

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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ZONING COMMISSION

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PUBLIC MEETING

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IN THE MATTER OF:

Text Amendments to
Neighborhood Commercial
Overlay District: Limitation
for Eating or Drinking
Establishments.

Thursday,
July 18, 2002

Hearing Room 220 South
441 4th Street, N.W.
Washington, D.C.

The Public Hearing of Case No. 02-06 by the District of Columbia Zoning Commission convened at 6:30 p.m. in the Office of Zoning Hearing Room at 441 4th Street, N.W., Washington, D.C., Carol J. Mitten, Chairperson, presiding.

ZONING COMMISSION MEMBERS PRESENT:

- | | |
|-----------------|---------------|
| CAROL J. MITTEN | Chairperson |
| ANTHONY J. HOOD | Vice Chairman |
| PETER MAY | Commissioner |
| JOHN PARSONS | Commissioner |
| JAMES HANNAHAM | Commissioner |

COMMISSION STAFF PRESENT:

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WASHINGTON, D.C. 20005-3701

Alberto P. Bastida, Secretary, Zoning Commission

OFFICE OF ZONING:

Sharon Sanchez

OFFICE OF PLANNING:

Jennifer Steingasser
Karen Thomas

D.C. CORPORATION COUNSEL

Alan Bergstein, Esq.

APPEARANCES:

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PROPOSED ACTION 5
 (Z.C. Case No. 02-06 - Text Amendments to Neighborhood
 Commercial Overlay District: Limitation for Eating or
 Drinking Establishments)

Presentation by Office of Planning 7

Reports of other government agencies (None)

Reports of organizations and 26
persons in support

Reports of organizations and 36
persons in opposition

P-R-O-C-E-E-D-I-N-G-S

6:30 p.m.

CHAIRPERSON MITTEN: Good evening, ladies and gentlemen. This is a public hearing of the Zoning Commission of the District of Columbia for Thursday, July 18th, 2002. My name is Carol Mitten. Joining me this evening are Vice Chairman Anthony Hood and Commissioners Peter May, John Parsons and James Hannaham.

The subject of this evening's hearing is Zoning Commission case number 02-06. This is a request from a text amendment to section 1302.5 of the Zoning regulations to provide uniform procedures for determining the limitations that apply to eating and drinking establishments in the neighborhood commercial overlay districts.

Notice of today's hearing was published in the D.C. Register on May 17th, 2002, and in the Washington Times on May 31st, 2002.

This hearing will be conducted in accordance with the provisions of 11 DCMR, Section 3021, which are the procedures for rulemaking hearings.

Copies of today's hearing announcement are available to you and are located on the table near the door where you came in.

The order of procedure will be as follows. Preliminary matters followed by the presentation by the Office of

1 Planning. Reports of other government agencies. Reports of any
2 ANC's, organizations and persons in support. Organizations and
3 persons in opposition.

4 The following time constraints will be maintained
5 in this hearing. Organizations will have five minutes and
6 individuals will have three minutes.

7 The Commission intends to maintain these time
8 limits as strictly as possible in order to hear the case in a
9 reasonable period of time. The Commission reserves the right to
10 change the time limits for presentations if necessary, and notes
11 that no time shall be ceded.

12 All persons appearing before the Commission are to
13 fill out two witness cards. These cards are also located on the
14 table near the door. Upon coming forward to speak to the
15 Commission, please give both cards to the reporter, who is
16 sitting to our right.

17 The decision of the Commission in this case must be
18 based on the public record. To avoid any appearance to the
19 contrary, the Commission requests that persons present not engage
20 the members of the Commission in conversation during a recess or
21 at any other time.

22 The staff will be available throughout the hearing
23 to discuss any procedural questions, so you can direct those
24 questions to Mr. Bastida or Ms. Sanchez.

25 Please turn off all beepers and cell phones at this

1 time so as not to disrupt these proceedings.

