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IN REPLY REFER TO:  
NCPC File No. 08-06-01

**JAN 05 2009**

Anthony Hood, Chair  
Zoning Commission of the District of Columbia  
441 4<sup>th</sup> Street NW, Suite 220  
Washington, DC 20001

RE: Case No. 08-06-1: Updates to Zoning Codes Related to Height

Dear Chairman Hood and Members of the Commission:

We have received the District of Columbia Office of Planning (DCOP) December 1, 2008 memorandum providing revisions to their conceptual approaches to measuring height, for use in updating the District's zoning codes. Our understanding is that the Zoning Commission will be reviewing and providing direction on this topic at their January 5 meeting. The December 1 memorandum proposes several significant changes from the previous memorandum, about which we have a number of concerns which will be discussed in more detail below. Several of the conceptual recommendations could result in continuing conflicts in interpretation, as several of the proposals do not appear consistent with our agency's interpretation of the 1910 Height of Buildings Act (Height Act). This could lead to an approach where buildings at or above the limits established by the Height Act would have to meet zoning requirements to ensure consistency with the Height Act, while buildings fully below the Height Act limits could meet different standards set by District codes. While a solution, this provides neither the desired consistency in interpretation, nor does it promote uniformity in the built environment. Our concerns regarding the December 5 memorandum are not just with individual sections, but with the result of the proposal in total. Many of the current recommendations could result in buildings that are significantly higher and out of scale with surrounding streets and adjacent development, particularly in areas of the city with sloping topography; and where rooftop structures occupy the majority of the roof area, providing de facto additional floors, and are clearly visible from adjoining streets.

As noted in our earlier testimony to the Zoning Commission, the Height Act has shaped the horizontal character of the city and the skyline, and the urban form and airy, light-filled streets that comprise the unique look of our nation's capital. Planning policies in both the District and Federal Elements of the *Comprehensive Plan for the Nation's Capital* support the Height Act.

ZONING COMMISSION  
District of Columbia

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and the qualities it advances. Within the framework of this shared support for the Height Act, we acknowledge that NCPC and the District have had some differences of interpretation. For your information, we have attached a letter providing background on NCPC's authority to interpret the Height Act (Attachment A). Our Commission and the Board of Zoning Adjustment requested that staff from our agency work cooperatively with DCOP to resolve differences in interpreting height requirements within the context of the Height Act. The September 15, 2008 memorandum presented by DCOP provided a number of recommendations which reflected consensus between the staff of our two agencies, as well as the input of the zoning task force. We remain committed to working cooperatively with the District and other interested stakeholders to develop mutually consistent interpretations, which would benefit agencies, developers and the public, and ensure that the character and urban design of the city continue to be protected and enhanced.

Our prior comments on the September 15 memorandum are included as Attachment B. The following items remain as previously proposed, and we concur with DCOP's proposals: Item 2: Streets Fronting on Open Space, Item 3: Business v. Residential Streets, Item 6: Elevation of Bottom Measuring Point and Item 8: Top Measuring Point. Item 1: Streets with Multiple Frontages would benefit from a definition of a building front, a term used in the Height Act, and distinct from the "frontage."

Our comments on the remaining items follow. Items 5 and 7 are related, and our key concern is that long term, areas of the city with significant grade changes may develop in a manner significantly out of scale with surrounding development and steps should be taken to identify and address this possibility. Items 9 through 12 are also related. To ensure consistency with the language and urban design intent of the Height Act, all rooftop structures *at or above* the limits of the Height Act must be set back from exterior walls, which we define more broadly than the District, and relief cannot be granted from this requirement.

#### Item 4: Single v. Multiple Buildings

We believe that DCOP should continue to work on a clear, usable definition. The definition offered in the December 1 memorandum is headed in this direction, but may still create uncertainty in application. We do *not* believe that a roofed-only connection with no enclosed walls, as suggested at the end of the discussion, should be used to establish building connections.

#### Item 5: Location of Bottom Measuring Point

A long-standing concern of our agency has been the possibility that a combination of site topography on through lots adjacent to streets of different widths could result in buildings with heights that are significantly higher than adjacent development, and potentially high enough to negatively impact the horizontal character of the city. The approach that the city is proposing, which allows the use of any street to establish height and the selection of any street to measure height, is allowable as an interpretation of the Height Act language, although based on our agency's experience, is less likely to provide uniformly consistent interpretations as the other option presented in the September 15 memorandum. However, the most extreme cases, where the widest street is also at the highest elevation, are permissible under either proposed interpretation. Note that we did not find the arguments regarding non-conformity to be

compelling, as non-conformity can and does occur under zoning code changes. Further, to our knowledge neither the District nor other groups raising this argument appear to have conducted a thorough analysis that could quantify issues of non-conformity in regards to this specific topic, and such an analysis would be useful.

