

**Testimony of John Lawrence Hargrove
for Kalorama Citizens Association
before the Zoning Commission for the District of Columbia
Case No. 08-06-1 (Comprehensive Zoning Rewrite: Height)
September 25, 2008**

Chairman Hood and Members of the Commission:

Let me preface our remarks on the Commission's specific recommendations with two general comments:

***First*, I would appeal for the most careful and scrupulous respect for the terms of the Height of Buildings Act. Much of what the Commission is doing, in crafting new regulations on the height of buildings, must be understood as interpretation of a statute – in this case an Act of Congress binding on the District of Columbia. That requires adherence to legally established canons of statutory interpretation. We are not at liberty to draft regulations on a blank slate, and must avoid the temptation to embrace tenuous or even fanciful interpretations of the Height Act in pursuit of outcomes that may currently be perceived to be desirable as a matter of policy, however attractive they may be. It appears to us that some of the recommended provisions fall substantially short of this standard. Examples include the proposed regulations regarding the elevation of the bottom measuring point for determining the height of a building, the definition of "exterior wall" for purposes of determining when roof structures must be set back from the building's perimeter, the enumeration of types of permissible roof structures, the provision for BZA-granted special exception relief from even certain Height Act requirements (e.g. roof structure setback), and others, all of which should be brought into conformity with the Height Act. Failing to do so only promotes uncertainty and confusion and invites legal challenge down the line.**

***Secondly*, I would urge that, in interpreting the Act, you ~~to~~ look with a very skeptical eye on assertions of clearly established precedents of many decades' standing regarding some of the key concepts in the Act – "exterior wall" and roof structure setback are examples -- particularly where the evidence for such precedents consists mainly in the mere existence of buildings configured in accordance with the alleged precedent. There is a substantial history of buildings being allowed to be constructed in ways that might arguably be said to violate the Act, in which there is no history of the Height Act question having been even been raised, let alone addressed or decided by any public agency or official. Such a situation does not give rise to legal precedent.¹**

The *third* general comment is that we are concerned at the omission of the provision now contained in 11 DCMR §2510.1 that incorporates the provisions of the Height Act into the Zoning Regulations. That regulation provides that "[i]n addition to any controls

¹ See Attachment 1, pp. 2-3 for further discussion of the District's routine failure to address and enforce the Height Act's setback requirements

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established in this title, all buildings or other structures shall comply with the Act to Regulate the Height of Building” It is important that this provision be retained, thus retaining the established authority of the Commission, the BZA and the Zoning Administrator, within their respective spheres of competence, to interpret and apply all provisions in District law and regulations relating to the height of buildings – the Commission, because some matters within the scope of its authority under our charter are also governed by the Height Act and it therefore must interpret the Act in order to ensure consistency of its regulations and decisions with it; the Zoning Administrator and the BZA because they are required to interpret and apply the Zoning Regulations, which incorporate the Height Act.

An earlier OP draft included the text of §2510.1, together with an explicit statement that the recommended regulations were intended to constitute interpretation of the Act. Unfortunately, in our view, the provision was subsequently watered down and eventually eliminated. The OP memorandum now before you seems ambivalent about the authority of the Commission to interpret the Height Act, and seems to suggest that the Zoning Administrator has exclusive authority to do so². On the contrary, we believe there can be no doubt that the Commission has authority to interpret the Act: it has done so at length in its rulemaking capacity³ and has done so also in the decision of particular cases⁴. The BZA has also interpreted the Act in the decision of particular appeals, and the issue of its authority to do so was explicitly addressed and decided in one such appeal in 2005.⁵ And like these two bodies, the Zoning Administrator also cannot avoid interpreting the Act, to ensure that the Zoning Regulations are applied in a manner consistent with its provisions.

The reason this is important has to do with coherence, clarity and efficiency in the application of the rules governing building height in the District. There is already more than enough potential for confusion in the fact that we have two parallel sets of rules, one applicable only to those buildings that reach the federally established height limit and necessarily trumping the other in the event of conflict between the two. If we were to abandon the present legal arrangement in which these two sets of rules are incorporated into a single unitary body of regulatory law, interpreted and applied by the same officials, it would mean one of two things: At worst, it would mean that the federal height issues would be overlooked in the routine administration of zoning matters -- this has happened with disturbing frequency in the past⁶. At best, federal height issues would be carved out from the non-Height Act issues in a given case and heard and determined by separate procedures not involving the Zoning

² OP Memorandum to the Zoning Commission of September 15, 2008, p. 13.

³ See, e.g., Zoning Order No. 476, Case No. 84-10, Penthouses – Text Amendment, June 9, 1986, and the extensive record of that case

⁴ See, e.g., Zoning Commission Order No. 749-A, Case No. 93-9C (1994) (WETA). This case, in which the Commission – wrongly, in our view – narrowly upheld a Zoning Administrator determination approving a roof structure that was not set back from non-street-facing walls, was appealed to the Court of Appeals. It was remanded on other grounds, and no final order was ever issued.

⁵ See BZA Appeal No. 15568 (October 21, 1991) (Howard University); BZA Appeal No 17109, November 8, 2005 (Kalorama Citizens Association).

⁶ For a review of the history on this point, with reference to the Act’s roof structure setback requirement, see Attachment 1 to this statement, pp. 2-3.

Administrator, BZA or Commission (at one time it was suggested that only the Office of Attorney General – to whom the Act gives enforcement powers – could interpret the Height Act). That would make no sense, and would be enormously wasteful of the resources of time, expertise and money of all concerned.

ZC Recommendation 1: Any street abutting a building's property line may be used to determine the maximum height allowable, based on the street's width, designation, and height restrictions imposed by this Chapter. There should be no requirement for the presence of an entrance to designate a building "front".

ZC Recommendation 5: [When a building faces more than one street:] Option 1: The street chosen to determine the maximum allowable height must also be used to determine the point from which building height is measured.

These two provisions should be adopted, the latter in order to deal with the problem of buildings that take their allowable height from a lower, wider street and then measure it from a higher, narrower street, with the resulting intrusion of inappropriate height onto the lower scale of the narrower street. In so doing, the Commission should first explicitly resolve a certain ambiguity in § 7 of the Height Act that might call into question the legality of this provision under the Height Act.⁷

On a related problem, we strongly recommend that the Commission Restore provisions previously recommended by OP but later dropped that would require, in the case of buildings fronting on more than one street and having a maximum allowable height greater than that allowed on one or more of those streets (which will be the narrower streets), that there be appropriate setbacks and stepdowns on the sides fronting the narrower street, in order to avoid intrusions of height and mass that are out of scale with the narrower street.

