

## OUTLINE OF TESTIMONY TO THE ZONING COMMISSION

### CASE NO. 08-06-9 ZONING REGULATIONS REWRITE SUSTAINABILITY

KYRUS L. FREEMAN, ESQ.

HOLLAND & KNIGHT LLP

MAY 21, 2009

#### I. Introduction

- A. Kyrus L. Freeman, Attorney and LEED Accredited Professional
- B. Have experience working on a number of projects that include sustainability features; buildings that are LEED certified at various levels; and often advise and assist firm clients on the LEED certification process.
- C. Support Recommendations: 6, 7, 9, 10, 14, 19, 20, 21 and 22
- D. Need more information regarding Recommendations: 1, 2, 3, 11 and 17
- E. Not in Support of Recommendations: 4, 5, 8, 12, 13, 15, 16, 18 and 23

#### II. In general, we support those recommendations which:

- 1. Are clear to understand, easy to apply and yield consistent/predictable results in both matter-of-right developments and PUDs; and
- 2. Remove existing impediments to incorporating sustainability features.

#### III. We do not support those recommendations which:

- 1. Exceed the appropriate scope of the Zoning Regulations,

**ZONING COMMISSION**  
CASE NO. 08-06-9  
ZONING COMMISSION  
City of Columbia  
EXHIBIT NO. 16  
CASE NO. 08-06-9  
EXHIBIT NO. 16

2. Are already addressed by other laws or regulations; or
3. Contradict other laws or regulations.

IV. Transportation Demand Management (Recommendation 1)

A. Concept: Identify and require the incorporation of TDM features in "large" new buildings.

B. Comments:

1. Need to understand how "large" is defined.
2. The Green Building Act already requires "large" buildings to be LEED Certified.
3. LEED already includes Alternative Transportation as Credits 4.1 – 4.4.
4. The District already has a number of tools that address TDM.
5. Most other jurisdictions address these issues through their Departments of Transportation.

V. Accessory Dwelling Units (Recommendation 2)

A. Concept: Allow ADUs a matter-of right in residential, subject to standards.

B. Comment:

1. Agree with allowing ADUs in more areas.
2. However, we disagree with the limitation of 6 total residents in both the primary and ADUs because such limitation could result in unforeseen circumstances. For example, if a family of 6 wanted to provide an ADU for a relative, the cap on the number of residents would prohibit such use.

**VI. Transit Oriented Development (Recommendation 3)**

**A. Concept:** Encourage the incorporation of transit oriented development concepts into certain developments.

**B. Comments:**

- 1. Support the concept of connecting people to transit. However, it is unclear whether including this in the Zoning Regulations is necessary since a number of sites already incorporate TOD measures.**
- 2. Need to better understand what "zoning tools" would be utilized.**
- 3. Need to ensure this does not result in every case having to go to BZA or Zoning Commission for approval.**
- 4. If LEED certification is pursued, a number of the Sustainable Sites credits (1, 2, 4.1, 4.2, 4.3, and 4.4) incorporate TOD measures.**

**VII. Increased Energy Efficiency (Recommendation 4)**

**A. Concept:** Require certain buildings to meet "Architecture 2030" or other "progressive standard."

**B. Comments:**

- 1. Oppose this because it impacts the operation of buildings, which is beyond the scope of zoning.**
- 2. The Green Building Act requires certain buildings to be LEED certified, and a substantial number of the LEED credits/points relate to energy and atmosphere.**
- 3. Requiring a standard beyond what the Green Building Act requires may be subject to legal challenge or legislative override.**
- 4. D.C. Department of Environment is appropriate agency for these regulations.**
- 5. As noted in the report prepared by OP's consultant, there are already a number of non-zoning, Federal, and District regulations and policies that address air quality and energy, including the following examples:**

- Air Quality Related Regulations, District Department of**

**the Environment, Title 20, Chapters 3, 4, 6, 8 and 9;**

- **D.C. Code Energy Efficiency Standards, Title 8, Subtitle D-1 Chapter 17M; and**
- **The Energy Policy Act of 2005 (H.R. 6, § 1335).**

**VIII. Outdoor Lighting (Recommendation 5)**

**A. Concept: Adopt a model lighting ordinance.**

**B. Comments:**

- 1. Those jurisdictions that have adopted lighting ordinances have done so as stand-alone legislation, not as part of their zoning regulations.**
- 2. OP correctly suggested in its report that exterior lighting should be regulated by the D.C. Department of the Environment.**
- 3. The appropriate process for implementing a lighting ordinance would be to petition the D.C. Council to adopt such legislation, and the D.C. Department of the Environment to issue implementing regulations.**
- 4. The Green Building Act requires certain buildings to be LEED certified, and Sustainable Sites Credit 8 addresses lighting, so this requirement would (1) be redundant, and may contradict the LEED requirement.**

**IX. Sustainable Energy Features (Recommendation 6)**

**A. Concept: Provide more flexibility for the incorporation of energy-related sustainability features in all districts.**

