

## TESTIMONY OF MICHAEL STOVER DATED JANUARY 24, 2019, OPPOSITION TO VALOR DEVELOPMENT

In ZC Case 16-23 Valor Development LLC Square 1499

CRD has demonstrated that Valor's proposed base height measurement point (BHMP) is unlawful because Valor has used the curb grade of 48th Street for its BHMP at a point where 48th Street rests upon an artificial embankment. Under the zoning rules, at §307.7, this is not permitted. Valor is asking this Commission to make an arbitrary finding of fact, unsupported by evidence, that the wide embankment plainly shown on CRD's photographs is not there.

Valor would have the Commission find that 48th Street rests entirely upon the natural elevation of the preexisting slope, as it has "always" been, but Valor does not explain how the roadbed could have been made level across that slope without making a supporting embankment. This claim rests on nothing but the say-so of expert witness Glatfelter, who points to old USGS topographical maps dating back to the 19th century as showing exactly the same elevation as his modern gps reading of 265 feet above sea level. There is no such equivalency of measurement accuracy. Methods for determining altitude were far less accurate prior to the invention of the barometric altimeter in 1928, and the advent of GPS in 1973, so exact comparisons of elevation before and after the building of 48th Street are not possible. Even the USGS website says, with regard to modern topographic maps and handheld gps devices:

The inherent accuracy limitations for USGS topo maps is typically about +/- half a contour interval although it can be worse than this in steep or heavily vegetated areas. This is much better than delivered by most GPS handhelds, in which elevations can err by several tens of meters.

(Half a contour level on the map below would be 5-10 feet.) It also proves nothing to claim that the elevation of the 48th Street curb grade has not changed since the 1940's. The road, and the embankment that supports it, predate the 1940's by several decades. There is also no support for the claim that the BHMP rests on "in situ" soil. Valor has submitted no soil sample report by which the Commission could determine whether the soil there is natural, or compacted fill as would be normal in a roadbed embankment. (See DC DOT Standard Specifications for Highways & Structures (2013) at p. 100).

In sum, a level roadbed cannot be constructed across a steep slope without either a road cut on the uphill side, or an embankment on the downhill side. CRD's photographs show no road cut, but a wide embankment which runs across the level roadbed of 48th Street and then over level ground 28 feet to a retaining wall. Taking its measure at such an artificially raised elevation contravenes Subtitle B, §307.7. An expert witness's opinion like Mr. Glatfelter's, given in "conclusory terms" with "no factual elaboration," and not in accordance with accepted standards, is not a basis for reasoned decision-making. Etheridge v. District of Columbia, 635 A. 2d 908, 917-918 (D.C. 1993).

In its latest submission, Valor is reduced to making some new, but meritless legal arguments.

In the first place, Valor's reliance on Subtitle B §307.1 and §307.5 as entitling it to choose "any front" of its building for its height measuring point is not the issue. The issue is whether §307.7 prohibits Valor from using its 48th Street "front" because 48th Street rests upon an artificial embankment. Valor cites no authority to support its claim that the embankment rule of §307.7 was established to address only the case of railroad bridges, overpasses and the like. No such limitation appears in §307.7. On its face, the rule applies to any "embankment." There is no ambiguity that would justify speculation as to the intent behind the rule in order to interpolate of some unwritten limitation to its application. The definition of "embankment" in Webster's Unabridged Dictionary, which applies here under Chapter 11, §199.2 (g), is as follows:

**Em-bank-ment**...n. 1. a bank, mound, dike, or the like, raised to hold back water, carry a roadway, etc.

CRD's photographs show that there is a substantial embankment on the downhill side of 48th Street which carries both the sidewalk and the roadway. (See photo below.) As §307.7 states, where the "curb grade" has been artificially changed by an "...embankment, ramp, abutment, excavation, tunnel, or other type of artificial elevation or

depression...” the measuring point for a building’s height can only be determined by following the alternative methods described in §307.7. That puts the proper BHMP on the Ladybird’s Yuma Street front.

In the second place, Valor’s reference to the definition of “natural grade” in Subtitle B §100.2 is irrelevant here, because the term “natural grade” is not used in §307.7. The operative term in §307.7 is “curb grade.” Within §307, the term “natural grade” is only used in provisions that govern the measurement of height for buildings limited to 40 feet (§307.2) and buildings removed from lot lines by a distance equal to their height (§307.6). Reference to the definition of “natural grade” in §100.2 therefore cannot be used to control the meaning of §307.7 with respect to the consequences to such specified features as embankments, ramps, abutments, etc., affecting “curb grade.”

Moreover, even the definition Valor relies upon in §100.2 for the term “natural grade” expressly excludes “berms” from the two-year limitation Valor would like to see applied. The rule says that the “...natural grade may not include manually constructed berms or other forms of artificial landscaping.” A berm is exactly what we have in this case.

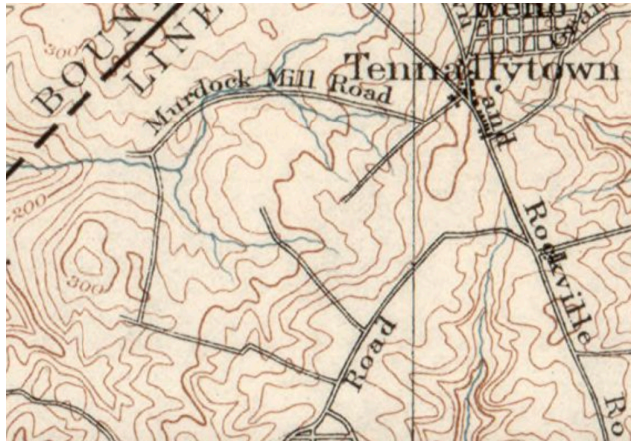
A **berm** is defined in Webster’s Unabridged Dictionary as, inter alia, “...any level strip of ground at the summit, or sides, or along the base, of a slope.” The 48th Street embankment shown by CRD’s photographs is exactly that, viz., a level strip of ground artificially made, and landscaped with grass and trees, at the summit of the slope which extends down to the old Superfresh store. We note that §307.7 has no limit on how old such features may be.

CRD has made a *prima facie* case for the applicability of §307.7. On the other hand, Valor, which bears the burden of proof, has failed to give the Commission the evidence it would need in order to make a rational finding that “no such embankment exists.”

### Conclusion

Changing Valor’s measuring point would lower the height of its enormous building (79 1/2’ high at the back end) by one floor, and thus enhance compatibility with the surrounding grid of houses and shops. We urge the Commission to examine carefully the evidence below, which includes: (1) the embankment viewed from Yuma Street; (2) the old USGS topographic map showing the continuous slope before the construction of 48th Street; and (3) a full aerial view of the 48th Street embankment.





Detail from U.S. Geological Survey of the District of Columbia, topographic map, published in 1886, in the Library of Congress