It is regrettable that this provision was dropped. Together with the immediately preceding one it could be highly beneficial in moderating what would otherwise be jarring

⁷ This provision might reasonably be held to conflict with the §7 of the Act, which states: "If the building has more than 1 front, the height shall be measured from the elevation of the sidewalk opposite the middle of the front that will permit of the greater height." Whether it does conflict depends on the meaning of "the front that will permit of the greater height". Does this phrase mean the street that has the wider width and thus would allow the higher height limit, or does it mean the street on which the sidewalk elevation is the higher? A 1950 Corporation Counsel opinion cited in discussions of a previous OP draft takes the latter interpretation. This is a genuine ambiguity, which can reasonably be argued either way, and according to that opinion is not elucidated by the drafting history of the Height Act. The Commission should couple the adoption of this provision with an explicit interpretation of §7 of the Height Act, to the effect that the phrase "the front that will permit of the greater height" means "the front facing the street that has the wider width and thus would allow the greater height". With such an interpretation, the proposed provision would appear to be consistent with the Act.

incongruities of scale in urban streetscapes, resulting from developers' efforts to maximize marketable floor space.

ZC Recommendation 2: When any portion of a building face abuts a property line that is directly across a street from a public open space or reservation, the building's maximum allowable height may be determined by the width of any single right of way that is not divided by the public open space or reservation and that is adjacent and parallel to any single side of the open space or reservation.

This provision is a useful clarification and should be adopted.

ZC Recommendation 3: A "Residence street" would be any block face that contains any residential property located in a low to moderate density zone district, as those zones may be described after completion of the zoning review process, OR any block face entirely made up of properties of any residential zone. "Business streets" would mean all other block faces. As with the above recommendations, any property facing more than one street could choose its frontage and rise [to] the greater of the zones' permitted heights.

We have had misgivings about this proposal from the outset, and they have not been entirely dispelled.

First, we believe there is serious reason to question the consistency with the Height Act of any proposal to make the distinction turn on the relative density of the zoning on the block face, rather than simply the character of the street as actually used as residential or business (commercial) regardless of density. The Act makes no mention of density in drawing this distinction, and it is a considerable stretch to impute to the drafter's the notion that if a residential street surpasses a certain point of increased density of use it will thereupon morph into a business street.

Secondly, whether relative density is retained as a criterion or not, we think it is essential that the distinction between "business" and "residence" retain the principle that the presence of a residentially zoned property on a block face would qualify that block face as "residence" for Height Act purposes. For the future, the District's residential neighborhoods are likely increasingly to need this bulwark of protection.

Finally, representing one of Washington's many predominantly rowhouse neighborhoods, in which bits of commercial property at one or both ends of an otherwise residentially zoned block are not uncommon, we think it is equally important to ensure that in any block face containing residentially zoned *rowhouses*, regardless of the density of the residential zoning, would qualify as "residence" for Height Act purposes. OP has sought, not completely successfully, to quell our anxieties by describing the criterion of "low or moderate residential" as merely a placeholder -- a blank to be filled in later. But this is being asked to buy a pig in a poke. More to the point, OP has stated that the Comprehensive Plan designates rowhouse areas as "moderate"⁸; it would be essential that that characterization be adhered

⁸ Memorandum to the Zoning Commission of September 15, 2008, pp. 13, 16.

to if relative density is to be used as a basis for distinguishing between “business” and “residence” streets.

Destabilization: The reason for concern about the possibility of residentially zoned blocks being designated “business” is of course the risk of pressure for demolition and redevelopment, where historic protections are not available, as well as the inducement to build new or add-on construction to heights out of scale with the existing built neighborhood. OP has sought to reassure us by stating that changing the Height Act designation would not of itself affect the allowable height, which is controlled by zoning. But OP has acknowledged that this proposal may be a precursor to increasing zoning height limits, and in any event changing a street’s designation from “residence” to “commercial” is an open invitation for re-zoning of parcels to a mixed category to enable them to go to the higher commercial category limit. In short, the predictable eventual effect of this proposal, without protection for rowhouse neighborhoods, might often be the destabilization of architecturally appealing, already sufficiently dense largely rowhouse neighborhoods with tree-lined streets and good light – an invaluable part of the fabric of our city.

ZC Recommendation 4: A “building” is a structure having a roof supported by columns or walls for the shelter, support, or enclosure of persons, animals, or tangible property. When separated from the ground up or from the lowest floor up by common division walls, each separate portion shall be deemed a separate building unless there is open access between each portion on at least half of the shared floors. Two or more structures that are in all other respects physically separate from each other cannot be combined to form a single building through the introduction of any type of physical connection between the structures, including trellis, walkway, garage or tunnel, at any location.

This provision should be adopted, after addition of a precautionary proviso. It would make more precise and stringent the criteria for determining when separate portions of a structure are deemed separate and when they are deemed parts of a single building, thus eliminating the practice of developers to construct a minor physical connection between two structures fronting on streets with different height limits, in order to claim the higher height for a building to be constructed on the narrower street to a height out of scale with that street. As drafted, this definition, properly, would apply for purposes of the entirety of DCMR Title 11 (the Zoning Regulations) and thus would presumably supplant the current definition in 11 DCMR § 199.1, on which it appears to be based. The second sentence of that existing definition states: *“When separated from the ground up or from the lowest floor up, each portion shall be deemed a separate building,”* and adds *“except as provided elsewhere in this title.”* The second sentence of the proposed definition needs a similar proviso, to assure compatibility with existing special provisions regarding the treatment of portions of structures as separate buildings such as those for R-4 and R-5 districts found in 11 DCMR § 410.

ZC Recommendation 6: The height of a building shall be measured from the midpoint of the building’s property line along a public street. The elevation for this point is determined by the level of the curb approved by the District government plus a 2% gradient between the curb and the line, up to maximum height difference of 12 inches.

This provision would be inconsistent with the Height Act and thus could not lawfully be applied in cases to which the Height Act applies, even though in particular cases the practical differences between this provision and the Height Act provision would probably not be great.