2 And at this time we will consider any preliminary
3 issues. Mr. Bastida, do we have any preliminary matters?

4 SECRETARY BASTIDA: The staff has no preliminary
5 matters, Madam Chairman.

6 CHAIRPERSON MITTEN: Thank you. So we'll move
7 right into the presentation by the Office of Planning.

8 MS. STEINGASSER: Good evening, Madam Chair and
9 members of the Commission. Since you have -- in the interest of
10 time, we had thought about just briefly highlighting our
11 recommendations.

12 And Mr. Nate Gross is here, who was our consultant
13 on this, having been the Office of Planning staff person that was
14 involved with this case when it was originally adopted. And he
15 was prepared to give a bit of context, since only one
16 commissioner is still sitting from the Commission that had
17 adopted that.

18 Would you like us to go into more detail in our
19 report or --

20 CHAIRPERSON MITTEN: I think we've all had a chance
21 to read it. Is there anyone who needs sort of a little overview
22 or shall we just go into -- I mean, do you want to have Mr. Gross
23 come up?

24 MS. STEINGASSER: Right. I thought that would be
25 best.

1 CHAIRPERSON MITTEN: Let's do that.

2 MS. STEINGASSER: Basically, as the -- while he's
3 approaching the table, as the Commission has seen, I think many
4 of the proposals that were originally made in the submission by
5 the Department of Consumer and Regulatory affairs that the
6 Commission had been concerned about were subsequently withdrawn.

7 And so in the advertised text, we basically
8 addressed ourselves to the clarification of the ground floor
9 level, eliminating the language about the accessory uses of
10 gasoline stations and grocery stores. Clarified the street
11 frontage and street -- street square footage and street frontage
12 language, and clarified the three-year time period and so that --
13 and that's relatively simple and, I think, speaks for itself as a
14 recommendation.

15 So why don't I turn it over to Mr. Gross to do a
16 little bit of a context on this?

17 CHAIRPERSON MITTEN: Thank you.

18 MR. GROSS: Thank you. Good evening, Madam Chair
19 and members of the Commission. I'm Nathan Gross, residing --
20 state planner residing at 4424 Alton Place, Northwest.

21 As Ms. McCarthy mentioned, in the mid-1980's, I was
22 working on the zoning staff at the Office of Planning. And I
23 believe several factors converged to bring about the creation of
24 the neighborhood commercial overlay zones.

25 One was that the office did a planned use and

1 zoning study of the Connecticut Avenue corridor, from Florida
2 Avenue to the District boundary. And several map amendments came
3 out of that.

4 And the same time, at the Cleveland Park commercial
5 area, there was a proposal for a major redevelopment that would
6 have involved a PUD and a highrise hotel and, I think, an office
7 building.

8 And coming out of that, the Cleveland Park
9 residential historic district wound up being extended into the
10 commercial historic district, because that was considered out of
11 scale with the commercial character.

12 And the Woodley Park area, there was some concern,
13 especially with eating and drinking use, because you had the two
14 large hotels right across the street from the small commercial
15 pocket at the Woodley Park metro station, the Sheridan and the
16 Shoreham being there. And they had a very nice collection of
17 restaurants, but they felt it was in danger of kind of
18 overwhelming the area.

19 And I believe that the original proposal from
20 Cleveland Park citizens was a straight re-zoning from C2A to C1.

21 And at about that time, myself and a couple of others had been
22 to a zoning institute in San Francisco, where there was a
23 briefing on their neighborhood of commercial overlay zones.

24 And we suggested to the citizens a compromised
25 approach, instead of a down zoning fight and so on, to try to do

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1 some things to enhance these pedestrian oriented commercial
2 districts.

3 So the key provisions, and this is a broader
4 context than the eating and drinking, but the required ground
5 floor retail use continuity, so that you wouldn't get a dead
6 spot, then a loss of business activity, ground floor.

7 A list of pedestrian oriented retail uses,
8 recognizing that while most of the commercial strips in the city
9 allow automobile dealerships, car washes, gas stations and so on,
10 that in these few areas that still have your small scale
11 pedestrian oriented retail uses, maybe to try to preserve that
12 scale.

13 Along with that, prohibition on driveways through
14 the street frontage so you don't get a lot of driveways breaking
15 up the continuity of businesses. Instead, require the access
16 from the alley at the rear.