**B. Comment: Agree**

**X. Renewable Energy Generation (Recommendation 7)**

**A. Concept: Permit wind and solar generation as accessory uses.**

**B. Comment: Agree**

**XI. Solar Access Protection (Recommendation 8)**

**A. Concept: Limit PUDs that would block existing roof-mounted solar power generation or solar hot water facilities**

**B. Comments/questions:**

- 1. This is not practical for a dense, heavily populated jurisdictions with limited land resources such as the District.**
- 2. The jurisdictions cited by OP have much lower densities and much larger expanses of land would permit this type of ordinance.**
- 3. By way of comparison, according to the U.S. Census Bureau, at last count, Boulder, CO has a population of 293,161; Ft. Collins, CO has a population of 133,899; Gresham, OR has a population of 99,721, and Teton County, WY has a population of 20,396; whereas the District has a population of over a half-million people. Simply put- one size does not fit all.**
- 4. As currently written, this would enable a single property owner to install a solar panel at any point which could thus stop a new development that would include a significant number of public benefits and amenities.**
- 5. This proposal could result in numerous unfair extractions from unscrupulous property owners.**
- 6. This recommendation could severely limit the amount of density constructed on a site.**
- 7. Are we suggesting that the height of a neighbor's solar panel should be the sole factor in determining the appropriate height or design of a building and whether a project can move forward?**
- 8. The D.C. Court of Appeals held in Hefazi v. Stiglitz, 862 A. 2d 901 (DC 2004), which represents the definitive law in the District of Columbia and is followed by 49 of the 50 states, that absent an express easement, "the actual enjoyment of the air and light by the [property] owner is upon his own land only." Accordingly, under DC case law, individuals that have installed roof-mounted solar power generation or solar hot water facilities cannot claim a legal right to light and air across adjacent property.**

**XII. District Energy Systems (Recommendation 9)**

- A. Concept:** Expressly permit district energy systems in all districts.
- B. Comment:** Agree

**XIII. Water Conservation Features (Recommendation 10)**

- A. Concept:** Remove barriers to the installation of water-related sustainability features.
- B. Comment:** Agree

**XIV. Environmentally Sensitive Area Buffers (Recommendation 11)**

- A. Concept:** Establish environmental protection zones to create buffer requirements for steep slopes, streams, and wetlands.
- B. Comments:**
  - 1. Both the D.C. Department of the Environment and the US. Environmental Protect Agency have specific regulations regarding development near certain streams and wetlands.**
  - 2. Even in those regulations, problems of definition and scope arise; it is not clear how these problems would be addressed or resolved in the Zoning Regulations.**
  - 3. Before accepting this recommendation, the Zoning Commission should require OP to submit concrete examples of zoning regulations from jurisdictions similar to the District that include environmental buffer standards.**
  - 4. We need more information to understand how it would not decrease the development potential of existing lots, as indicated in OP's report.**
  - 5. The Green Building Act requires certain buildings to be LEED certified, and Sustainable Sites Credits 1, 3, 5.1 and 5.2 addresses environmentally sensitive areas and buffering.**
  - 6. The Zoning Regulations are likely not the most-appropriate tool for incorporating these concepts.**

XV. Floodplain Protection (Recommendation 12)

A. Concept: Restrict certain types of uses from being located in floodplains.

B. Comments:

1. **We agree with OPs determination that construction limitations within the floodplain are most appropriately regulated by the Department of the Environment.**
2. **Pursuant to 20 DCMR §3104.2, construction is permitted within the floodplain provided that certain requirements are met. Thus, there is no basis for the Zoning Commission to impose additional requirements, regarding uses within floodplains, as such determinations were already considered in adopted Title 20.**
3. **OP has not submitted any data indicating there is a practical need to restrict certain uses in floodplains, that there is a real "risk of injury to vulnerable population," or that there is a proven risk of contamination during flood events in the District.**
4. **Moreover, for projects pursuing LEED certification, the location of a site in relation to a floodplain is already considered in Sustainable Sites Credit 1.**

XVI. Existing Tree Cover Protection (Recommendation 13)

A. Concept: Expand the Tree and Slope Overlay to other residential areas.

B. Comments:

1. **There is no clear need for additional tree protections in every residential zone.**
2. **Requiring a special exception to remove trees in every residential zone would significantly burden homeowners and the BZA.**
3. **The District already has a tree protection act known as the Urban Forest Preservation Act adopted to preserve trees in the District. Thus, the appropriate method for increasing tree protection would be to request that the Council amend the Urban Forest Preservation Act.**

4. **The Zoning Commission should not extend the Tree and Slope Overlay in a manner that may conflict with an existing law adopted by the D.C. Council.**

**XVII. Vegetated ("Green") Roofs (Recommendation 14)**

- A. **Concept:** Exempt vegetated roof components from zoning height restrictions up to four feet.
- B. **Comment:** Agree

