

January 16, 2009

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Zoning Commission for the District of Columbia
441 4th Street, N.W., Suite 210-South
Washington, DC 20001

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Re: Zoning Commission Case No. 08-06-01 – Height Regulations

Honorable Members of the Commission:

On January 5, 2009, the Zoning Commission reopened the record in the above-referenced case to accept a letter, with exhibits, from the staff of the National Capital Planning Commission. Attachment A to that letter is a letter from NCPC staff to this firm, dated October 29, 2008, which was the fourth in a series of letters between this firm and NCPC on the subject of building height, laws, regulations and interpretations. To complete the record, we respectfully request that the Commission reopen the record to accept the following letters which, together with the letter filed by NCPC, comprise the full exchange between the firm and the NCPC staff:

1. Letter dated April 30, 2008, from Holland & Knight to NCPC;
2. Letter dated October 3, 2008, from NCPC to Holland & Knight; and
3. Letter dated October 21, 2008, from Holland & Knight to NCPC.

Thank you.

Very truly yours,


Whayne S. Quin

Attachments

cc: Travis Parker
Julia Koster, NCPC

ZONING COMMISSION
District of Columbia

CASE NO.

EXHIBIT NO.

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ZONING COMMISSION
District of Columbia
CASE NO.08-06-1
EXHIBIT NO.49

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April 30, 2008

VIA HAND DELIVERY

National Capital Planning Commission
401 9th Street, NW
North Lobby, Suite 500
Washington, DC 20004

Re: NCPC File No. Z.C. 07-21

Dear Chairman Cogbill and Members of the Commission:

The purpose of this letter is to provide comments to NCPC regarding the April 28, 2008 Staff Recommendation on the above-referenced PUD project. That recommendation indicates that the proposed project would be adverse to the federal interest because it does not conform to the requirements of the Height of Buildings Act in the following way: "the roof top penthouses exceed the allowable height [because they] are not set back from all the exterior walls as required by the Act." Accordingly, the Staff Recommendation is for NCPC to recommend that "the Zoning Commission require the applicant to modify the project design to set back the penthouses from all exterior walls of the building a distance equal to their height above the adjacent roof as required by the Height of Buildings Act."

The Applicant's Proposed Penthouses Meet the Required Setback

The Applicant's three proposed penthouses are set back a distance equal to their height (18 feet, 6 inches) from the north and west elevations of the building, which are the only portions of the building that front on a street. The penthouses are set back six inches from the north and west lot lines, which abut the adjoining properties to the north and west, and are set back between 0 and 6 feet from the edge of the roof abutting the interior courtyard. This courtyard abuts a public alley at the rear of the property.

Under the Height Act, penthouses must be set back from the "exterior walls" a distance equal to their respective heights above the adjacent roof. The term "exterior walls" in the Height Act provision has historically been consistently interpreted to mean

only those walls that front on a street. The Staff Recommendation would have NCPC depart from that long-standing interpretation of the Height Act – including its own past decisions – and now take the position that the federal law must be applied more restrictively to include all walls of the building, and not just the street frontage walls. The District has never adopted this position, and it is at odds with the intent and purposes of the Height Act.

The Legislative History of the Height Act Supports Penthouse Setbacks at Street Walls Only

The Staff Recommendation flatly contradicts the rules of statutory construction and long-standing administrative interpretation of the federal law. By focusing on the phrase "exterior wall" in isolation and ignoring the legislative history of the Height Act, the Staff Recommendation has created a new interpretation of the setback requirements advanced only recently in one case by NCPC, which was rejected by the Zoning Commission.

The Zoning Commission squarely addressed this issue 14 years ago in Zoning Commission Order No. 749-A (Case No. 93-3C), dated April 29, 1994, *reconsid. denied*, ZC Case No. 749-B, July 22, 1994.¹ There, the George Washington University ("GW") and the Greater Washington Education Telecommunications Association ("WETA") received approval for a PUD to construct a new building at 21st and H Streets, N.W. The penthouse was to be set back a distance equal to its height along 21st and H Streets, but would not have a 1:1 setback ratio at the rear and side of the building. Opponents argued before the Zoning Commission and at NCPC that the lack of penthouse setbacks at the rear and side of the building violated the Height Act. The Zoning Commission found otherwise.

In reaching its decision, the Zoning Commission relied on the testimony of the Zoning Administrator, who is charged with enforcement of the Height Act.² The Zoning Administrator noted that:

[t]he setback requirements of a roof structure under provisions of the Act of 1910 have always been interpreted by the Zoning Division as being required to set back from the property line *which adjoins a street*. The

¹ The Zoning Commission's decisions in Z.C. Case Nos. 749-A and 749-B were appealed to the D.C. Court of Appeals; however, the Zoning Commission asked the court to remand the case so that the findings and conclusions in the order could be clarified. The case was remanded but the Zoning Commission never took any further action and the entitlements granted under the orders lapsed when the applicants elected to abandon the project. There has not been any action by any court or by the Zoning Commission to invalidate the orders.