This is another instance in which it is essential to distinguish between cases to which the Height Act applies and those to which it does not. As to the former, the language of §7 of the Act is unambiguous: **“For the purposes of this Act the height of buildings shall be measured from the level of the sidewalk opposite the front of the building to the highest point of the roof.”** Consequently the Regulations may not provide a method of measurement that would allow a building that, when measured by that method, would exceed the height allowable under the Act, as Recommendation 6 could do. The current definition of “building height” in 11 DCMR §199.1 is “the vertical distance measured from the level of the curb opposite the middle of the front of the building to the highest point of the roof or parapet.” This adequately incorporates the Height Act provision, except that it substitutes “curb” for “sidewalk”. Reverting back to “sidewalk” in the regulations, and including a second sentence earlier proposed by OP (“No sidewalk may be raised to affect this measurement”) would seem to deal adequately with the possibility of a sidewalk being placed at an elevation substantially above the level of the adjacent street, and constitute the optimal definition of “building height” for purposes of the Height Act.

A provision like Recommendation 6 could lawfully be applied to buildings that it would not cause to exceed the Height Act limit. However, the value of including such a provision, which does not seem great, should be weighed against the significant value of avoiding the potential for confusion inherent in a two-tier measuring system, one tier applicable to Height Act cases and one applicable in all other cases.

ZC Recommendation 7: The “natural elevation” or “natural grade” of a property is the ground elevation that existed immediately prior to the issuance of the first special or building permit, including a raze permit, needed to begin the construction of the building for which a height measurement is being made. Where natural elevation is interrupted by a bridge, viaduct, embankment, ramp, abutment, tunnel or other type of artificial elevation the height of a building will not be measured from the human-constructed elevation, but will be measured either from a street frontage not affected by the artificial elevation or from a level determined by the Zoning Administrator to represent the logical continuation of the surrounding street grid where height is not affected by the discontinuation of the natural elevation.

These two sentences are a laudable, but we think not completely successful, effort to define “natural grade” or “natural elevation” in such a way as to ensure that the Regulations effectively preclude deliberate alteration of the grade of a lot prior to applying for permit for the building whose height is to be determined by the elevation of the “natural grade”. To do this, they need to be redrafted to include a temporal element – a cutoff date on grade alterations prior to permit issuance.

The first problem is a certain circularity resulting from the fact that the second sentence of the definition employs the very term that is being defined, “natural elevation”. That could be remedied by redrafting that sentence to read: “Where there is present on the lot a bridge, viaduct, embankment, ramp, . . .” etc.

So redrafted, the proposal would work perfectly well except in the one case where it is most likely to be needed, namely, where earth has been deliberately moved in an effort to affect the legal grade (possibly creating an “embankment”) at some time prior, but not “immediately prior”, to the issuance of the permit. Since, as OP points out, the grade on most parcels in the District will have been

altered by human activity at some prior time, there is little possibility of distinguishing permissible from impermissible alterations without introducing a temporal element into the definition: e.g., by ruling out any alteration later than a stated number of years prior to permit issuance, and we would recommend such an amendment. Even then the provision seems likely to generate evidentiary issues.

ZC Recommendation 8: A building shall be measured to the top of the roof including any parapet on exterior walls, or any other continuation of the exterior walls. When a building's measurement, inclusive of the full height of a parapet or balustrade, is below the maximum permitted height under the Height Act, a parapet or balustrade of up to 4' may be excluded from the height measurement.

The commission should adopt this provision, to bring the Regulations into consistency with the height Act's requirement that no parapet wall shall extend above the permissible height. In effect it treats any structure that is an upward continuation of the wall as a parapet for purposes of measuring height.

ZC Recommendation 9: The following features may exceed the limitations on height set forth in this title, subject to the provisions of this section:

(a) Ornamental features limited to spires, towers domes, pinnacles, and minarets, that are aesthetic, primarily vertical elements of a building, even if also enclosing or screening utilitarian or amenity features;

(b) Utilitarian features including, but not limited to, mechanical equipment, safety railings, stairwell access, elevator penthouses, and building components or appurtenances dedicated to the environmental sustainability of the building; and

(c) Amenity features such as structures accessory to communal outdoor recreation space, communal pergolas, communal enclosed recreation space, and structures limited to providing individual unit access to private, unenclosed space atop a roof.

No enclosed structures for human habitation shall be constructed above the limit of a building's roof height unless otherwise authorized by District law or regulation.

Paragraphs (a) and (b) above, including arguably "building components or appurtenances dedicated to the environmental sustainability of the building", appear to have a basis in the Height Act as reasonably interpreted in the past, and should be adopted. This is not the case for paragraph (c), which should be struck.

Paragraph (c) is clearly inconsistent with the Height Act and would invite legal challenge. Section 5 of the Act explicitly enumerates the structures that may exceed the height limit. All of the enumerated structures are either ornamental or related to the operation and functioning of the building, and none may be used for human occupancy. A number of the "features" enumerated in the proposed paragraph (c) are not included in the list enumerated by the Act, and therefore must be presumed not to be permitted by the Act, unless some rational basis for overcoming that presumption can be shown. To this end, structures or equipment not mentioned in the Act that are for directly

analogous purposes related to the mechanical functioning of the building, and which are not for human occupancy except to the extent that human presence may be necessary for carrying out the building function in question, have long been deemed additions to the list (examples are staircase enclosures and HVAC equipment). On this basis it may be possible to make a case for all of the items enumerated in paragraph (b) that are not enumerated in the Act (i.e., all items except “elevator penthouses”).

However, there is no basis in the Height Act for including a whole new category, cut from whole cloth, called “amenity features”, or any of the particular structures enumerated in (c), even if they were not –as some of them clearly are – intended for human occupancy. While there is no prohibition against persons accessing the roof for recreation purposes or for maintenance of the roof, there is no provision in the Act to allow penthouses or other structures that can be used for recreation, meetings, bathrooms or any other purposes unrelated to maintaining or monitoring building functions. The issue is not whether such “amenity features” are desirable, but whether they are allowed by the Height Act. If builders wish to include such structures, they must not exceed the Height Act limits. Including a provision such as the proposed paragraph (c) in the Zoning Regulations would violate both the letter and the spirit of the Height Act.

OP argues that while the Height Act prohibits structures for human “occupancy”, it does not prohibit structures for human “use”. There is no basis for imputing such a specious distinction to the drafters of the Height Act – as if they would have regarded the poolside restroom as not “occupied” when someone is inside “using” it. But even if the distinction were sharply clear, OP’s argument ignores the fact that what is involved is the interpretation of a statute that prohibits roof structures unless they fall within stated exceptions, which do not include any of these “amenity” structures. The fact that the drafters did not *prohibit* structures for human “use” does not imply that such structures are *permitted*.