17 And then, finally, the 25 percent limitation on
18 eating and drinking establishments. And then, lastly, special
19 exception to deviate, recognizing that these are more detailed
20 zoning requirements than you usually have. So a variance would
21 be kind of an unfair imposition.

22 So the focus of this case being on the eating and
23 drinking establishments -- at the time, San Francisco's
24 regulations were being advertised, but weren't adopted. And they
25 had -- they had 14 of these, with two standards, most of them 25

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1 percent limit on eating and drinking and two where it's 30
2 percent because they were already over the 25 percent.

3 And in research, the Office of Planning found in
4 the two initial cases that Cleveland Park had 19 percent of the
5 street frontage as eating and drinking, and Woodley Park at 3
6 percent. So the 25 percent standard was used.

7 Comment on that approach. I think the Zoning
8 Commission and OP liked the street frontage approach because it's
9 so much simpler than dealing with square footage of the use. You
10 can take a base map and just your Sanborn or your base atlas will
11 have all the dimensions you need.

12 And it's not intended to be an extremely fine-
13 grained standard in which you're dealing with noxious uses. I
14 mean, these are not undesirable uses at all. It's just the
15 feeling was that you don't want your retailer to be too dominated
16 by higher rent paying eating and drinking establishments and
17 price out a greater diversity of neighborhood retail and service
18 establishments. So you had a kind of a streamlined enforcement
19 mechanism by using just the street frontage.

20 Just by way of general background, I have just a
21 couple of other comments on enforcement ideas. And I don't claim
22 any great knowledge about enforcement.

23 But one thought would be, since the mapping
24 approach and very simple field work could help here, perhaps an
25 annual kind of a map exercise, with OP and DCRA cooperating,

1 could be a good thing. I mean, DCRA obviously has to monitor
2 these as permit applications come in and out.

3 But Woodley Park and Macomb was concentrated on
4 both very small geographically -- Cleveland Park is somewhat
5 bigger.

6 But when all you're doing is marking whether it's
7 an eating or drinking use and then not an eating or drinking use,
8 and the base percentage of the total linear frontage doesn't
9 change numerically, it isn't such a big exercise to do that. And
10 that might be one thought.

11 The other thought would be with fuller staffing at
12 DCRA, at the zoning administrator's office -- and for some
13 reason, reasonable staffing never seems to come about -- you
14 might have one staff person whose part-time work is to become
15 more familiar with overlay zones in general than everybody else.

16 And then when a permit comes in on an overlay zone, that person
17 is always involved. But that's for the day when there's better
18 staffing.

19 I think I have -- I think one third comment is that
20 originally the first three zones, and I think those are really on
21 the table because the 8th Street overlay has a 50 percent limit
22 one eating and drinking and I think that won't be reached for
23 quite a while.

24 Originally, there were three separate zones. And
25 in rulemaking, at a certain point, they were combined and certain

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1 standard provisions and all of them were put in there, and then
2 certain deviations for each one.

3 I believe the intent was to minimize duplication in
4 regulations, but in some respects it might be better to have a
5 little more duplication and a little more simplicity for the
6 enforcement people. Because I think some of the cross-references
7 that came about, the way it's restructured, may be a little bit
8 confusing.

9 I -- if time permits, I'll -- if you leave the
10 record open, I'll put in some suggestions on some simplifications
11 of text that might help a little bit on people readily digesting
12 the zone, the public and people who've had to enforce this in the
13 middle of a flow of other permit applications.

14 I did call the San Francisco planning staff and
15 looked at their website as to their current regulations within
16 the past weeks. Spoke with Jim McCormack there. It happens on
17 the question of the timing requirement and the vesting -- or
18 whatever it's called, the discontinuance period -- it happens
19 that they use a three-year rule also, that they allow an existing
20 eating or drinking use a three-year period to find another
21 replacement eating or drinking use. After that time, the rights
22 are lost.

23 In that contest, it turns out that upon adoption or
24 amendment, at some point they no longer have the kind of
25 formulation that we have with the percentages. They have three

1 categories. This is just from looking at the website.