² See Z.C. Order No. 07-13 (Randall School PUD), March 21, 2008, at 4 (Zoning Administrator interprets the Height Act).

setback of a roof structure under the Zoning Regulations now requires roof structures to be set back from the exterior walls. Consequently, it is my opinion that the Zoning Commission, under a Planned Unit Review, does have authority to waive the setback of a roof structure from a property line which does not adjoin a street.

Memorandum to the Acting Director for the Office of Zoning from the Zoning Administrator, November 24, 1993, Zoning Commission Case No. 93-9C, Exhibit No. 90 (emphasis added). See Exhibit A. The Office of Attorney General also submitted a letter to the record endorsing the Zoning Administrator's interpretation.

The Zoning Administrator based his decision on the long-standing interpretation that the term "exterior walls" in the Height Act had been historically interpreted to mean walls fronting on a street. Documents supporting the Zoning Administrator's position included a July 27, 1953, Opinion of the Office of Attorney General regarding penthouses above the height limits; a May 13, 1953 Memorandum from the D.C. Director of Inspections regarding housing for air conditioning equipment above the 130-foot level; a July 15, 1958 report of the Zoning Advisory Council on proposed amendments to the roof structure setback provisions of the Zoning Regulations; as well as numerous BZA Orders approving relief from the penthouse setback provisions along interior lot lines where penthouses exceeded the maximum building height under the Height Act. See also BZA Order No. 17109, November 8, 2005 (neither Zoning Regulations nor Height Act require penthouse setbacks along interior lot line walls).

What is significant in that case is that NCPC endorsed the Zoning Administrator's interpretation of the setback provisions of the Height Act. Over objections raised by its staff in a report dated March 2, 1994, and based on advice of its counsel, NCPC found that the proposed WETA PUD "would not adversely affect the Federal Establishment or other Federal interests and would not be inconsistent with the Comprehensive Plan for the National Capital." See Report to the Zoning Commission of the District of Columbia, NCPC File No. ZC. 93-9C, March 3, 1994, and Draft NCPC Staff Report. In analyzing objections raised by the ANC on the setback provisions of the 1910 Height Act, NCPC counsel advised that:

In their pleadings, ANC 2A presents no other argument for the all around setback requirement other than the plain words of the Act itself.

Based on the above [Report of the Advisory Council on Proposed Amendments to the Zoning Regulations dated July 16, 1958], it appears that, for at least forty years, and probably longer, those local entities with authority to administer zoning provisions in the District of Columbia have interpreted the Height Act setback provisions to apply only to exterior walls facing the street. A court of law, in interpreting a statute, will give

great deference to long standing administrative interpretations of that law by the body which has responsibility for administering that law.

Note from Sandra Shapiro, NCPC Counsel, to George Oberlander, NCPC staff, Re: George Washington University/WETA Zoning Commission Case No. 93-9C, February 17, 1994 (emphasis added), a copy of which is attached as part of Exhibit B. Based in part on this advice, NCPC found that the federal interests of the Height Act were not adversely affected by the long-standing interpretation that "exterior walls" means only those walls fronting on a street. NCPC made a similar recommendation to the Zoning Commission on proposed text amendments to the penthouse regulations by stating that "the 1910 Height Act's requirement of penthouse setback from exterior walls is clearly intended to hide or screen penthouses from street views." See Z.C. Order No. 476, July 4, 1986, at 6.

In making its current recommendation on the Applicant's PUD, the Staff Recommendation relies upon NCPC's action of February 2008 in Z.C. 07-26, which had almost the identical fact pattern, and an identical recommendation. That recommendation, which changed years of consistent interpretation by NCPC on this issue, was rejected by the Zoning Commission and final approval for that project was granted by the Zoning Commission earlier this month.

The Staff Recommendation also relies upon the definition of the term "exterior wall" from the Dictionary of Architecture and Construction (which heretofore has not previously been cited) to determine that an exterior wall has "one face exposed to the weather or to earth." This rationale is used to justify the claim that the north and west walls abutting the adjacent buildings, and the north and west walls abutting the interior courtyard, are "exterior walls" under the Height Act. However, there is nothing preventing the adjacent properties to the north and west from being redeveloped in a manner which covers the north and west lot line walls, such that these walls are no longer "exposed to the weather", and thus, under the Staff Recommendation's new analysis, no longer exterior walls. Notwithstanding the foregoing, NCPC has consistently interpreted the Height Act in a manner where walls that have been "exposed to the weather" have been determined not to be "exterior walls" for purposes of the Height Act. Rather, the only focus heretofore has been on exterior walls that abut a street.