A broader concern may not be successfully addressed through the proposed District zoning changes. Attachment C is a GIS map developed by NCPC staff that identifies topography changes across parcels with business code classifications. Grade changes across parcels in the downtown area could result in one to three stories of additional allowable height for development, as compared to a flat site. The downtown is generally flat and has parcels of generally consistent size. This is not true throughout the rest of the District, as illustrated on this map. Large parcels with grade changes are present along the highway and railroad corridors, near NoMa, and the New York Avenue corridor. Steep topography is present along the entire escarpment, and many of the city's commercial corridors have adjacent sites with steep topography as they move across the escarpment. Although not shown on the map, some residential areas on steeply sloped areas near the escarpment or stream valleys may, over time, move towards more urban, mixed-use or commercial development that approaches the limits established through the Height Act. These are the areas where we anticipate that future development - outside of the traditional downtown - may use site grade changes to propose significantly taller structures that are dramatically out of scale with adjacent development. We strongly encourage the District to fully analyze this issue throughout the city, and to contemplate an innovative approach, such as establishing overlay zones or parcel-specific height limits on parcels of large size or with significant grade changes. This is also a compelling reason to ensure that Item 7: Natural and Artificial Grade, is appropriately addressed.

#### Item 7: Artificial and Natural Grade

While agreeing with the originally proposed concept, the proposed additional language is confusing and could lead to difficulties in consistent interpretation and require significant record-keeping. The District should have clearly defined standards for when projects vest under current codes; if any proposed developments have not vested, they should be subject to the new code language. This section should be clear in how the idea of "precedent" would apply to new additions and redevelopment of existing sites. Please refer also to the discussion in Item 5, above.

#### Item 9: Structures Permitted Atop the Roof:

The District could allow rooftop amenity structures in their own zoning codes where they are completely under the limits of the Height Act; however, specifically allowing amenity features when at or above the height limit established by the Height Act does not appear to be consistent with the Height Act. Amenity features are not specifically provided for in the Height Act as allowable rooftop structures. Practically, many of the recent development proposals our agency has reviewed relative to this issue have proposed exercise areas and lounges with features that appear to be occupiable space not consistent with the intent or language of the Height Act.

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**Item 10: Height, Width and Massing of Roof Structures:**

Maximizing rooftop development in the interior area of the rooftop is acceptable, but *only if*: 1) all of the setbacks are maintained (see discussion in item 11) and rooftop uses are consistent with the Height Act (see discussion in item 9). A special exception review for enclosed features *within the setback area* would not be consistent with the intent or language of the Height Act. We have no specific issues with the deletion of the special exception for the height of ornamental features, as the District can choose to be more restrictive than allowed by the Height Act.

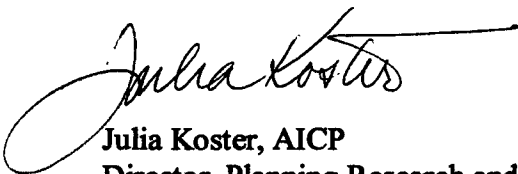
**Items 11: Roof Structure Setbacks and 12: Exterior Walls**

We agree with District staff that setbacks for rooftop structures should be provided from all of the following: walls facing streets, walls facing alleys, any wall facing a court open to the street, any wall setback and facing a lot line and any lot line wall built higher than the greater of the neighboring building's actual or matter of right height. However, the Height Act requires setbacks from exterior walls, and the long-standing interpretation of our agency is that all of these walls noted above are *exterior* walls. The related provisions of the Height Act are intended to achieve urban design objectives – namely, that rooftop structures should be set back to reduce visibility from adjacent streets and public spaces. This distinction regarding the definition of exterior walls becomes important when considered together with the proposals below to provide setback relief for rooftop structures.

We do not believe it is appropriate for the Board of Zoning Adjustment (BZA) to provide setback relief where a rooftop structure is proposed at or above the limits of height established by the Height Act. The BZA cannot grant relief from a federal law. Again, this leads to an approach with one set of codes for rooftop structures fully below the limits of the Height Act and a different set for those at or above the limits of the Height Act. This approach could work, but does not provide a single, consistent interpretation, nor does it advance a consistent urban design approach.

We appreciate the opportunity to provide the Zoning Commission with these comments. Should you have any questions, please call me at 202-482-7211.