2 They have commercial districts where additional
3 eating and drinking is sort of prohibited, or presumably they've
4 gone over the limit and they want those where it's just a special
5 exception and others where there's no indicated limitation.

6 And so I asked Mr. McCormack, in the prohibited
7 areas where you absolutely don't want any more, do you still
8 allow the three-year period? And he said yes.

9 I mean, I think the implication there is that there
10 has been one issue here in discussions between citizens and DCRA
11 of wanting to be aggressive on a rollback, where presumably now,
12 at least in one, maybe two of the areas were actually over the
13 limit.

14 And his -- what he was saying was, San Francisco
15 does not -- in the areas where they're already kind of over
16 whatever limit they have -- they don't try to forcibly roll it
17 back. If the owner can find a replacement use within the three-
18 year period, fine. If they don't find it in three years, they
19 lose their rights.

20 And basically, those were the only kind of general
21 comments I had, Madam Chair.

22 CHAIRPERSON MITTEN: Thank you.

23 MR. GROSS: I'll be happy to answer any questions.

24 CHAIRPERSON MITTEN: Thank you. Any questions for
25 Mr. Gross or for Ms. McCarthy about the Office of Planning

1 report?

2 One of the questions that I had was originally when
3 the measures were done to determine what the threshold was, to
4 decide whether the 25 percent was going to capture the existing
5 circumstance, it wasn't already over the 25 percent when this was
6 all being considered originally.

7 Whatever methodology that was used to make those
8 measurements, is that consistent with the language that's been
9 proposed? Or was there some other methodology that was used at
10 that point?

11 MR. GROSS: I think what has been added is the
12 doublecheck with the CFO. I think originally, we simply relied
13 on field work and a base map that had the dimensions along the
14 street frontages. Calculated the total street frontage as the
15 denominator and then eating and drinking as the numerator. I
16 think it's -- I think it's a good thing to add the double check
17 of the CFO.

18 CHAIRPERSON MITTEN: Okay. I did have a question
19 for the Office of Planning. On page -- let's see -- I think this
20 is on page 7 of your report, Section 1302.5 (g)(1), where it
21 makes reference to if the space has remained vacant for a period
22 of three years or less.

23 And given that there's nothing, there's no overt
24 thing that happens when space is vacated, how do we know when the
25 clock started ticking? Or how will we know, or do you have any

1 suggestions, for how we would know what should happen there?

2 I mean, certainly, we would capture it if we were
3 able to take Mr. Gross' suggestion about having an annual report
4 done, but that might mean that if a space is vacated one month
5 after they did the annual report, then 11 months would go by
6 before you'd pick it up. Do you have any thoughts on that?

7 MS. STEINGASSER: Yes, ma'am. We have discussed an
8 option that the -- excuse me -- that a property owner upon the
9 vacancy could file a letter or some statement of intent with the
10 Department of Consumer and Regulatory Affairs, initiating,
11 stating their intent to initiate that three-year period. And if
12 any CO came in for a vacated property for eating -- an eating
13 establishment -- and that letter or the statement was not on
14 file, they would not be eligible.

15 CHAIRPERSON MITTEN: Okay. How would we -- how
16 will we capture that? How will we capture that device? Is that
17 just going to be a practice of DCRA or --

18 MS. STEINGASSER: No. I think we would have to
19 craft an additional section. Because the topic did come up in
20 discussion, but it was after the OP report had been filed.

21 And I think it would have to be crafted in such a
22 way that made it very clear in the regs that this provision,
23 because it would be a trigger that would move a use from
24 permitted to special exception, that it would need to be in the
25 regulations. And it would be something we would be happy to try

1 to draft --

2 CHAIRPERSON MITTEN: I think -- for us to take a
3 look at it, just to -- at least to react to it.

4 PARTICIPANT: Right. This was something that came
5 up in a subsequent discussion with the Office of Corporation
6 Counsel, because that issue had troubled us, too, and is
7 certainly the case, as you know, many times with nonconforming
8 use, is how do you really know when the original use was vacated?