The Staff Recommendation also asserts that the proposed project is inconsistent with the Preservation and Historic Features Element of the Comprehensive Plan with respect to the following policy: "Preserve the horizontal character of the National Capital through enforcement of the 1910 Height of Buildings Act." However, the Staff Recommendation does not challenge the actual height of the penthouses themselves, but only the setback as a function of the height. Whether or not the setbacks are increased, there will be no infringement on the "horizontal character of the National Capital."

Under the principle of *stare decisis*, NCPC is bound by the previous long-standing interpretations of the Height Act. If an agency determines to break from past decisions, it must explain its rationale and apply the new interpretation prospectively only. In *Reichley v. District of Columbia Department of Employment Services*, 531 A.2d 244 (D.C. 1987), the D.C. Court of Appeals held that:

if an agency's adjudication is a clear break with the past and a party reasonably relied to its detriment on the previous rule, then the new rule should be applied prospectively, unless the agency ... can demonstrate that this reliance interest is outweighed because prospective application would impose a severe administrative burden, otherwise interfere with a significant statutory interest, or fail to provide an essential reward to those who innovate change.

Reichley, 531 A.2d at 253; see also *Smith v. D.C. Bd. of Zoning Adjustment*, 342 A.2d 356, 359 (D.C. 1975) (established principles of *stare decisis* require that any change in long-standing interpretation of Zoning Regulations to be made prospective only).

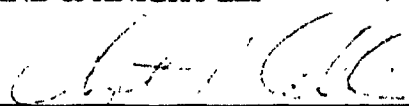
No such explanation was given by NCPC in Z.C. 07-26, nor was such an explanation offered in this case. Based on the long-standing administrative interpretation, "exterior walls" under the Height Act applies only to street frontage walls. There is no support for NCPC's position that the penthouse setback requirements should also apply to lot line walls or rear elevations.

Conclusion

Based on the foregoing, the Applicant respectfully requests that NCPC find, consistent with years of past precedent, and its own prior rulings, that the setback provisions of the Height Act apply only to those portions of buildings fronting on a street; that the roof structures as proposed in this case meet those setback requirements; and therefore, that the proposed building complies with the Height Act and does not adversely affect the federal interest.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: 

Christopher H. Collins
Kyrus L. Freeman

Attachments

National Capital Planning Commission
April 30, 2008
Page 6

cc: Woody Bolton
C. Wynne
Mark Adamo
Gabrielle Kornely

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October 3, 2008

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Dear Mr. Collins:

We are writing to respond to your letter to the National Capital Planning Commission dated April 30, 2008 addressing Height of Buildings Act setback requirements from exterior walls. Your letter addressed NCPC's review of a Zoning Commission action on a Planned Unit Development project at 2201 M Street, NW.¹ We have also taken the liberty of including in this letter a response to information provided by Carolyn Brown of your law firm during and after her testimony at the March 6, 2008 meeting of NCPC on a Consolidated Planned Unit Development at 1000 F Street, NW, Washington, DC that raised the same Height Act question.² The District of Columbia Zoning Commission referred both cases to NCPC. NCPC commented on the cases pursuant to its authority under the National Capital Planning Act.

At issue in both cases was the proper placement of mechanical penthouses, which, under Section 5 of the Height of Buildings Act of 1910 as amended, must be set back from the edges of the "exterior walls" at a distance equal to their height above the adjacent roof. The cases require a proper understanding of the definition of an "exterior wall."

As you will see below, NCPC's long-standing, generally consistent position is that an "exterior wall" is any wall that comprises part of the building envelope.³ In contrast, both your letter and Ms. Brown's testimony have urged a different position. Your view, as Ms. Brown testified at the March 6 Commission meeting, is:

"For almost 100 years, exterior walls, under the 1910 Height Act, have been interpreted to mean only those walls fronting on streets. That is based on interpretations from a 1953 Office of Attorney General opinion, 1958 Zoning Advisory Committee opinion, and numerous Zoning Administrator decisions since that time that have all said 100 years-worth of interpretation."⁴

¹ File Number Z.C. 07-21.

² File Number Z.C. 07-18.

³ The definition set forth in Cyril M. Harris, *Dictionary of Architecture and Construction* (McGraw-Hill, 1993), p. 314, is: "A wall which is part of the envelope of a building thereby having one face exposed to the weather or the earth."

⁴ Transcript of Commission meeting of March 6, 2008 at 62.

NCPC has reviewed the materials upon which you and Ms. Brown base your analysis. We have also conducted further research on materials and NCPC documents related to the review of “exterior walls” over the years. We have concluded that:

1. Section 5 of the Height of Buildings Act of 1910 requires penthouse setbacks from all exterior walls—that is, any wall forming part of the building envelope;
2. NCPC’s interpretation of “exterior wall” has been generally consistent;
3. As a federal agency, NCPC has an important role in interpreting a federal statute like the Height of Buildings Act;
4. NCPC was not asked to review and did not review for compliance with the Height Act any of the 21 buildings included in Ms. Brown’s powerpoint on which Ms. Brown based the assertion that NCPC has not been consistent in applying the Height Act;
5. The documents that you cite do not support your position;
6. The Commission action on the WETA case does not support your position; and
7. Legislative history and other contemporaneous materials support NCPC’s position.

