

CHRISTOPHER H. COLLINS
202-457-7841
chris.collins@hklaw.com

**OUTLINE OF TESTIMONY IN ZC CASE NO. 08-06-1
OF RECOMMENDATIONS REGARDING MEASUREMENT
AND REGULATION OF HEIGHT
SEPTEMBER 25, 2008.**

1. INTRODUCTION

A. OTHERS ON THIS PANEL HAVE SPOKEN OR WILL SPEAK ABOUT SPECIFIC RECOMMENDATIONS RAISED IN THE SEPTEMBER 15 OP REPORT, WHERE WE QUESTION THE WISDOM OR NEED FOR CHANGES TO THOSE REGULATIONS, IN LIGHT OF THE HISTORY OF THE REGULATIONS THEMSELVES AND THE EXTENSIVE BODY OF INTERPRETATIONS AND RULINGS ON MATTERS OF BUILDING HEIGHT.

B. MY PRESENTATION FOCUSES ON JUST A FEW EXAMPLES OF WHAT WOULD HAPPEN IF THOSE OP RECOMMENDATIONS ARE ADOPTED-- WHAT WILL THE DISTRICT ACHIEVE, AND WHAT THAT MEANS TO THE PROPERTY OWNER.

C. PARTICULAR FOCUS ON ISSUES INVOLVING:

--POINT OF MEASUREMENT AND METHOD OF MEASUREMENT;

--WHAT CONSTITUTES A SINGLE BUILDING; AND

--BUSINESS STREETS VS. RESIDENCE STREETS

2. NON-CONFORMING STRUCTURES

A. DEFINITION IN SECTION 199.1 (ATTACHED).

B. IF THE OP RECOMMENDATIONS ON HEIGHT MEASUREMENT AND REGULATION ARE ADOPTED AS ZONING REGULATIONS, ONE RESULT WILL BE THAT MANY BUILDINGS IN THE DISTRICT WILL BECOME NON-CONFORMING STRUCTURES.

ZONING COMMISSION
District of Columbia

CASE NO. 08-06-1
EXHIBIT NO. 27

C. WE RECOGNIZE THAT EVERY TIME THE COMMISSION ADOPTS A TEXT AMENDMENT, THE RESULT IS THAT BUILDINGS COULD BECOME NON-CONFORMING. BUT IN THIS CASE, THE MAGNITUDE OF THE RESULTING NON-CONFORMITIES WILL BE ENORMOUS.

D. WHAT IS THE BENEFIT TO THE CITY IF THESE BUILDINGS BECOME NON-CONFORMING? NOTHING, REALLY. MOST, IF NOT ALL, OF THE BUILDINGS AFFECTED BY THE CHANGE IN REGULATIONS WILL REMAIN IN PLACE INTO THE INDEFINITE FUTURE. BUT FROM THAT POINT ON, THEY WILL BE CLASSIFIED AS NON-CONFORMING STRUCTURES.

E. WHAT IS THE IMPACT TO THE OWNER? SECTION 2001.2 ALLOWS ORDINARY REPAIRS, ALTERATIONS, AND MODERNIZATIONS TO BE MADE TO NON-CONFORMING STRUCTURES. ADDITIONS AND ENLARGEMENTS CAN ALSO BE MADE PER SECTION 2001.3, PROVIDED THAT CERTAIN OTHER REQUIREMENTS ARE MET.

F. THERE IS A REAL IMPACT TO THE OWNER, IF A PROPOSED ADDITION OR ENLARGEMENT DOES NOT MEET THE REQUIREMENTS OF SECTION 2001.3. THE ONLY ALTERNATIVE IS THE LENGTHY AND COSTLY BZA PROCESS.

G. PERHAPS MORE IMPORTANTLY, SECTION 2001.4 ADDRESSES THE ABILITY TO RECONSTRUCT A NON-CONFORMING STRUCTURE THAT IS DESTROYED BY FIRE, COLLAPSE, EXPLOSION OR ACT OF GOD TO AN EXTENT OF MORE THAN 75% OF THE COST OF RECONSTRUCTION. EVER SINCE 9/11, THE ISSUE OF THE ABILITY TO RECONSTRUCT A NON-CONFORMING BUILDING THAT IS DESTROYED HAS BECOME AN INCREASINGLY IMPORTANT CONSIDERATION TO LENDERS AND EQUITY SOURCES CONSIDERING WHETHER TO PARTICIPATE IN REAL ESTATE TRANSACTIONS, PARTICULARLY HERE IN THE NATION'S CAPITAL. IN AN INCREASINGLY TIGHT LENDING ENVIRONMENT, WHERE REAL ESTATE DEALS CAN BE REJECTED FOR THE SLIGHTEST IMPERFECTIONS, THIS IS A REAL ISSUE, WITH REAL IMPACTS.

3. UNINTENDED CONSEQUENCES

A. A NUMBER OF THE CHANGES PROPOSED BY OP, ALTHOUGH WRITTEN IN THE CONTEXT OF HEIGHT ISSUES, ACTUALLY AFFECT OTHER ISSUES AS WELL. BY WAY OF ILLUSTRATION, THE OFFICE BUILDING AT 2445 M STREET, NW WAS BUILT IN THE 80'S WITH AN ABOVE-GRADE COVERED WALKWAY TO THE FAIRMONT HOTEL AT THE NORTHWEST CORNER OF 24TH AND M. THE BUILDINGS ARE BOTH LOCATED IN THE CR ZONE. THE CR ZONE ALLOWS THE PERMITTED RESIDENTIAL AND NON-RESIDENTIAL FAR TO BE APPORTIONED BETWEEN TWO LOTS ANYWHERE IN THE SAME SQUARE UNDER WHAT IS NOW SECTIONS 631.3 AND 631.4.