9 We'd be -- we would want to say clearly for the
10 record that it would not be confused with retreating in terms of
11 section -- is it 2045 -- that we would -- 2005. We would not be
12 retreating from what the Zoning Commission had established as a
13 precedent that is described in footnote number 1 on page 5 of
14 our report, that there is some legal document about intent to
15 abandon.

16 CHAIRPERSON MITTEN: Right.

17 PARTICIPANT: And the Zoning Commission went in to
18 adopt a 2005, wished to -- repudiate's to strong a word -- but
19 wished to differentiate or to establish that it was not -- it was
20 setting another standard.

21 So we would want to be clear that the record show
22 that that proposal not be going back to the notion that, oh,
23 somebody had to show an intent to abandon, but merely that the
24 commission would be adopting that as a housekeeping measure or as
25 an implementation measure, just to make it easier for the zoning

1 administrator to know that a use had been abandoned.

2 And I guess our proposal would be, since that just
3 came up in the conversation with the Office of Corporation
4 Counsel, we would work with them to draft something in
5 conjunction with the zoning administrator, because you clearly
6 want something that is as easy as possible for CRA to
7 administrator.

8 CHAIRPERSON MITTEN: Right. Okay. Just sticking
9 with 1302.5(g), the second point there, I'm just going to read
10 (g) with 2. So it says, "Whenever the linear street frontage
11 devoted to existing eating or drinking establishment use equals
12 or exceeds the applicable percentage limitation, no new
13 certificates of occupancy may be issued for the expansion of an
14 existing eating or drinking establishment occupying the ground
15 floor level of a building."

16 And what I wanted to ask you is, is that without
17 regard to whether or not the street frontage changes? So we have
18 -- let's say we're right at 25 percent and so the street frontage
19 requirement is met, but somebody wants to, you know, take --
20 break through a wall at the back and make -- you know, get more
21 seats in their restaurant, but it doesn't affect the actual
22 street frontage?

23 PARTICIPANT: Well, that's a good question. I
24 invite my colleagues -- I think I did -- if they have an
25 alternative idea.

1 I think -- and, you know, Mr. Gross, correct me if
2 Im wrong. But we know that the reason that the focus had been on
3 street frontage was because of this importance of getting
4 diversity of retail and not letting other retail be crowded out
5 of neighborhoods. And the recognition that for almost any kind
6 of retail, other than maybe, you know, hair salons that can
7 operate from second stories or that sort of thing, for most other
8 kinds of neighborhood oriented retail, the street frontage is
9 critical for determining whether it's viable to operate.

10 So to that extent, I think if it doesn't change the
11 street frontage, my off-the-top-of-my-head answer would be that
12 it probably doesn't make a difference.

13 And I guess one thing would depend on whether the
14 Commission wanted to get into any of the other adverse impacts
15 that have been mentioned over the years from eating and drinking
16 establishments, in terms of generating parking demand and other
17 things.

18 CHAIRPERSON MITTEN: Right.

19 PARTICIPANT: But as I recall, and I think you
20 substantiated that also, Mr. Gross, that the primary concern was
21 diversity of neighborhood delving retail and not some of the
22 other adverse consequences --

23 MR. GROSS: I would agree -- and I think that
24 reinforces the point that the linear street frontage and picking
25 a percentage recognizes from the beginning, that this is not a

1 precise thing.

2 The idea is just, you know, a rolling cap that --
3 and then over that, you can have special exception and who knows.

4 I mean, it's not as if every special exception
5 would be viewed as a bad thing necessarily by the neighborhood.
6 There's some situations where a dead space or a not particularly
7 desirable service or retail use has been replaced by a restaurant
8 that people want.

9 And so recognizing all of that, I think dealing
10 with the street frontage and not trying to be real precise about
11 number of tables, square footage and so on, is a very reasonable
12 way to deal with it.

13 CHAIRPERSON MITTEN: Let me ask you, Mr. Gross. I
14 don't know if this is a subject that came up when you were
15 talking to Mr. McCormack in San Francisco, but has anything --
16 any kind of weird contrivance evolved there where people will
17 avoid occupying the actual street frontage, but take space, you
18 know, ten feet behind the street frontage and really effectively
19 preclude that space from being used for what is thought to be the
20 intent -- or what is the intent here?