The remainder of this letter will address each of these points.

1. The Height of Buildings Act provision on “exterior walls” requires setbacks from all walls that comprise a part of the building envelope.

Section 5 of the Height of Buildings Act of 1910 provides in part:

“pent houses over elevator shafts...may be erected to a greater height than any limit prescribed in this Act when and as the same may be approved by the Commissioners of the District of Columbia: *Provided, however,* That such structures when above such limit of height shall be fireproof, and no floor or compartment thereof shall be constructed or used for human occupancy above the top story of the building upon which such structures are placed: *And provided,* That pent houses...shall be set back from the exterior walls distances equal to their respective heights above the adjacent roof.” (emphasis added).

This provision has been interpreted by NCPC, by the District of Columbia Zoning Commission and Zoning Administrator, and the Board of Zoning Adjustment. While NCPC’s interpretation of the Act has been generally consistent over the years, we acknowledge it has not been the same as that of the other entities.

2. NCPC’s interpretation of “exterior wall” has been consistent.

NCPC has had a consistent position that “exterior wall” means any wall that comprises part of the building envelope. The purpose of the Act, and NCPC’s interpretation of it, is to preserve the horizontal character of the nation’s capital, which also protects light and air.⁵ The penthouse

⁵ Federal Elements of Comprehensive Plan (2004) at p. 161. The suggestion in your letter that NCPC’s position is problematic because a neighbor could build and cover a wall that comprises a part of the building envelope (or that is exposed to the weather or the earth) misses an important feature of NCPC’s position – the Height Act , and

setback requirements affect light and air. An important case related to this issue was NCPC's 1994 review of an action by the Zoning Commission approving plans for a building by WETA, the television and radio organization. That case is discussed more fully in Section 6. NCPC's Executive Director's Report ("EDR") on the WETA case⁶ states NCPC's staff position that penthouses must be set back a distance from "all exterior walls" equal to their height above the adjacent roof and applies that term to all four walls of the building (some of which do not front on streets). The EDR also notes:

"In the staffs [sic] experience (since 1967), all public and private buildings reviewed by the Commission that required penthouses have had those penthouses setback [sic] from all exterior walls in accordance with the Height Act."

In the context of this EDR, "exterior wall" is implicitly defined as "all building envelope walls" and not just those walls fronting streets. This paragraph underscores the many years that NCPC has held a consistent view of this matter. We discuss more fully in Section 6 below the Commission's action on the WETA case.

In our examination of available records since that decision in 1994, we can identify no NCPC review cases from 1994 to 2002 on this topic. From 2002 to the present, we have identified seven PUDs involving "exterior wall" or related "setback" questions that NCPC has reviewed. In five, NCPC's Commission action is consistent with its current position. In only one case did the NCPC Commission approve a building with less than a one-to-one penthouse setback;⁷ in the seventh it declined to act.⁸ This pattern demonstrates a clear and generally consistent position. You state that NCPC took a sudden new direction in February 2008 in Z.C. 07-26. That case—the O Street Market case—was handled as a delegated action and approved because the building and penthouses were all fully below the allowable building height. We do note that in the Randall School case that came before NCPC in January 2008 NCPC did recommend to the Zoning Commission that it disapprove a PUD for failure to comply with the setback requirements of the Height Act;⁹ this is a continuation of an existing interpretation, not as you suggest a sudden change in position.

In your letter, you state that under the principle of stare decisis, NCPC is "bound by the previous long-standing interpretations of the Height Act." That principle does not apply here. As noted, NCPC has had a generally consistent position for many years that exterior walls means all walls that comprise part of the building envelope and has not changed that position for purposes of analyzing penthouse setbacks under the Height Act. Moreover, stare decisis—"let the decision

NCPC's interpretation of it, are concerned with protecting light and air as well as views of the building. Of course if the neighbor covered the wall it would become a party wall and NCPC would not object.

⁶ The Commission hearing and transcript are dated March 3, 1994, and are included in the House of Representatives Hearing Report of April 26, 1994 at pp. 429-437 ("Hearing Book").

⁷ The case that NCPC did not raise concerns about is File Number Z.C. 01-07C at 1700 K Street, N.W., where the setback on the back alley wall was 9 feet for an 18.5 foot penthouse. This case was delegated—handled by the Executive Director rather than the Commission—and approved by delegation dated January 4, 2002. Indeed it should not have been delegated but submitted to the Commission as a proposed Zoning Commission action not complying with the Height Act.