The loose open-endedness phrases such as “amenity features” should be a red flag. It gives us no way of predicting what kind of “features” we can expect to find cluttering rooflines next (former Commissioner John Parsons once speculated that we could look forward to Ferris wheels). The problem is that once the Regulations have been cut free from the constraining language of the underlying statute, as this proposal would purport to do, there is no rational limit, and the city is left in a situation where the Zoning Administrator and the BZA with the eager help of permit applicants are on their own, making up the rules as they go along until possibly reined in by the court on the basis of the Height Act.

ZC Recommendation 10

Space enclosed by walls on a roof shall be limited to 40% of that roof’s total area, but shall not count toward overall building FAR. The enclosing walls need not be vertical or of uniform height, and multiple roof structure enclosures shall be permitted.

Utilitarian and amenity features may not rise more than twenty feet (20 ft) above the roof.

Ornamental features shall be restricted to those now permitted and may not rise more than thirty (30) feet above the roof, unless approved by the Board of Zoning Adjustment as a Special Exception.

Under Special Exception review, utilitarian and amenity features could be entirely enclosed within ornamental features not setback from exterior walls. The provisions of this section could be waived by Special Exception.

As to the fourth paragraph above, relating to special exception review: In all instances, roof structures exceeding the Height Act's height limits must comply with the Height Act requirements including 1 to 1 setback, and cannot be relieved of this obligation by special exception or otherwise. This provision should be revised to make the fact that it is limited to non-Height Act cases explicit.

ZC Recommendation 11:

Utilitarian and amenity features shall be set back a distance at least equal to their height above the adjacent roof from (a) any exterior wall; (b) a wall that is set back 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 matter -of-right height.

The following shall not be subject to the requirements of this section: skylights; gooseneck exhaust ducts; and plumbing vent stacks.

The Board of zoning Adjustment may approve relief as a special exception from the requirements of this section where compliance would be impracticable because of operating difficulties, size of building lot, or other conditions relating to the building or surrounding area, provided that the intent and purpose of this chapter and title shall not be affected adversely.

ZC Recommendation 12:

An exterior wall is any wall facing a public street, alley, or any area dedicated to the District for the public use of pedestrians or vehicles.

§5 of the Height Act requires that certain roof structures that exceed the height limit "shall be set back from the exterior walls distances equal to their respective heights above the adjacent roof. " The two Recommendations above, taken together, do four things: *first*, they affirm the one-to-one setback requirement as to "utilitarian and amenity "roof structures; second, they propose a definition of "exterior wall" as used in the Height Act; third, they set out additional criteria, not related to or purporting to interpret any provision in the Height Act, for determining when setback is required; and *fourth*, to provide for special exception relief from the setback requirements.

In these respects these provisions are (1) inconsistent with the Height Act; (2) inconsistent with at least one provision of the Comprehensive Plan, and (3) somewhat muddled as an effort to craft workable regulatory language interpreting the underlying statute and likely to engender confusion and legal challenge. They should be struck, and replaced by a single definition of "exterior wall" that is consistent with the Act and is intended, as in the Act itself, to serve as the sole criterion for determining when setback is statutorily required in Height Act cases. Having done this, the Commission can decide whether there is some reason to apply additional, more stringent setback requirements to Height Act cases, or to apply different, more liberal setback requirements in non-

Height Act cases. What it cannot lawfully do is to apply more liberal requirements to cases that fall under the Height Act.

The definition of “exterior wall” in the Height Act has been the subject of a longstanding contest between developers who want to maximize freedom of action in the location of various roof structures that the Act permits to exceed its height limits, and preservationists and others concerned with the building’s aesthetic quality and its impact on light, air and streetscape. This is because the concept of “exterior wall” is the criterion in the Act, and the only criterion, for determining when these roof structures -- which often have been simply ugly boxes unrelated to the design of the building -- must be set back toward the middle of the roof and thus made less visibly intrusive.

Consequently, since the principal announced purpose of the redrafting of this whole section was to provide an official interpretation of the Height Act, the first requirement in connection with the Act’s setback provisions is to devise a definition of “exterior wall” that reasonably reflects the apparent legislative intent of the drafters. Recommendation 11 falls far short of that goal. There is nothing in the Act or its legislative history to suggest that “exterior wall” means anything other than what it would be taken to mean in ordinary usage – one of the four or more walls that define the outside perimeter of the building, by contrast to the various walls found inside the perimeter of the building. By contrast, in all the protracted history of efforts to whittle away at the setback requirement, OP’s present proposal as to the meaning of “exterior wall” is perhaps the most radically truncated and divorced from ordinary meaning. Who could possibly imagine that when the Congressional drafters of the Act in 1910 spoke of “exterior wall”, they really meant anything like “wall facing a public street or alley, or any area dedicated to the District for the use of pedestrians or vehicles”? OP notes that the “Comprehensive Plan calls for all party walls to be considered as exterior walls for zoning purposes,” and that “[t]his provision points to requiring setbacks from party walls for any construction atop a row house roof, or possibly for any construction higher than an abutting wall pat wall. In row house neighborhoods, such a practice would require 1:1 setbacks from at least the front and side walls of buildings that typically range from 15 to 25 feet wide”⁹, yet proceeds to proffer a definition that excludes all party walls.

OP may well reply that it has broadened its proposed setback requirement by going beyond “wall facing a public street or alley” to include also “any wall facing a lot line that is set back from the lot line” and “any lot line wall built higher than the neighboring walls actual height or matter-of-right height”, and might even suggest that these criteria be incorporated into the definition of “exterior wall”. But while such incorporation might make sense and indeed would be required as a matter of coherent drafting – since the meaning of “exterior wall” is the only thing that triggers a setback requirement under the Height Act -- the latter two contrivances are as divorced from any reasonable meaning of “exterior wall” as the first.

Leaving aside questions of coherent drafting, however, and looking at the practical effect of all of the proposed setback provisions together, the principal problem is that they exempt almost all party walls (in contravention of the Comprehensive Plan) and other side walls except those that face a right of way or are set back from the lot line. In our view this is inconsistent with the Height Act and promises a permanent unsightly cluttering of street views. Worse, evidence suggests that in many instances, particularly as to larger commercial buildings, these provisions would serve no compelling interest other than a saving in cost. Photographs in Exhibit 1 of the Attachment to this statement

⁹ Memorandum to the Zoning Commission of September 15, 2008, p. 33.

strongly suggest that that Washington architects have had no difficulty in designing commercial buildings with roof structures attractively set back from all four walls.