HOWEVER, THAT IS NOT WHAT WAS DONE IN THIS CASE. RATHER, THE BUILDINGS ARE LOCATED ON A SINGLE RECORD LOT, WITH A COVERED WALKWAY CONNECTION BETWEEN THE HOTEL AND THE OFFICE BUILDING, AND WITH A SINGLE BUILDING COVENANT, AN ALLOCATION OF DEVELOPMENT RIGHTS COVENANT, AND A PARKING COVENANT. MOST OF THE COMMERCIAL DENSITY IS IN THE OFFICE BUILDING, AND ALL OF THE RESIDENTIAL DENSITY IS IN THE HOTEL. THERE IS ONE POINT OF MEASUREMENT, ON 24TH STREET, BUT THE ELEVATIONS OF 24TH AND M STREETS DO NOT VARY SIGNIFICANTLY. THE COVERED WALKWAY, APPROVED BY THE ZONING ADMINISTRATOR, ALLOWS THE SHARING OF FEATURES, SUCH AS THE GROUND FLOOR OPEN SPACE REQUIREMENT, THE MEASUREMENT OF AN OPEN COURT BETWEEN THE HOTEL AND THE OFFICE BUILDING, AND THE HOTEL'S REQUIRED PARKING BENEATH THE OFFICE BUILDING. THE COVERED WALKWAY CONNECTION ITSELF WOULD MAKE THIS A "NON-CONFORMING STRUCTURE" UNDER OP'S NEW PROPOSAL. THE RESULT OF OP'S LANGUAGE IN RECOMMENDATION A.4 IS THAT THESE WOULD BE DEEMED TWO BUILDINGS ON ONE RECORD LOT. THE OFFICE BUILDING WOULD THEN EXCEED THE PERMITTED HEIGHT. IN ADDITION, ONE OF THE TWO BUILDINGS WILL NOT COMPLY WITH THE GROUND FLOOR OPEN SPACE REQUIREMENT, AND THE OPEN COURT AREA REQUIREMENT, AND THE HOTEL WILL NOT COMPLY WITH THE PARKING REQUIREMENT. THE PROVISIONS OF SECTIONS 631.3 AND 631.4, ALLOWING TWO BUILDINGS IN THE CR ZONE TO APPORTION FAR, DO NOT SPECIFICALLY APPLY TO THOSE SITUATIONS.

THERE ARE MANY OTHER DEVELOPMENTS AROUND THE CITY APPROVED WITH COVERED WALKWAY CONNECTIONS, WHERE THESE AND OTHER ISSUES WILL ARISE, FROM SINGLE-FAMILY HOMES CONNECTED TO GARAGES TO ALLOW DWELLING USES, TO CONNECTED APARTMENT HOUSES, TO CONNECTED OFFICE DEVELOPMENTS.

B. ANOTHER REAL-LIVE EXAMPLE IS THE MULTI-PHASE PORTALS DEVELOPMENT ALONG MARYLAND AVENUE, SW, BETWEEN 12TH AND 14TH STREETS, SW. MARYLAND AVENUE IS A MAN-MADE ELEVATED ROADWAY, AND THERE HAVE BEEN 20 YEARS OF CONSISTENT APPROVALS AND RECOGNITIONS BY BOTH THE COUNCIL AND THE EXECUTIVE BRANCH THAT MARYLAND AVENUE IS TO BE USED AS THE MEASURING POINT FOR DEVELOPMENT OF ALL PHASES OF THAT PROJECT. OP'S RECOMMENDATION B.3 ON HEIGHT MEASUREMENT WOULD NOT ALLOW THAT. I HAVE SUBMITTED TO YOU A BOOKLET ON BEHALF OF PORTALS DEVELOPMENT ASSOCIATES WITH EXTENSIVE DOCUMENTATION IN SUPPORT OF OUR POSITION ON THAT ISSUE, AND I URGE YOU TO GIVE IT YOUR FAVORABLE CONSIDERATION. HOWEVER, THIS IS NOT AN ISOLATED EXAMPLE. THE EXISTING DEVELOPMENT AT

L'ENFANT PLAZA WOULD ALSO BE AFFECTED IN THE SAME WAY BY OP'S PROPOSAL, AND THERE ARE PROBABLY OTHERS AS WELL.

C. ONE LAST EXAMPLE--OP'S RECOMMENDATION A.3, CHANGING THE INTERPRETATION OF WHAT CONSTITUTES A BUSINESS STREET, AND WHAT IS A RESIDENCE STREET. SIMPLY STATED, THIS CHANGE WILL RENDER EXISTING BUILDINGS NOT ONLY NON-CONFORMING UNDER THE ZONING REGULATIONS, BUT ALSO IN VIOLATION OF THE 1910 HEIGHT ACT, WHEN BUSINESS STREETS ARE REINTERPRETED TO BECOME RESIDENCE STREETS. WHAT HAPPENS THEN?

D. THESE ARE JUST A FEW EXAMPLES OF THE MANY PROBLEMS THAT WOULD ARISE. WE URGE THE COMMISSION TO CAREFULLY CONSIDER THE RESULTING EFFECTS OF ALL OF OP'S RECOMMENDATIONS. THANK YOU.

5631103_v1

Nonconforming structure - a structure, lawfully existing at the time this title or any amendment to this title became effective, that does not conform to all provisions of this title or the amendment, other than use, parking, loading, and roof structure requirements. Regulatory standards that create nonconformity of structures include, but are not limited to, height of building, lot area, width of lot, floor area ratio, lot occupancy, yard, court, and residential recreation space requirements. (30 DCR 3922)