⁸ At its July 10, 2008 meeting the Commission declined to act of ZC 05-36A.

⁹ Commission action on Z.C. 07-13, Randall School PUD.

stand”—is a principle that governs actions by courts rather than administrative agencies. The Supreme Court has made clear that an administrative agency such as NCPC may change positions so long as it explains rationally its reasons for doing so. Motor Vehicle Manufacturers' Association v State Farm Mutual Automobile Insurance Co, 463 US 29, 41-42 (1983).¹⁰

3. NCPC is a federal agency that may interpret this Congressionally-enacted statute itself.

Much of the material in your letter and Ms. Brown's testimony sets forth the position of the D.C. Zoning Commission that "exterior walls" in the setback provision of the Height Act are limited to walls fronting streets. As a federal agency, NCPC has an important role in interpreting this federal statute. Indeed, Congress underscored the importance of the federal role in implementation of the Height Act by specifically providing in the Home Rule Act that only Congress, and not the District of Columbia Council, may amend the Height Act.¹¹ While NCPC may review and consider Zoning Commission views and materials, it is not required to follow them. Further, many of these materials you rely on do not support your position. See Section 5 of this letter.

4. NCPC did not review the buildings on which Ms. Brown based her assertion that NCPC had been inconsistent.

In her March 2008 presentation to the Commission, Ms. Brown identified 21 buildings in her Powerpoint presentation as buildings with penthouses that were not set back from walls that did not front on streets. NCPC has determined that NCPC had not reviewed any of them. Thus, they do not support the contention that NCPC has changed positions.¹² Instead, our review shows that NCPC has been generally consistent in its interpretation of the "exterior walls" provision of Section 5 of the Height of Buildings Act.

In your letter, you state that NCPC's position is inconsistent with "numerous" BZA cases, and site one specifically, the case related to 1819 Belmont Road, N.W. (see above) but give no indication that NCPC reviewed those cases.

¹⁰ Indeed, one of the cases you cite is instructive. In Smith v. District of Columbia Board of Zoning Adjustment, 342 A. 2d 356 (1975), the Court of Appeals held that the Board of Zoning Adjustment is not bound by past decisions, but must consider in its deliberations long-standing interpretations. See Board of Zoning Adjustment Appeal No. 17109, at p. 13 (Order dated November 8, 2005) (case related to 1819 Belmont Rd. NW). This case was also reconsidered and the BZA issued a subsequent opinion for Appeal No. 17335, dated November 16, 2006.

¹¹ District of Columbia Home Rule Act, signed into law on December 24, 1973 (P.L. 93-198; 87 Stat. 777, DC Code §1-201 et seq., at §602 (a) (6).

¹² Of these 21 sites, the Board of Zoning Adjustment (BZA)—on which NCPC has one representative—heard at least one case, but penthouse setback relief was not requested in that matter. We have another list of zoning matters that may have been included in one of Ms. Brown's recent presentations to the Zoning Commission. We have reviewed the cases on that list, and of the ones we can find, the BZA may have approved up to three penthouses without setback from all the walls that NCPC would consider "exterior." NCPC's representative did sit on the consideration of the 1819 Belmont St. NW case. Even if that position was supported by the NCPC representative, such a vote is not the same as an NCPC Commission action. Moreover, the cases occurred over a period of 30 years.

5. The documents that you cite do not support your position.

Your letter cites several documents that you believe support your view that “exterior walls” in Section 5 of the Height Act are limited to walls fronting streets, and Ms. Brown in her March 2008 presentation relied on three of these documents. But the documents do not support your position. The first—a July 27, 1953 opinion from the Corporation Counsel—does relate to penthouses, but it does not address or interpret the exterior wall requirement.¹³ It is silent on the definition of an exterior wall. This opinion therefore does not support any position as to the definition of an exterior wall under the Height Act.

Similarly, the letter from the Director of Inspection dated May 13, 1953 rules that fans are a type of air conditioning equipment that may not rise above 130 feet. That letter interprets the type of equipment that is covered by the applicable rules—it does not mention setbacks. It thus does not support your position.

Most importantly, the third document you cite is a 1994 memorandum from NCPC’s General Counsel Sandra Shapiro. We have reviewed the General Counsel’s memorandum of February 17, 1994 to George Oberlander. Your quote from the memo is accurate-- but incomplete. Ms. Shapiro simply reported on positions taken by District of Columbia agencies and entities, and noted that courts give deference to certain longstanding administrative agency interpretations. However, Ms. Shapiro did not endorse the District of Columbia’s longstanding view; rather, in a sentence in her memo that you did not quote, she went on to make one of her most important points:

“In this case, the force of this long-standing interpretation may be somewhat undercut by the apparent lack of ambiguity in the statute itself. However, the ultimate question for the Commission is whether it believes that, in the absence of an adverse impact on any other clearly defined Federal interest such as Pennsylvania Avenue, the Federal interest it has consistently found in maintaining the integrity of the Height of Buildings Act is in any way compromised if this interpretation stands.” (emphasis added).