As to inconsistency with the Comprehensive Plan: Land Use Statement 2.1.B in the plan states: “Amend definition of exterior wall for zoning or height requirements to include the division-line wall or party wall of a row house or semi-detached house”. In earlier drafts OP included a provision purportedly intended to carry out this mandate (but not, in our view, doing so); that provision was subsequently watered down further and ultimately dropped, and no such provision is included in the Commission’s Recommendations. OP states that it “believes that the proposed language [in its proposed definition of ‘exterior wall’, which is carried forward in ZC Recommendation 12] adequately addresses the objectives of LU 2.1.B. while permitting a reduction in the number of required roof structure relief applications.”

There is simply no basis in the language of these two provisions for this assertion. So far from “addressing the objectives” of LU 12.1.B, which concerns row houses and semi-detached houses, the proposed definition makes no mention of the subject. There is no ambiguity in the language of LU 2.1.B, the object, intent and meaning of which are clear on its face: to include a division line wall or party wall of a row house or semi-detached house in the definition of “exterior wall”. In proposing that the Zoning Commission adopt a definition flatly inconsistent with this Comprehensive Plan provision, the drafters seem to have overlooked the charter requirement that zoning not be inconsistent with the Plan. This provision must be redrafted to comply with the Comp Plan.

Finally, as to the third paragraph of Recommendation 11, relating to special exception review: In all instances, roof structures exceeding the Height Act’s height limits must comply with the Height Act requirements including 1 to 1 setback, and cannot be relieved of this obligation by special exception or otherwise. This provision should therefore be revised to make the fact that it is limited to non-Height Act cases explicit – otherwise it is an invitation to needless litigation in the BZA or Court of Appeals.



**Testimony of Ann Hughes Hargrove
on March 6, 2008 on behalf of the
Committee of 100 on the Federal City
before the National Capital Planning Commission
regarding Z.C. 07-18, Consolidated Planned Unit Development,
1000 F Street, N.W., Washington, D.C.**

Chairman Cogbill and Commissioners:

The Committee of 100 does not oppose the proposed Planned Unit Development (PUD) and is fully supportive of the proposal for preservation of the historic Waffle Shop building through its dismantling and restoration on another suitable site, as well as the proposal for restoration of the other historic structure located within the project site. That said, we wish to associate ourselves with the NCPC Staff Recommendation regarding the roof structure setback provisions of the Height of Buildings Act of 1910 ("the Act").¹ The Act, and its interpretation, are the basis for the federal interest in this case.

The PUD proposal seeks a waiver of the Zoning Regulations' requirement² (and by necessary implication the Height Act's similar requirement) that penthouses be set back from "all exterior walls" by a distance equal to their height above the roof. The NCPC Staff Recommendation is that the penthouse be set back from all four walls, rather than only two as proposed in the PUD. The Committee supports that recommendation, both in the interest of minimizing any adverse impact of this particular project in an historic area, and because of the larger implications of the issue for the integrity of the Height of Buildings Act.

Why the setback requirements and the definition of "exterior wall" are important

"Exterior wall" is not defined in the Height Act or the definitions provision (§199.1) of the Zoning Regulations. Because of the Act's setback requirements, its definition is critical in determining the configuration, aesthetic impact and in some cases the permissibility of penthouse roof structures. Under the Height Act and Zoning Regulations, penthouses that house certain mechanical equipment related to the operation of the building and which may not be used for human occupancy, may extend above the maximum allowable height of the building. Over the years the Act has been interpreted by analogy to permit other types of roof structures that serve functions related to the operation and functioning of the building also, such as enclosure of stairways, and are not intended for human occupancy (except for maintaining building functions), that were not known or not in general use at the time of the adoption of the Act in 1910. More recently still, there has been a further softening of interpretation as to what functions "penthouses" may encompass, but that is another discussion.

¹ The PUD proposal calls for a parapet wall that would extend above the building height allowable under the Act. Since this would clearly contravene the Act's explicit prohibition on such walls extending above the height limit, we believe that a recommendation that the plan be modified so as to correct this problem -- which is addressed in the NCPC Staff recommendation -- should be uncontroversial.

² 11 DCMR §400.7

The penthouse setback provisions, and thus the “exterior wall” definition, are important because of their potential effect in enhancing the overall aesthetic quality of the building through limiting the visual intrusiveness of what was traditionally a plain and unattractive box atop on an otherwise well-designed building. And they have somewhat different ramifications for smaller versus larger buildings.³

In larger buildings, the result of exempting some walls from the setback requirements is to allow penthouses that are more visually intrusive than the dimensions of the building require, and more visually intrusive than they *could* be if greater effort were made to avoid this unfortunate effect. In that regard, I invite your attention to exhibit A. It is important for the Commission to be aware that, as the aerial views of a sampling of buildings in DC’s downtown areas suggest, many, perhaps most, architects and builders of our more recent commercial buildings have not found proper setback to be an insuperable challenge, nor does there seem to be a compelling practical necessity to continue to permit the construction of buildings that are aesthetically inferior in this one respect in the nation’s capital.

The District’s routine failure to address and enforce the Height Act’s setback requirements

In addition to the Zoning Regulations’ setback requirements paralleling those of the Height Act, the Regulations contain numerous references to the Act, and specifically require that “all buildings or other structures shall comply” with it.⁴ Developers and their lawyers have sought maximum latitude in this respect before the Board of Zoning Adjustment (BZA) or the Zoning Commission, sometimes arguing that setbacks should be required only from walls facing a street, or that the BZA could and should waive the setback requirements as to some or even all walls through the Regulations’ “special exception” procedure, a generally permissive procedure. Often arguments have been more about what one would want the Act or Regulations to allow than about what a scrupulous reading of the Height Act can fairly be said to require. Although there is no exception procedure in the Height Act, and there is nothing in the language of the Act that would justify exempting some walls from the setback requirement, developers have succeeded over the years in a number of instances in getting the setback requirements waived, with resulting buildings not having setbacks from all four walls. These waivers have routinely been granted *without reference to or mention of the federal Height Act, referring only to the setback requirements in the Zoning Regulations* – with only two exceptions of which we are currently aware, the 1993 “WETA” case⁵ (discussed in the NCPC Staff Recommendation at pp. 6-7) and a

³ In smaller buildings such as rowhouses and small semi-detached houses, the result of exempting some walls from the setback requirements of the Zoning Regulations (rowhouses rarely reach Height Act height limits, so the Act’s setback requirements would not apply) is to promote roof structures on rowhouses that can be acutely intrusive, because of the lower height of the building, and the greater height and mass of the roof structure, in proportion to the height and mass of the building itself, than is the case with larger buildings. The structures typically are unsightly, break the harmony of the rowhouse blockface, and block light and air for neighboring residential structures.

