except the 130-foot height limit.

The Zoning Regulations of the District of Columbia, as amended, have been promulgated by the Zoning Commission of the District of Columbia under the authority contained in the Act approved June 20, 1938 (52 Stat. 797, as amended; Title 5, sections 413 through 428, D. C. Code, 1951 ed.). Among other things, such Act empowers the Zoning Commission to regulate the height of buildings, except the permissible height of any building shall not exceed the maximum height of buildings authorized by the Act of June 1, 1910, *supra*. Further, section 12 of the Act of June 20, 1938 (Section 5-424, D. C. Code, 1951 ed.) provides:

"Sec. 12. Wherever the regulations made under the authority of this Act require a greater width or size of yards, courts, or other open spaces, or require a lower height of buildings or smaller number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in or under any other statute or municipal regulations, the regulations made under authority of this Act shall govern. * * *."
(Underlining supplied)

Accordingly, I am of the opinion that although the Act of June 1, 1910, may be construed to permit the construction, above the maximum height limits established by such Act, of penthouses sheltering building utilities, providing such penthouses meet the other requirements of such Act, nevertheless paragraph 1 of Section XIII of the Zoning Regulations of the District of Columbia has the effect of prohibiting the construction of such penthouses above the 130 foot height limit, although impliedly permitting the construction of penthouses for air conditioning equipment above the lower height limits established by the June 1, 1910, Act.

The Chief Engineer of the Department of Inspection concludes his memorandum of June 16, 1953, with the following paragraphs:

"It is apparent that a situation difficult both for this office and for the architects, owners, and mechanical engineers will continue to exist until both the Act of 1910 and the Zoning Regulations are clarified and a consistent and equitable policy established for both.

"It seems to me that the intent and limitation of the Act of 1910 should be established by Commissioners directive, and that thereafter the Zoning Regulations be clarified in order to be consistent with such directive.

"It is recommended that such directive clearly establish what equipment may be in a 'penthouse' above the height limit as established by the Act of 1910, that there be a limiting size to such pent-house based on a percentage of roof area, and that the Zoning Commission establish regulations consistent therewith, also for such pent-houses as exceed the zoning height limits but are not above the limits established by the Act of June 1, 1910."

Inasmuch as in my view, the Act of June 1, 1910, may be construed to permit the construction, above the various height limits established by such Act, of penthouses to house utilities necessary in the operation of buildings, and to permit the presence in such penthouses of personnel required to operate such utilities, the only action required of the Commissioners with respect to establishing "the intent and limitation of the Act of 1910" would be to direct their Secretary to forward a copy of this opinion to the Director of Inspection for his information and guidance.

But as has been pointed out earlier, the construction of the Act of June 1, 1910, is not all that is required to furnish the "clarification" recommended by the Chief Engineer. Since the Zoning regulations prohibit the construction of fire-sprinkler tanks, water towers, or housing, for air-conditioning equipment above 130 feet, such regulations effectively establish, for all buildings, an extreme height of 130 feet, not including spires, domes, pinnacles, penthouses over elevator shafts, ventilation shafts, chimneys, and smokestacks.

RECOMMENDATIONS:

1. That although the Act of June 1, 1910, regulating the height of buildings, may be construed to permit the construction, above the various height limits established by such Act, of penthouses to shelter building utilities of all kinds, and to permit the presence in such penthouses of building maintenance personnel, paragraph 1 of section XIII of the Zoning Regulations prohibits the construction above a height of 130 feet of fire-sprinkler tanks, water towers, and penthouses for air conditioning equipment.

2. That should the Commissioners desire to authorize the Director of Inspection to approve plans for the construction, above the maximum height limits established by the Act of June 1, 1910, of penthouses to shelter building utilities, it would appear necessary that there first be a change in the Zoning Regulations of the District of Columbia, which are controlling.

3. That the Commissioners forward a copy of this opinion to (1) the Director of Inspection, D. C., and (2) the D. C. Building Code Advisory Committee, for appropriate recommendation relating to the desirability of amending the Zoning Regulations of the District of Columbia so as to clarify the present uncertainty regarding the construction, above certain height limits, of penthouses to shelter building utilities.

/s/ VERNON E. WEST,
Corporation Counsel, D. C.

RFK:hs
7/24/53

GOVERNMENT OF THE DISTRICT OF COLUMBIA
ENGINEER DEPARTMENT
DEPARTMENT OF INSPECTION
WASHINGTON 4, D. C.

ADDRESS REPLY TO
DIRECTOR OF INSPECTION

May 13, 1953.

To Whom It May Concern:

Re: Housing for air conditioning equipment
above 130 foot level.