This is not support for your position, but rather a recognition of NCPC’s view of this Height Act provision. Indeed, Ms. Shapiro’s memorandum was written at the time the staff was considering its recommendation to the Commission on the WETA case, and the staff in its Executive Director’s Report recommended that the Commission define exterior wall differently from what you refer to as the “long standing interpretation.” That interpretation was the Zoning Commission’s view, not NCPC’s generally consistent long-standing view. Ms. Shapiro also does not endorse the District of Columbia’s position in her memo a few months later (see below).

You also rely on a report of the Zoning Advisory Council in 1958, but that report does not support your position. The Report, dated “July 16, 1958, hearing”, analyzes proposed amendments to the zoning regulations that would set back penthouses from lot lines. The Report notes: “Under the regulations recently repealed, the application of this provision [exterior wall

¹³ The opinion addresses whether penthouses may be over air conditioning and heating equipment and how the term “human occupancy” related to penthouses is defined.

setbacks] was construed by the Zoning Commission to mean exterior walls from the street sides only, an interpretation considered in harmony with the Act and not in violation thereof." In our opinion, the Advisory Council is reporting on the views of the Zoning Commission, not giving its independent views of the meaning of the Height of Buildings Act.

Finally, you note that when the Zoning Commission issued an Order revising the zoning regulations in 1986, its Order No. 476 (Penthouse-Text Amendment)(June 9, 1986) reflects that NCPC commented that the Height Act requirement of penthouse setback from exterior walls is intended to "hide or screen penthouses from street views." Indeed, NCPC so stated in order to assure that setbacks would be measured from the building line perimeter of roof, and not the lot line. (Order, at p. 6). The proposal under consideration by the Zoning Commission, and on which NCPC was commenting, required that all penthouses be setback to a 1:1 ratio "from the perimeter of the structure". (Order at p. 4). That would cover all walls, not just street-facing walls. While NCPC proposed alternate language, nothing suggests that it intended to change the perimeter concept. Thus, this document supports NCPC's view of the Height Act and not your position.

In conclusion, the material on which you rely in your letter and on which Ms. Brown relied at the March 2008 National Capital Planning Commission meeting does not support your position, and the material does not change NCPC's generally consistent view that "exterior wall" in Section 5 of the Height Act means any wall that comprises part of the building envelope.. In applying this definition, we consider the exposed portion of a bulding line wall as comprising part of the building envelope.

6. The WETA case does not support your position.

The National Capital Planning Commission's actions in 1994 on the WETA case, mentioned above, do not support your position. In your letter you assert that in the WETA case the National Capital Planning Commission "endorsed the Zoning Administrator's interpretation of the setback provisions of the Height Act." Similarly, at the March 2008 meeting, Ms. Brown testified (Transcript at 62): "The staff has suggested that there has been a debate on this interpretation [that only exterior walls facing streets are covered by Section 5 of the Height Act]. I would submit that the Commission ended that debate on the WETA case in 1994. The Commission rejected the staff recommendation and there is testimony before the hearings on the Hill on this matter by the then Executive Director, that said, under oath, 'Our staff position was rejected by the Commission.'" This view expressed by you and by Ms. Brown mischaracterizes the Commission's 1994 action.

I have now reviewed the transcript of the Commission meeting of March 3, 1994, at which the Commission reviewed the WETA case. There was a long discussion of the definition of "exterior wall" under the penthouse provision of the Height of Buildings Act. The decision came to be focused on the Commission's resolution (action). I have also reviewed the resolution that the Commission adopted on the matter. The resolution states in part: "The Commission finds that the proposed Planned Unit Development and related amendment to the Zoning Map of the District of Columbia would not adversely affect the Federal Establishment or other Federal interests and would not be inconsistent with the Comprehensive Plan for the National Capital."

This resolution does not reflect a Commission finding or decision about the definition of an "exterior wall" in the Height of Buildings Act. Rather, in discussions about the resolution, the Commission makes clear that it is taking out any reference to the Height of Buildings Act so that the resolution will not take a position on the Act. See especially Transcript of March 3, 1994 at pp. 176-7. Several Commission members expressed the view that the purpose of the resolution was to permit continued discussion of the interpretation of the Height of Buildings Act without holding the WETA project hostage to that discussion. See, e.g. Transcript at pp.152-5, pp. 176-8. Thus, the Commission action on the WETA project does not take a specific position on how "exterior walls" are to be defined or interpreted and, by the Commission's own approach, is not support for your view.