21 MR. GROSS: Yeah.

22 CHAIRPERSON MITTEN: Did you discuss that with him?

23 MR. GROSS: That didn't come up, Madam Chair. And
24 I think -- I expected to actually learn more from their
25 experiences over the years.

1 And I think the reason -- the reason there wasn't
2 more that was more relevant to our enforcement issues is probably
3 that, A, they have such a very large planning staff that are all
4 over these areas and all over all neighborhoods, and planning and
5 enforcement staff.

6 And then secondly, when your choice is just special
7 exception or it's prohibited, you know, the kind of things that
8 we're dealing with, with the matter of right cap, then a special
9 exception may not come up as much.

10 CHAIRPERSON MITTEN: All right. Okay. Let's see.

11 I did have one other question. And I don't know who can answer
12 this, but my understanding of the public space rules are that you
13 may not occupy public space for, say, an outdoor café unless you
14 occupy the adjacent frontage. Is that correct or is that
15 incorrect? The adjacent frontage of the building so that
16 somebody can't come along and --

17 Let's just say that they had -- not to say that
18 this is an efficient way to operate a restaurant -- but say you
19 had an entrance and then it was a second floor restaurant, but
20 then -- and you did not occupy the frontage on the first level,
21 but you decided you wanted to have an outdoor café. Could you do
22 that if you didn't occupy the adjacent ground floor space?

23 MR. BERGSTEIN: I actually know the answer, so --

24 CHAIRPERSON MITTEN: Okay. Well?

25 MR. BERGSTEIN: The answer is no under the sidewalk

1 café rules.

2 CHAIRPERSON MITTEN: Okay.

3 MR. BERGSTEIN: For what it's worth, there was
4 legislation that was enacted several years ago to allow persons
5 to occupy the public space, even if they weren't the abutting
6 property owner. But that legislation has been used for persons
7 to occupy the underground space with conduit or possibly the
8 personalized pavers that you see in front of MCI Center.

9 So because those types of uses presented
10 themselves, there was a need to amend the existing laws to allow
11 the rental of public space to persons who didn't occupy -- who
12 weren't adjacent property owners. But for sidewalk cafes, you
13 had to have that nexus.

14 CHAIRPERSON MITTEN: Okay. Great. Thank you. All
15 right. Any other -- anyone else have any other questions for the
16 Office of Planning? Okay. Thank you for the trip down memory
17 lane.

18 I would just like to suggest that based on the
19 additional input that we got from the Office of Planning, if
20 anyone would like to comment on the proposal that was made about
21 an owner have to declare their intent to maintain a use for the
22 period of three years and having to overtly do that, if you'd
23 like to comment on that provision that was suggested by the
24 Office of Planning, please do so when the opportunity presents
25 itself.

1 All right. Anyone representing any other
2 government agency that would like testify? All right. Anyone
3 here representing any ANC? Anyone here from the ANC, any ANC?

4 All right. I have a list of witnesses that
5 everyone might not be on it, so we'll just use the list and then
6 work through anyone else in the audience. I have two folks on
7 the list in support and we'll call them up first. We have
8 Lindsley Williams and Ruthanne Miller. So if you'd like to come
9 to the table and hand your witness cards to the court reporter,
10 which I'm sure --

11 Okay. Well, why don't you fill them out while Mr.
12 Williams testifies, then you can turn those in. And if -- I see
13 you're just here on your own?

14 MR. WILLIAMS: Absolutely on my own.

15 CHAIRPERSON MITTEN: Well, we welcome you.

16 MR. WILLIAMS: And I requested that you hear this
17 as a term I sort of crafted -- basis --

18 CHAIRPERSON MITTEN: Yes, that's good.

19 MR. WILLIAMS: -- for all the reasons that are set
20 forth, and I won't read through them. And I'd like to take the
21 first opportunity to say thank you for having the hearing, the
22 second opportunity to pick up on the theme you introduced just a
23 minute ago, to comment on the proposal about having to give
24 notice of intent to use the three year.

25 CHAIRPERSON MITTEN: Yes.

1 MR. WILLIAMS: And on that, this is as quick as
2 some of the other things that have been grabbed out of the
3 suggestion box.