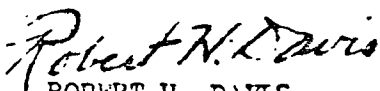
Prior to December 1, 1944, fire-sprinkler tanks, water towers and air conditioning equipment were permitted above height limits of buildings as established by the Zoning Regulations and the Act of June 1, 1910, whichever was the more restrictive.

On November 15, 1944, a public hearing was held by the Zoning Commission to consider amendments regarding the location of air conditioning equipment above the 130 foot height limit. The Commission evidently felt that air conditioning equipment was unsightly, and where fans were used they created a noise nuisance. The upshot was that the following amendment in part was promulgated: "* * * * the Commissioners of the District of Columbia shall not approve the construction of fire-sprinkler tanks, water towers, or housing for air conditioning equipment to a height in excess of 130 feet measured from the level of the curb opposite the middle of the front of the building. * * *"

The erection of ventilating shafts permitted by the Act of June 1, 1910 was not included in the above mentioned prohibitions. However, I am of the opinion that the installation of fans is not permitted.

The American Society of Heating and Ventilating Engineers defines "Air Conditioning: The simultaneous control of all, or at least the first three, of those factors affecting both the physical and chemical conditions of the atmosphere within any structure. These factors include temperature, humidity, motion, distribution, dust, bacteria, odors and toxic gases, most of which affect in greater or lesser degree human health or comfort," and "Ventilation: The process of supplying or removing air, by nature or mechanical means, to or from any space."

For purposes of administration, air conditioning and forced ventilation should be considered as synonymous.


ROBERT H. DAVIS,
Director of Inspection, D. C.

July 15, 1958

REPORT OF THE ZONING ADVISORY COUNCIL
ON PROPOSED AMENDMENTS TO THE ZONING
REGULATIONS

JULY 16, 1958, HEARING

"3201.26 An elevator or stairway penthouse may be erected to a height in excess of that authorized in the district in which located, provided such penthouse is set back from all lot lines of the structure upon which located a distance equal to its height above the roof of the structure."

"4201.22 An elevator or stairway penthouse may be erected to a height in excess of that authorized in the SP District provided such penthouse is set back from all lot lines of the building or other structure upon which located a distance equal to its height above the roof of the building or structure."

"5201.23 An elevator or stairway penthouse may be erected to a height in excess of that authorized in the district in which located, provided such penthouse is set back from all lot lines of the building or other structure upon which located a distance equal to its height above the roof of the building or structure."

"6201.22 An elevator or stairway penthouse may be erected to a height in excess of that authorized in the district in which located, provided such penthouse is set back from all lot lines of the building or other structure upon which located a distance equal to its height above the roof of the building or structure."

These proposed amendments relate to the location of elevator and stairway penthouses. Set back provisions of such appurtenances are contained in the Act of June 1, 1910, (36 Stat. 452), regulating the height of buildings in the District of Columbia. The Act provides that when above the limit of height, a penthouse, etc., shall be set back from the exterior walls of the building on which it is located a distance equal to its height above the adjacent roof. Under the regulations recently repealed, the application of this provision was construed by the Zoning Commission to mean exterior walls from the street sides only, an interpretation considered in harmony with the Act and not in violation thereof. While regulations promulgated by the Commission are subject to minimum standards provided by the Act of June 1, 1910, ample authority exists to incorporate more restrictive provisions into the regulations which has been done in numerous instances with respect to other provisions of the Act.

The principal difficulty encountered in applying the provision of the new regulations is that the required set back of penthouses from all outside walls of the building does not in many instances serve any useful purpose since a set back from yards or courts required or provided is unnecessary to protect light and air for adjoining properties. It is for this reason that modification of these paragraphs in some form appears fully justified.

There are several ways in which these paragraphs could be amended, each of which merits consideration. In addition to the method advertised for this hearing, the Commission might either apply the set back to only those sides of a building abutting public streets, or to only those sides of a building abutting public streets or alleys; or to only those sides of a building abutting public streets, alleys, or a lower height district. There appears to be more support from builders and architects for one of the latter methods than there is for adoption of the proposal now before the Commission. However, the Council is of the opinion that the method proposed here will more closely follow the intent of the 1910 Act and assure adequate light and air for adjoining properties under all conceivable circumstances, whereas adoption of one of the other methods might in some instances adversely affect adjoining structures. The amendment as proposed does not provide a remedy for every conceivable situation since there will be a few buildings on narrow lots which will be unable to provide the set back and must therefore be erected (with penthouse) within the total height envelope, such penthouse area counting as a part of the floor area ratio. Since these cases will be limited and since there is ample opportunity to conform because of the decreased bulk of buildings now required, it is believed that no material hardship will result.

For the reasons outlined, approval of the amendments as advertised is recommended.

(S) R. O. CLOUSER
(S) T. P. HUNTER H. D. HUNTER (ALTERNATE)
(S) WILLIAM F. McINTOSH