In your letter you provide and discuss materials that set forth the position of the Zoning Administrator and the Zoning Commission regarding the WETA case. The views of the National Capital Planning Commission, however, are set forth in the action of the Commission described above.¹⁴

Ms. Brown also relied on Congressional testimony of Mr. Reginald Griffith, Executive Director of NCPC at the time of the WETA case. We have reviewed that testimony, which was provided to the District Committee of the House of Representatives chaired by Congressman Stark, at a hearing of April 26, 1994. In his testimony, Mr. Griffith accurately described the Commission action that took no position on the Height Act.

Mr. Griffith did not appear at that hearing on behalf of NCPC, but spoke only for himself. (Hearing Transcript, p. 24). Mr. Griffith reported accurately on the NCPC action. He persisted in his view that the Height of Buildings Act required setback from all walls, not just street walls. On questioning from Congresswoman Norton, Mr. Griffith responded: "The Commission did not agree with the staff recommendation", and: "The Commission voted five to seven to recommend to the Zoning Commission that there was no adverse impact on the Federal interest." (Both at Hearing Transcript 26). In short, Mr. Griffith's testimony did not change the Commission resolution that deleted any reference to the Height Act because the Commission in its action on the WETA case sought to take no position on the meaning of "exterior wall" under that Act.

We also note that the Commission's decision to take no position on the Height Act was not well-received by Congressman Pete Stark, at that time an ex officio Commissioner of NCPC. Congressman Stark introduced two bills related to building heights to reiterate NCPC's long-standing position that the Height Act provides for setbacks from all walls that comprise a part of the building envelope. The purpose of the two bills was, in part, to prohibit construction of the WETA building unless any penthouse was set back from all of the building's walls. A memorandum in NCPC's files from Sandra Shapiro, then General Counsel, through Mr. Griffith to the Commission, dated May 24, 1994, analyzing one of the bills, notes of that penthouse

¹⁴ Thus your attached memorandum of November 24, 1993 from Joseph Bottner, Jr., Zoning Administrator, to Madeliene H. Robinson, Acting Director, Office of Zoning, and your attached Memorandum of November 18, 1993 from the Assistant Corporation Counsel to Ms. Robinson do not affect NCPC's position. Indeed, the memorandum from Ms. Shapiro, NCPC's General Counsel, that you attach specifies, as we describe in this memorandum above, that the plain meaning of the Height Act differs from the interpretations of the District of Columbia agencies.

setback provision: “The second provision...simply reflects the Chairman’s [Cong. Stark’s] often expressed disagreement with the District of Columbia [government’s] position that ‘exterior walls’ means only those walls facing a street.”¹⁵

Further, the Hearing Book from the April 26, 1994 Congressional hearing described above includes a letter from Congressman Pete Stark, Chairman of the House District Committee, (and an ex officio member of NCPC) to Mr. James Draude, counsel for ANC2A, an ANC involved in the WETA case, that sets forth in detail the legislative history of the 1910 Height of Buildings Act. The letter clearly supports NCPC’s current and long-standing view of the meaning in the Height Act of 1910 of the term “exterior wall.” See Hearing Book at 489-495.

7. Legislative History and other contemporaneous materials support NCPC’s position.

While we were looking at historic materials, we identified additional information that strongly supports NCPC’s view that Congress intended the term “exterior walls” in Section 5 of the Height Act to mean any wall that comprises a part of the building envelope.

The contemporaneous legislative history of the 1910 Act is strong. It underscores that Congress intended “exterior walls” to mean “all walls forming the building envelope.” Congress first enacted height controls in the District by Act of 1899 in response to the Cairo Hotel building. There were several small amendments between 1899 and 1910, and the 1910 Act built on the 1899 Act. Both the House and Senate Reports on the 1899 law stated:¹⁶

“In addition to the uncertainty of structural conditions, serious objections can be urged on the grounds of light and ventilation and danger from fire.

“Of course the higher the building the more light and air is shut out from the street and the adjacent premises on all sides. The drafts of chimneys of houses in the vicinity of high buildings are also injuriously affected.” (emphasis added).

This information would have been available to Congress when it enacted the 1910 Act, and informs the words of that 1910 Act. Congress’ concern for light and air was not limited to street views but to all sides of the building.

¹⁵ Ms. Shapiro also notes in the memorandum that OMB will ask NCPC for its views on the bill, and outlines four options, including one of taking a position in favor of the legislation (with a question of whether that involves reopening the March 5 decision).

¹⁶ The “Advisory Neighborhood Commission 2A’s Response to Post-Hearing Submissions” in the Zoning Commission record for the WETA building, including in the Hearing Book at pp. 410-415. The Submissions reference H.R. Rept. No. 1704, 55th Cong., 3d Sess. (Dec. 20, 1898); S. Rept. No. 1532, 55th Cong., 3d Sess. (Jan. 26, 1899).

Also, the contemporaneous Building Regulations of the District of Columbia included a definition of "external wall" that is pertinent here. Regulations revised and adopted by the District of Columbia Commissioners on November 1, 1887, provide, in Section 1—Definition of Technical Terms, as follows:

"External Wall: The outer wall or enclosure of a building, other than a party wall"

and

"Party Wall: A wall built upon the dividing line between adjoining premises for their common use."