**XVIII. Water Conserving Landscaping (Recommendation 15)**

- A. **Concept:** Specify native and low-water demand plant species in the zoning code.
- B. **Comments:**
  1. **We agree with specifying native and low-water demand plant species for those instances in which landscaping is required.**
  2. **We also agree with the concept of providing a reference for the types of plants that can be used where landscaping is required.**
  3. **However, the Zoning Regulations are not the correct place to codify such list. This list should be issued, maintained and codified the D.C. Department of the Environment.**

**XIX. Pavement Runoff and Soil Erosion Control (Recommendation 16)**

- A. **Concept:** Standards for parking lots should include regulations for design and distribution of required landscaping.
- B. **Comments:**
  1. **We do not disagree with the concept of requiring a certain amount of landscaping for parking lots.**
  2. **However, a number of parking lots are temporary uses, and therefore**



**should not be required to incur the time and expense of incorporating the proposed sustainability measures for non-permanent uses.**

- 3. The Zoning Regulations already include a number of provisions addressing the design and layout of parking lots, and that address pedestrian safety and require buffering.**
- 4. Pavement runoff and soil erosion control standards are also addressed in a number of LEED credits, such as Sustainable Sites Credits 4.4, 5.1 and 7.1, and thus impose new requirements is not necessary.**

**XX. Pavement Runoff Reduction (Recommendation 17)**

**A. Concept: Reduce runoff from paved areas by encouraging pervious surfaces**

**B. Comments:**

- 1. We support allowing the use of pervious surfaces in sites.**
- 2. However, we disagree with using the Zoning Regulations to limit the total amount of impervious surface and the total amount of pervious pavement on a site.**
- 3. As indicated in OP's report, the D.C. Department of the Environment has adopted new stormwater fees to address the amount of impervious surface on a site, and the D.C. Department of the Environment is the appropriate agency to adopt and enforce such policies.**

**XXI. Green Area Ratio (Recommendation 18)**

**A. Concept: Require a point system to set requirements for green site design to meet goals for stormwater runoff, air quality, and urban heat island mitigation.**

**B. Comments:**

- 1. This recommendation would implement a complicated system, which is already addressed by the lot occupancy, rear yard and side yard requirements of the Zoning Regulations.**
- 2. The Green Building Act requires certain buildings to be LEED**

**certified, and a number of credits address runoff, air quality, and urban heat island mitigation. Thus, there is no need to impose new requirements in the Zoning Regulations which duplicate, complicate or may be contradict existing requirements.**

**XXII. Local Food Production (Recommendation 19)**

- A. Concept:** Remove potential barriers to gardening including community gardens, roof-top gardens, and composting in all zones.
- B. Comments:** Agree

**XXIII. Individual Food Sales (Recommendation 20) & Farmer's Markets (Recommendation 21)**

- A. Concept:** Allow produce sales stands in residential and mixed use districts as a temporary use; define farmer's markets and explicitly allow them in appropriate districts.
- B. Comments:**
  - 1. We do not disagree. However, the Zoning Regulations only apply to uses within property lines, not public space.**
  - 2. This recommendation would likely require input from the D.C. Health Department to ensure that the produce sold meets applicable health code requirements.**

**XXIV. Incubator Space for Sustainable Businesses (Recommendation 22)**

- A. Concept:** Enable incubator-sized light industrial uses in compatible commercial and mixed-use zones.
- B. Comment:** Agree

**XXV. LEED-ND for Large Areas (Recommendation 23)**

- A. Concept: Require new development of large tracts of undeveloped land to meet environmental standards equivalent to the LEED-ND program.**
- B. Comments:**
  - 1. The Green Building Act already requires certain buildings to be LEED certified.**
  - 2. The LEED-NC standards are different from the LEED-ND standards in a number of important respects, and thus there would be a number of conflicts between the two.**
  - 3. The LEED-ND is still in the pilot phase.**
  - 4. The Zoning Commission should not adopt a standard different from the standard already adopted by the D.C. Council, as such action may exceed the scope of the Zoning Commission's authority and be legislatively overridden.**

**XXVI. Conclusions**

- A. The changes which decrease requirements and add greater flexibility to do things in more creative ways are generally good things.**
- B. We request that the Zoning Commission approve recommendations: 2, 6, 7, 9, 10, 14, 19, 20, 21 and 22.**
- C. The reverse is also true: The changes which increase requirements and provide less flexibility are generally not good things.**
- D. We request that the Zoning Commission not approve recommendations: 4, 5, 8, 12, 13, 15, 16, 18 and 23.**
- E. We also request that the Zoning Commission require OP to submit more information regarding recommendations 1, 3, 11 and 17.**
- F. prior to taking any action on such proposals.**
- G. The notion of not fixing things which are not broken should be adhered to; there are things which are not justified and which seem to be changed for the sake of change (or perhaps because other jurisdictions do them and therefore the District should also).**