Sincerely,



Julia Koster, AICP  
Director, Planning Research and Policy Division

Attachments

Cc:

Jennifer Steingasser, DCOP  
Travis Parker, DCOP  
Steve Cochran, DCOP



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October 29, 2008

**VIA E-MAIL**

Christopher H. Collins, Esq.  
Holland & Knight LLP  
2099 Pennsylvania Avenue, NW – Suite 100  
Washington, D.C. 20006

Dear Mr. Collins:

We write in response to your letter of October 21, 2008 continuing the dialogue on the application of the Height of Buildings Act of 1910 in the District of Columbia. We appreciate your attention to our earlier letter of October 3, and set forth here a few observations in response to your points.

We of course concur that while the Height of Buildings Act uses the term “exterior wall”, it does not explicitly define that term. In that approach it joins legions of statutes that Congress has enacted and courts and agencies have interpreted and construed over the years. Congressional Research Service Report to Congress, Statutory Interpretation: General Principles and Recent Trends (CRS, March 30, 2006) at pp. 5-7.<sup>1</sup> That does not mean that the terms go undefined. Because Congress has used the term “exterior wall” in the Act, it must be given some content.

We strongly disagree with your suggestion that the federal government has no role in interpreting this important statute. You rely on Section 8 of the Height Act, which specifies that the Corporation Counsel may bring a nuisance action or an injunctive action to enforce the Act. Section 8 does not preclude any federal entity from taking enforcement action, and does not at all specify what agency is to interpret the Act. Both the law at the time of enactment and a sound interpretation of the Act underscore a role for the federal government in interpretation and enforcement of the Act.

By 1910, when Congress enacted the Height of Buildings Act as a federal law, set forth in the United States Statutes at Large, the Supreme Court had made clear that the United States could take steps including suing to protect its property and other interests. See, e.g. United States v. Jacinto Tin Co., 125 U.S. 273, 279 (1888). Congress legislated in 1910 against this backdrop. Because it was clear that the United States could interpret and apply this federal law, there was no reason for Congress to specify that fact. What was not so clear is that the City, through the Corporation Counsel, could take such action as well. Thus, the provision you cite added enforcement authority for the Corporation Counsel to that already existing for the United States. The Act did not subtract authority for federal enforcement or interpretation. Moreover, the Act does not state that the Corporation Counsel has “exclusive” authority to enforce; and does not state that the Corporation Counsel, or any entity, has “exclusive” authority to interpret. Congress knows how to use the word “exclusive” when it intends to impose such limits. See Wilmington

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<sup>1</sup> The CRS Report is on the web at <http://www.coherentbabble.com/signingstatements/CRS/CRS-ON-97-589.pdf>.

Shipping Company v. New England Life Insurance Company, 496 F. 3d 326, 339-40 (4<sup>th</sup> Cir, 2007).<sup>2</sup> Congress has not done so here.

As to the points you raise in Paragraphs three through five of your letter, we have fully responded to these in our letter of October 3. Federal agencies may consider District interpretations but are not required to give them deference, especially when the long-standing NCPC interpretation has differed from that of the Zoning Administrator. The key provision of the Height Act that we are construing is the following clause in Section 5: "*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.*" This clause, addressing when certain roof structures have to be set back, includes the terms "exterior walls" and "pent houses", so your point that those terms are in separate clauses is in error. Further, the law of statutory construction is clear that a statute must be construed as a harmonious whole.<sup>3</sup> We address in our October 3 letter the fact that participation by an NCPC staff member on the Zoning Commission, now or in 1938, does not bind the Commission.

Finally, we are interested that, in Paragraph 6, you limit your arguments that walls on side or rear lot lines are not exterior walls, to use of "essential mechanical space", and not any other kind of structure. Essential mechanical space is not a term in the Act. Moreover, you fail to acknowledge that walls on side or rear lot lines may well be visible from public space. For example, the building at 2201 M Street, N.W. (ZC 07-21) that NCPC recently reviewed had a wall on an alley clearly used as a public right of way, and thus, subject to views that the Height Act seeks to protect. Your position in this paragraph is thus contrary to the purposes of the Act.

We appreciate this healthy dialogue about such an important topic, and if you would like to continue the dialogue we would be pleased to meet with you to discuss further this important issue.