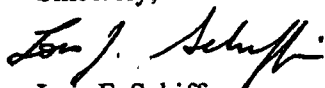
This understanding of these technical terms would have been available to Congress at that time. Moreover, the terms were again confirmed several years after the 1910 Act was enacted. In 1917, the District Commissioners provided "Regulations governing the Erection, Removal, Repair and Maintenance of Buildings and the Erection and Operation of Elevators and Fire Escapes in the District of Columbia." Those rules provide in the definitions section: "External wall—The outer wall or inclosure of a building other than a party wall" and "Party Wall—A wall built upon the dividing line between adjoining premises for their common use." These contemporaneous regulatory definitions underscore that when Congress referred in the 1910 Act to "exterior wall" it contemplated that it was covering all walls of the building envelope (with the exception of party walls in common use—that is, not exposed).

Conclusion

NCPC has fully reviewed your letter of April 30, 2008, as well as Ms. Brown's testimony and materials she relied on at the March 2008 Commission meeting. We conclude that, as to the definition of an "exterior wall," the Height of Buildings Act is clear on its face, in its legislative history, and in other supporting materials. Exterior walls are all walls that comprise part of the building envelope. Please let me know if you have further questions.

Because we have received correspondence from others in your firm on this subject, we have taken the liberty of providing a copy of this letter to them as well. Thank you for allowing us the opportunity to address with you our continued concerns over your position with respect to the Height Act.

Sincerely,



Lois F. Schiffer
General Counsel

cc: Carolyn Brown
Kyrus Freeman
Whayne Quin
Norman Glasgow

October 21, 2008

Christopher H. Collins
202.457-7841
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VIA E-MAIL

Lois F. Schiffer
General Counsel
National Capital Planning Commission
401 9th Street, N.W.
North Lobby, Suite 500
Washington, DC 20004

Re: Your Letter of October 3, 2008

Dear Ms. Schiffer:

Thank you for your letter of October 3, 2008, responding to my letter of April 30, 2008, regarding Zoning Commission Case No. 07-21. Your letter also references the testimony of my colleague Carolyn Brown before NCPC on March 6, 2008, in Zoning Commission Case No. 07-18.

I have reviewed your letter with those of my colleagues who were listed at the bottom of page 9 of your letter, and we have discussed the various points you have raised. Without going into greater detail, we note the following:

1. The Height Act does not define "exterior wall." The sole basis for the limitation on heights of buildings under the Act relates to the width of streets on which a building fronts.

2. Sole authority for the application of the Act was given by Congress to the District of Columbia with absolutely no interpretive role of any Federal agency including NCPC. As you are aware, the Commissioners of the District of Columbia initiated the height legislation, forwarding the proposal to the Congress for enactment.

3. As you correctly point out, a previous NCPC General Counsel recognized the consistent and longstanding District of Columbia applications construing "exterior walls" to be only those which front on a street. That interpretive application, applied to scores of buildings, is entitled to deference by courts of law.

Holland+Knight

Louis F. Schiffer, NCPC

October 21, 2008

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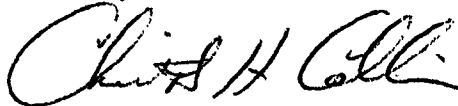
4. Notwithstanding your discussion of the Act's history and provisions of the Building Regulations, there is nothing in the legislative history to support your "interpretation" of the Act as it relates to roof structures. First, the language you cite refers to the building itself and not to roof structures permitted under the Act. Roof structures (for which no height limitation is provided under the Act) were governed by an entirely different section of the Act. Second, there is no correlation between an "external wall" for building code purposes and enclosures for roof structures which are above the building where there is to be no "human occupancy."

5. Congress, in 1938, established the Zoning Advisory Council (ZAC) and legislatively required a representative of NCPC to sit on the three member advisory body with expertise in zoning. The public and official acknowledgement of the consistent application of "exterior wall" by the Council without the remotest suggestion that it be changed implies that NCPC had no difficulty with the application.

6. The fact of the matter is that the horizontal skyline of our great City has been enhanced by the ability to provide essential mechanical space adjacent to side and rear lot lines while carefully respecting setbacks of roof structures from the street. As previously pointed out to NCPC, both federal and private buildings have rigorously complied with this consistent and longstanding application of the Act.

After a thorough review of the various points in your letter, we have reached the same conclusions as in my April 30 letter and Ms. Brown's March 6 testimony, and we respectfully disagree with your conclusions. We thank you for sharing your comments with us.

Sincerely,



Christopher H. Collins

CHC/lb

cc: Carolyn Brown
Kyrus Freeman
Wayne Quin
Norman M. Glasgow, Jr.