In a partial corrective step, the recently enacted Comprehensive Plan contains the following provision regarding exterior walls:

“Action LU-2.1.B: Amendment of Exterior Wall Definition.

Amend the city’s procedures for roof structure review so that the division-on-line wall or party wall of a row house or semi-detached house is treated as an exterior wall for the purposes of applying zoning regulations and height requirements.”

⁴11 DCMR §2510.1.

⁵ Case No. 93-9c

BZA case decided in 2005, both of which are discussed more fully below.⁶ This surprising process was facilitated by a maze of ignorance or uncertainty among District agencies as to who had what jurisdiction with regard to minding the Height Act store: apparently it was only in 2005 that the BZA, which must decide all special exception cases, explicitly addressed the issue of whether it even had *jurisdiction* to decide whether a proposal before it was in compliance with the Height Act (it decided, properly, that it did). As to the NCPC, we are currently aware of only one other instance other than the WETA case (1700 K Street) in which the NCPC considered a case and accepted that a structure did not have to be set back from all four walls.⁷

Historical consideration of the meaning of “exterior walls”

The issue of what constitutes an “exterior wall” has a long history of discussion and debate in the Zoning Commission in its capacity as the agency responsible for promulgating or amending the District’s Zoning Regulations, the Office of Planning (which is supposed to review all roof structure cases but has not always done so) as well as in the NCPC on those particular cases it reviews. It will likely to be an issue in the revision of the Zoning Regulations that is currently underway.

--Zoning Commission and NCPC position in 1986

The NCPC of course has had a special concern for the Height Act, a Federal law that has been a basic determinant of the architectural and horizontal character of the capital city for almost a century, and for the most part has explicitly favored strict construction of the setback requirements, one notable example being 1986 rulemaking case in which the Zoning Commission ultimately adopted the current setback language of the regulations. That case produced an extensive record in the NCPC as well as the Zoning Commission. In its order the Zoning Commission replaced the formulation that required setback from “all lot lines of the lot” with the current requirement of setback from “all exterior walls”. An examination of the case record makes clear that the intention of the Commission in so doing, and likewise the intention of the NCPC, was to have a formulation that required setback from all four or more outside walls of the building (see the affidavit of George H.F. Oberlander, former NCPC Associate Director, attached as Exhibit B⁸).

--Later Zoning Commission, NCPC and BZA positions

In the 1993 WETA case, however, the Zoning Commission was persuaded to approve a proposal that called for exempting non-street-facing walls from the setback requirement of the Zoning Regulations and the Height Act. NCPC staff opposed this position, but the Commission narrowly voted to accept it. The case, appealed to the Court of Appeals

⁶ In the 2005 BZA case (BZA Appeal No. 17109), no party was able to find a single instance of a building that had been constructed without compliance with the requirement of setback from all exterior walls in which the decision authorizing that non-compliance had even referred to the Height Act. In the 2005 case the zoning official responsible for the case was unfamiliar with the Height Act.

⁷ The WETA case generated strong concern on Capitol Hill as to the extent to which the District was enforcing the Height Act. A hearing on the matter before the House District Committee produced an extensive record (Committee Print Serial No. 103-7). The Staff Summary of Findings and Conclusions stated: “*It was clear from testimony during the hearing that city officials are confused about their responsibility and authority under the Height Act. For example, even though the law has no waiver provision, city zoning regulators routinely authorize waivers of the Height Act requirement that penthouses be set back from exterior walls. . . .* The hearing also revealed that the GW/WETA building is not an isolated case, but is one example of a pattern of neglect of enforcement of Federal height limits in the District of Columbia. Numerous manipulations used to evade the Act were brought to the Committee’s attention by the former Curator of the United States Capitol.” The uproar over the case seems to have had no impact on business as usual in the District, where developers continued to seek, and zoning authorities to grant, setback waivers without mention or apparent awareness of the Height Act.

⁸ This affidavit is a part of the record of BZA Appeal No.17109, decided in 2005, which is discussed below.

and remanded back to the Zoning Commission on other grounds, ultimately terminated inconclusively because the applicant pulled out. In the 2005 BZA case mentioned above, the Board, relying on the WETA case, upheld a view that the term “exterior walls” in the Height Act and Zoning Regulations does not apply to actual or potential party walls or abutting walls on line, even though one wall may be substantially higher than the adjoining wall and thus exposed to the elements and contain windows, citing the possibility that the adjoining wall might later be built to the same height. (The truism that anything can happen in the future seems a bit flimsy as a rationale.)

Conclusion

We believe these Zoning Commission and BZA positions and interpretations to be unsupported by any language of the Height Act and to be inconsistent with it, and in any event to have a significant and unnecessary adverse effect on the aesthetic quality of buildings in the national capital.