Sincerely,



Lois J. Schiffer  
General Counsel

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<sup>2</sup> In that case, the Fourth Circuit interprets the federal pension law--ERISA-- as not providing exclusive authority to a statutory trustee because it did not use that or similar words, and holds: "Congress knows how to use the word 'exclusive' (or other similar words) when it intends to impose the kind of limitation that NEL believes precludes plan participants from suing after plan termination, and Congress in fact has done so in another of ERISA's provisions...Insofar as the district court concluded-and NEL argues-that the statutory trustee irrespective of who the trustee is, possesses exclusive authority to prosecute claims on behalf of a terminated plan, there is nothing in ERISA's text that supports such a conclusion."

<sup>3</sup> See CRS Report, *supra*, at p. 2: "A cardinal rule of construction is that a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes."

Attachment B



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OCT 10 2008

IN REPLY REFER TO:  
NCPC File No. 08-06-1

Mr. Anthony Hood  
Chairman  
District of Columbia Zoning Commission  
441 4<sup>th</sup> Street NW, Suite 210  
Washington, DC 20001

RE: Zoning Case No. 08-06-01 Amendments to the Zoning Regulations Regarding Height

Dear Chairman Hood and Members of the Commission:

Thank you for the opportunity to offer comments on the District of Columbia Office of Planning's (DCOP) September 15 memorandum providing concept-level recommendations on the regulation of height in the city's proposed redraft of the zoning code.

The 1910 Height of Buildings Act (Height Act) has shaped the horizontal character of the city and the skyline, and the urban form and airy, light-filled streets that comprise the unique look of our nation's capital. The city that has developed within the framework of the Height Act is compact and intensive, yet human-scaled, walkable and transit-friendly. Planning policies in both the District and Federal Elements of the *Comprehensive Plan for the Nation's Capital* support the Height Act and the qualities it advances.

Within the framework of this shared support for the Height Act, we acknowledge that NCPC and the District have had some differences of implementation. We have been pleased to work closely and cooperatively with DCOP staff and the zoning task force on this important topic and have been making significant progress towards reaching agreement on many issues. It is very important to ensure that the zoning code is consistent with the Height Act, and to promote clear, consistent implementation of height requirements. While DCOP does not note it in the September 15 memorandum, we anticipate that the proposed text will include references noting that the Height Act is a federal law and specify enforcement methods.

Our approach to the Height Act and zoning code provisions is based on broad urban design objectives:

- Broad, open streets framed by strong, consistent street walls and uncluttered rooflines, as viewed from the street and public spaces.
- The general horizontality of the city that focuses attention on iconic structures that represent our shared federal and local ideals and aspirations.
- Buildings with height and scale in relationship to street width and street use.

The September 15 memorandum reflects many of the agreements NCPC and DCOP have reached. In some cases, resolution has been reached by mutually recognizing that the provisions of the zoning code offer greater flexibility where development is fully under the limits established by the Height Act than for

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development at or extending above the Height Act limits. There are several areas where we have yet to reach agreement, or where DCOP's recommendations are different than what had been previously discussed – most notably the issue of linking the street from which height is established to the street where height is measured. In several of these areas, detailed analyses that identify the magnitude of a recommendation's impact on the overall city will better guide further discussion. Finally, the height provisions within the zoning code are interrelated, and our agreements on certain concepts are based on an overall package of provisions.

Others have raised concerns that some of the proposed changes may create non-conforming structures. As part of our agency's review of height regulation, we have determined that in many areas of the city, the development that could be or has been built is limited not by the Height Act, but by local regulations and the development review process. We urge further studies that better quantify claims of non-conformity under the Height Act. The District may be able to address this issue in part by evaluating height limits allowed by zoning throughout the city.

The following are comments on the specific recommendations in the September 15<sup>th</sup> memorandum.

**Recommendation 1: Frontage on multiple streets**

We recommend that the building "front" be defined, and offer the following definition: "a prominent face of a building containing a principal public entrance of the building." The use of this definition promotes an architectural relationship between the façade treatment and what is typically the tallest side of a building, and prevents the front façade from being either a blank face or the side used exclusively for parking or loading. Because this definition is broadly written, it should not pose challenges to the architectural community or limit mixed-use development.

**Recommendation 2: Buildings confronting federal reservations or open space**

We support the concept approach proposed by DCOP.

**Recommendation 3: Residence and Business Streets**

We support the concept approach proposed by DCOP.

**Recommendation 4: Single vs. Multiple Buildings**

It is important to clarify this issue, and we support the direction of the approach proposed by DCOP in the September 15 memorandum. We are committed to working with DCOP to develop an appropriate standard.

**Recommendation 5: Location of Bottom Measuring Point**

Using the same street to determine maximum allowable height and measuring point – identified as Option One of this recommendation – is in keeping with the Height Act and the urban design concept of ensuring that the height and scale of buildings is in relationship to street width and adjacent use. Option 2 has the potential to allow buildings that are out of scale with adjacent streets and the size and character of adjacent development. We are concerned about the impact of this interpretation not only downtown, but throughout the city, particularly in areas that transition from residential to commercial, and in steeply sloped areas. We strongly urge DCOP to prepare an analysis of the impact of either of these options across the entire city, and to develop "extreme case" studies, before recommending an option.

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**Recommendation 6: Elevation of Bottom Measuring Point**

We have no specific objections to the approach proposed by DCOP, which appears to produce very similar outcomes to the requirements of the Height Act, and note that it provides useful guidance in cases where there are no sidewalks. However, the Height Act is specific regarding the bottom measuring point, and in the event of any conflict, the Height Act would take precedence over this proposed approach.

**Recommendation 7: Natural Grade**

We support the concept approach proposed by DCOP.

**Recommendation 8: Top Measuring Point**

We support the concept approach proposed by DCOP. Our agency and DCOP mutually recognize that the provisions of the Zoning Code offer greater flexibility where development is fully under the limits established by the Height Act than for development at or extending above the Height Act limits. Therefore, we will need two different standards, requiring greater attention by agencies and developers alike.

**Recommendation 9: Structures permitted atop a roof**

NCPC believes that "green building" features related to the environmental sustainability of a building are consistent with the Height Act's provisions for mechanical equipment as a "utilitarian feature."

"Amenity" features are not identified in the Height Act as allowable rooftop elements, and we do not support inclusion of this approach. Occupied spaces are not allowed by the Height Act above the limit of height.

**Recommendation 10: Height, width and massing of structures atop a roof**

We appreciate the recognition that ornamental features are intended to be vertical. The Height Act allows specified features to exceed the limit of height. We are concerned that specifically allowing utilitarian features within ornamental features could result in a proliferation of inappropriately located features built to hide structures, rather than advance a coherent design. This provision needs further review.

**Recommendation 11 and Recommendation 12: Setbacks for structures atop a roof and Exterior walls**

Recommendations 11 and 12 are closely linked. The Height Act is explicit about what rooftop elements are permitted, and which of these must be set back from an "exterior wall." Also, the concepts put forward for exterior walls and roof top structures could result in cluttered rooflines with structures visible from the street and rooftop structures that give the appearance of an additional story.

NCPC has a long and consistent history of interpreting an exterior wall as each wall that is part of the exterior envelope of a building, not just a street wall. We describe our view as "each wall exposed to the elements or the earth." The memorandum identifies new approaches to defining exterior walls, particularly relating to setback requirements, and these merit further study of their urban design impacts.

- We support identifying walls on alleys as exterior walls.
- The proposed concepts do not define a building wall set back from a side property line as an exterior wall; however, the proposed concepts specify a setback from this wall for rooftop

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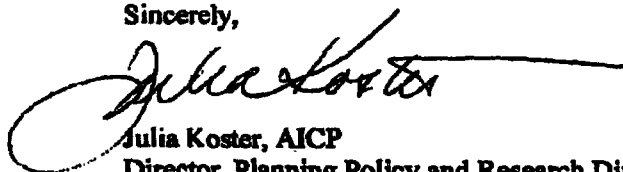
- structures unless allowed by special exception. We support the stronger protection provided by defining this wall as an exterior wall.
- Our agency has considered party walls and the walls of courtyards and "stepped" buildings as exterior walls; however, we are willing to work with DCOP to develop new approaches.

Under the Height Act, no relief can be granted for rooftop structures requiring setbacks above the limits established by the Height Act. We would not object to the District establishing a setback relief mechanism for structures fully below the Height Act, recognizing that this would create two standards - one for structures fully below the Height Act and one for structures at or above the Height Act.

However, the city has a strong urban design feature of rooftop structures that are set back. Granting relief through an exception process must consider urban design issues, and DCOP should explore what entity would be most appropriate for considering requests for relief that involve urban design issues.

In closing, we express our appreciation for the hard work and cooperative spirit of DCOP staff and the members of the zoning task force. Continuing work on this important issue would benefit from "extreme case" analyses and studies showing the magnitude of a recommendation's impact on the city. NCPC staff looks forward to further discussion with both District staff and the Zoning Commission. Please contact Julia Koster at (202) 482-7211 if you have any questions.

Sincerely,



Julia Koster, AICP  
Director, Planning Policy and Research Division

cc: Harriet Tregoning, District of Columbia Office of Planning  
Tom Luebke, Commission of Fine Arts