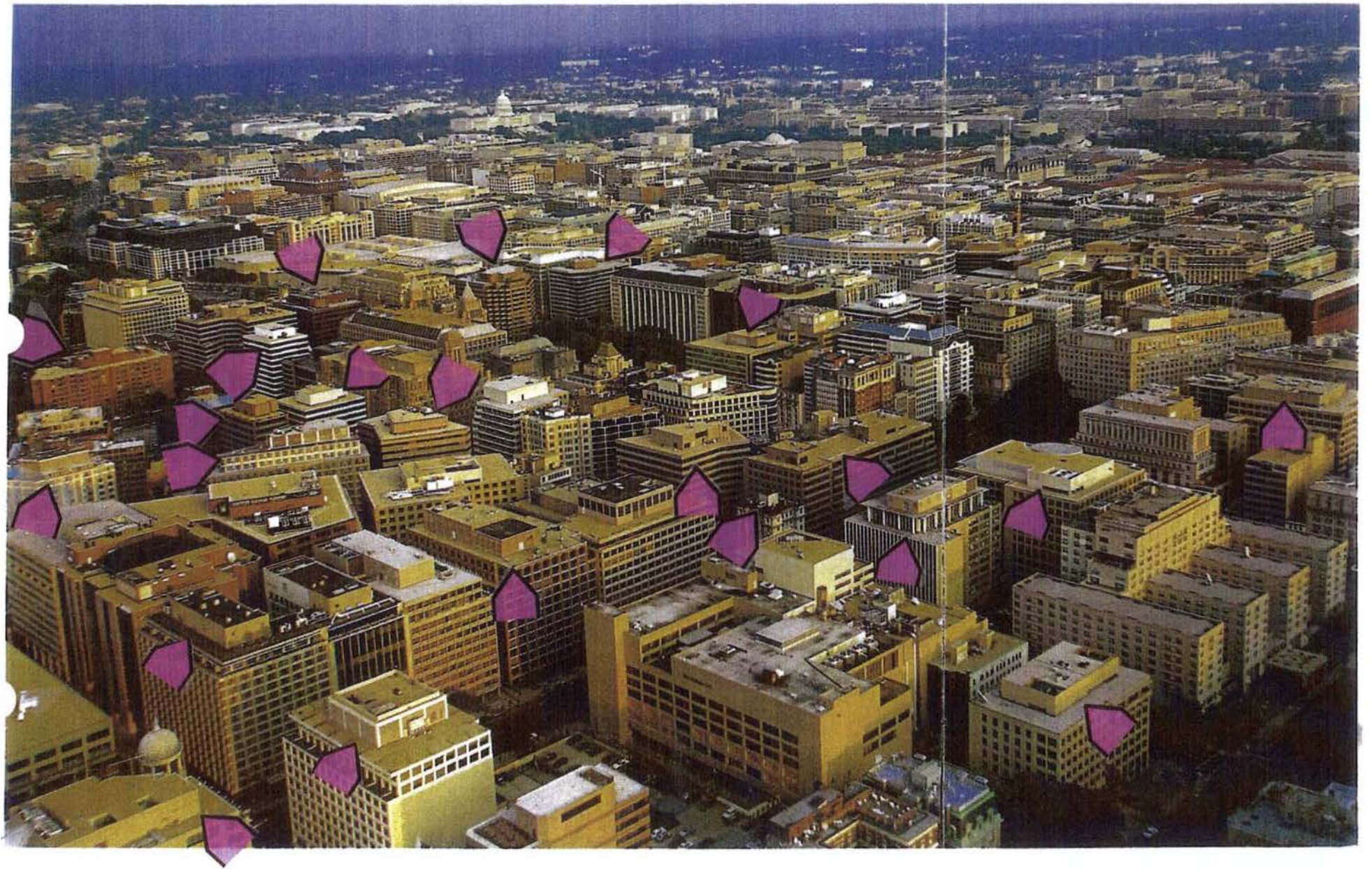
Consequently we urge the Commission to support the recommendation that it recommend to the Zoning Commission that the roof structure in the proposed PUD be required to be set back from all four walls by a distance at least equal to its height above the roof, as the appropriate position to take in safeguarding the federal interest. The Committee of 100 has been a participant and observer of planning decisions since the first quarter of the last century, and has learned to appreciate how decisions on seemingly arcane issues like the meaning of the term “exterior walls”, made under the pressure of the moment to satisfy the perceived needs of a particular case, can have widespread and permanent consequences. In this case, the Commission should realize that the longstanding pressure to relax the setback standards is part, but only one part, of a continuing and currently burgeoning effort to whittle away at the Federal restrictions on height of buildings that have played such a central role in determining the character of our city.

EXHIBIT A

The following list is a sampling of buildings in two largely commercial areas of the northwest quadrant of Washington, D.C. compiled from inspection of low-altitude aerial photographs,¹ copies of portions of which are attached. Buildings indicated in the photographs by an arrow appear to have roof structures set back from all edges of the roof in compliance with the Height of Buildings Act requirement of setback from "exterior walls". Some have party walls or walls on line. These images provide a revealing indication of the pattern of roof structure construction in Washington.

- | | |
|----------------------------------|--|
| 1. 1100 L Street | 33. 1800 K Street |
| 2. 1300 L Street | 34. 1801 K Street |
| 3. 1275 K Street | 35. 1025 Connecticut Avenue |
| 4. 1400 K Street | 36. 1133 Connecticut Avenue |
| 5. 1225 I Street | 37. 1150 Connecticut Avenue |
| 6. 1250 I Street | 38. 1120 Connecticut Avenue |
| 7. 1234 Massachusetts Avenue | 39. 1050 Connecticut Avenue |
| 8. 1155 14 th Street | 40. 1801 L Street |
| 9. 1101 14 th Street | 41. 1150 18 th Street |
| 10. 1199 Vermont Avenue | 42. 1900 K Street |
| 11. 1101 Vermont Avenue | 43. 1909 K Street |
| 12. 1501 M Street | 44. 1020 19 th Street |
| 13. 1177 M Street | 45. 1900 L Street |
| 14. 1156 15 th Street | 46. 1111 19 th Street |
| 15. 1125 15 th Street | 47. 1899 L Street |
| 16. 1090 Vermont Avenue | 48. 1120 19 th Street |
| 17. 1015 15 th Street | 49. 1850 M Street |
| 18. 1025 15 th Street | 50. 1030 15 th Street |
| 19. 1101 16 th Street | 51. 1501 K Street |
| 20. 1615 L Street | 52. 1575 I Street |
| 21. 1145 17 th Street | 53. 1850 K Street |
| 22. 1150 17 th Street | 54. 1800 M Street |
| 23. 1200 17 th Street | 55. 600 19 th Street |
| 24. 1726 M Street | 56. SW corner, Connecticut Ave. and K,
since demolished |
| 25. 1750 M Street | |
| 26. 1730 Rhode Island Avenue | |
| 27. 1660 L Street | |
| 28. 1667 K Street | |
| 29. 1666 K Street | |
| 30. 901 17 th Street | |
| 31. 815 Connecticut Avenue | |
| 32. 1776 K Street | |
| 33. 1800 K Street | |
| 34. 1801 K Street | |

¹ Source: Elysa Fazzino, *Washington from the Air* (White Star Publishers, 2003), at pp. 84-85, 98-99.



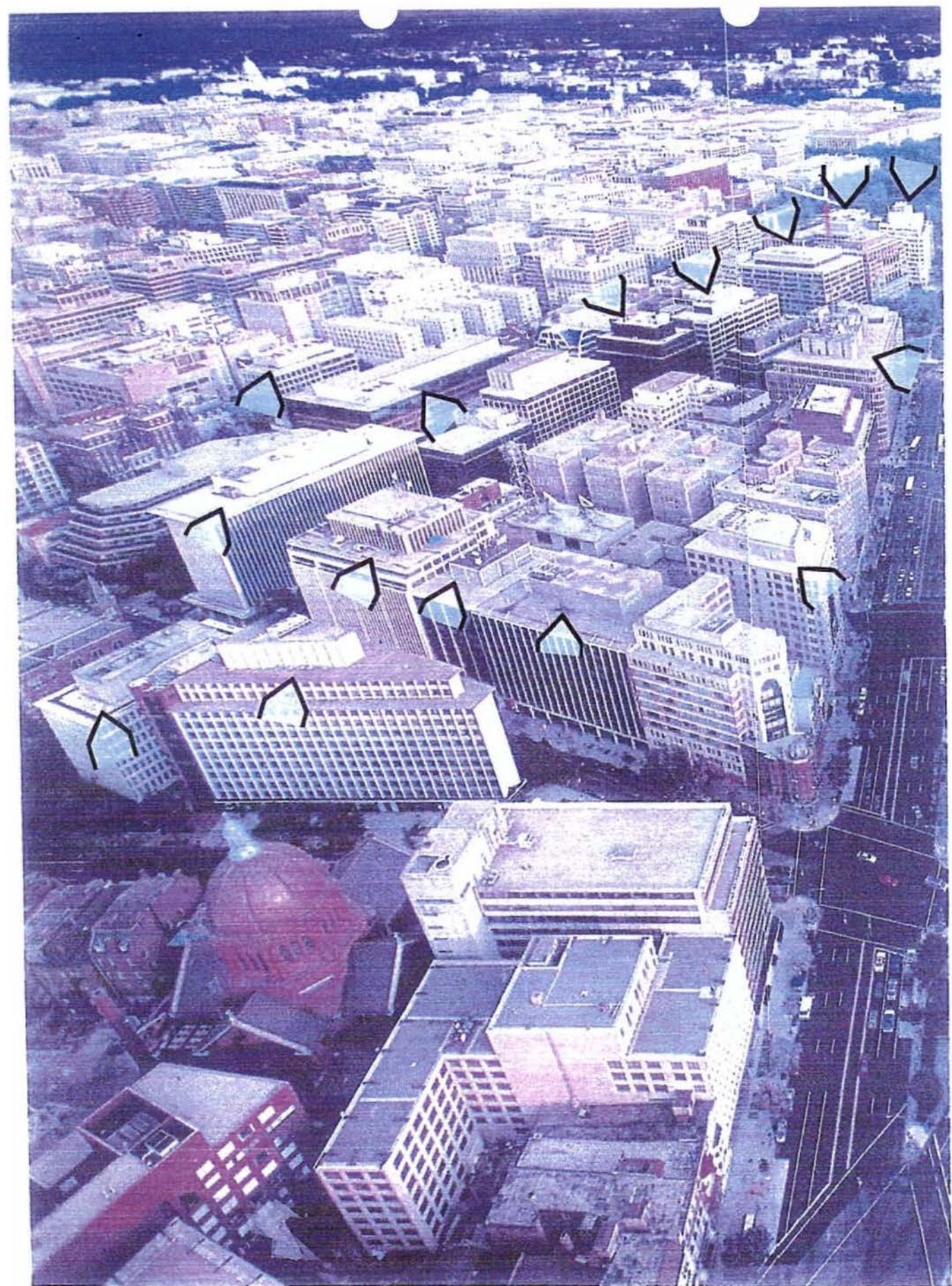




EXHIBIT B

**BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA**

Appeal of Kalorama Citizens Association from	)
The Decision of DCRA Issuing Building Permits	)
B455571 & B455876 Notwithstanding Non-	) BZA No. 17109
Compliance of Plans with FAR, Height, and Setback	)
Requirements with respect to 5-story Apartment in an	)
R-5-D Zone at 1819 Belmont Road, N.W. (Square 251,	)
Lot 45).	)

Statement of George H.F. Oberlander, AICP

I am George H.F. Oberlander. I served on the staff of the National Capital Planning Commission (NCPD) from 1965 to 1996. As Associate Executive Director for District of Columbia Affairs, I participated in the consideration within the NCPD of its position regarding issues raised by Zoning Commission Case No. 84-10 with respect to proposed changes in the Zoning Regulations regarding roof structures, and specifically, changes in the regulations regarding setback of rooftop penthouses. (NCPD August 1, 1985 Transcript attached).

The 1958 regulations required setback of penthouses, by a distance equal to their height above the roof, from "*all lot lines of the lot*" in most zoning districts.

The Zoning Commission had originally proposed changing these provisions to require setback to be measured from "*the perimeter of the roof*".

Later, however, the Zoning Commission proposed less restrictive language that would retain the requirement of measurement from "*all lot lines of the lot*".

The Zoning Commission also had before it less restrictive language that setback should be measured from the *lot lines fronting on a street* (reportedly expressed by the Corporation Counsel) or *exterior walls fronting on a street* (expressed by the Office of Planning).

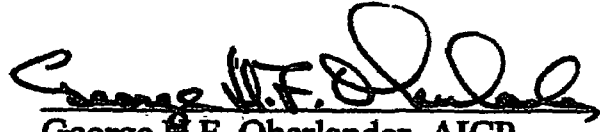
The NCPD was concerned that the Zoning Regulations be consistent with the Height of Buildings Act, which requires setback from the "exterior walls" in cases where the roof structure height exceeds the building height allowed by the Act. Therefore the NCPD opposed the then-current provisions measuring setback from lot lines, because the lot lines might be located some distance away from the exterior walls. It also opposed measuring setback only from lot lines or exterior walls that front on a street, since that would require setback from only some

exterior walls and would therefore, in the NCPC's view, be inconsistent with the Height Act.

In my current review of the NCPC files and Commission consideration of this matter, there were no provisions or discussion for exempting rowhouse party walls from the setback requirements.

The NCPC regarded the Zoning Commission's original proposal to require setback from the perimeter of the roof, which had the effect of requiring setback from all walls of the building, to be in keeping with and to have the same intent and effect as the Height Act's requirement of setback from the exterior walls.

The NCPC communicated its views on the setback issue to the Zoning Commission on August 1, 1985, requesting that the Commission consider reverting to its original proposal requiring penthouse setback to be measured from the perimeter of the roof. Ultimately the Zoning Commission adopted a formulation that the NCPC regarded as having the same effect, namely, the requirement of setback from "all exterior walls".


George H.F. Oberlander, AICP
04/19/04
Date

ACKNOWLEDGEMENT

State of Maryland
County of Montgomery

I, Zulienne C. Wolfrey, a Notary Public of said county, do hereby certify that George H.F. Oberlander, whose name is signed to the foregoing writing bearing the date of the 19th day of April, 2004, has t his day acknowledged the same before my in my said County.
Given under my hand this 19th day of April, 2004.

My commission expires May 1, 2007


Zulienne C. Wolfrey, Notary Public
Montgomery County
State of Maryland