4 But my sense is, it's probably something to be
5 thought about, but not to be required the day that a place
6 vacates. Because most retailers will be able to complete the
7 arrangements to get somebody else in, in relatively short order.

8 And so the need to have to make a declaration the
9 old tenant goes out in order to secure the rights to that three
10 year run makes no sense to me.

11 Rather, it would seem to me that if there is a -- a
12 certain period of time has elapsed, and I'm going to grab two
13 years -- and if you haven't succeeded, in order to preserve your
14 rights all the way through three, you better document when the
15 vacating occurred, and that you need this additional time, or
16 else there's something that becomes a little troublesome.

17 But I wouldn't want to see a situation where every
18 time there's a turnover, DCRA gets a piece of paper it doesn't
19 know what to do with.

20 CHAIRPERSON MITTEN: Okay.

21 MR. WILLIAMS: That's a quick reaction to that.

22 CHAIRPERSON MITTEN: Okay.

23 MR. WILLIAMS: The next thing I would like to
24 comment on very briefly in memory lane, and John may remember
25 this as well, is that among the other issues discussed in the

1 Woodley Park overlay -- and Nate was reviewing the history of the
2 case and so on.

3 But in the Woodley Park area in particular, I
4 remember distinctly agonized testimony on the part of the people
5 that lived immediately east of the alley that runs along
6 Connecticut Avenue, separating Connecticut Avenue from Woodley
7 Place in the -- I think it's the 2600 block -- the block just
8 north of Calvert -- who had any number of instances of
9 difficulties with the restaurateurs whose late night operations
10 and trash arrangements were not handled in a manner that they
11 found satisfactory. That's, I think, quite an understatement as
12 a summary.

13 So there were those factors that go to the
14 acceptability of the use in general. But we did get the cap out
15 of it and that's what we're here to talk about.

16 And what I did, Madam Chair, having said that I'd
17 like to give you some remarks, is prepare a long stream of
18 observations and suggestions. And there is absolutely no way I
19 can even begin to summarize that in three minutes. But I would
20 be happy to have you look them over at your leisure.

21 The principal points that I would make are the
22 three-year rule is something that was designed when the
23 Commission heard that case, to deal with situations when the
24 owner of the property failed to act in a good faith effort to get
25 somebody else to come in thereafter.

1 It was not designed to cover a situation where the
2 government and others external to the owner were considering a
3 situation. They looked at this way, they looked at it that.
4 Time's a running. And that's outside of the control of the owner
5 and is completely beyond the scope of what was contemplated in
6 that abandonment situation.

7 And I think in this particular case, knowing some
8 of the issues, I would think it would be extremely unfair to
9 simply say three years going back to some time two, three, four
10 years ago now, when a property became vacant for any number of
11 reasons and various things happened. It just would be squarely
12 unfair and improper.

13 I also comment on the question of accessory uses,
14 but my essential message to you there is, don't go there.

15 I've also identified, in a fashion that you
16 probably won't find entirely surprising, a number of other what I
17 will call opportunities for creative interpretations, that could
18 create tensions that might be resolved if you and the staff look
19 at them.

20 And finally, Madam Chair, and this is, I think, the
21 most important point of all of them, and it's new to this forum.

22 And that is to see whether or not this regulation as it was
23 drafted, this regulation as it would come to be changed, and
24 prospectively a host of others, are within the capabilities of
25 DCRA, in terms of the resources they have available to them, that

1 are allocated to them, and that are applied to the job.

2 Can they do the job? Because if we sit here and
3 design regulation after regulation -- three tree and slope
4 regulations. I can't believe it. Three of them, not one. This
5 overlay. Another one, another one. It's no wonder that they are
6 at risk of being confused. I'm confused.

7 And with all due respect, I think at times even the
8 learned staff of OP, and perhaps even the Commission
9 occasionally, has trouble figuring out what did we do.

10 And so my point here is to think about having --
11 I'm going to call it an administrative regulatory impact
12 statement. Now that's way too high falutin' a term.

13 But the real question is, can they figure out what
14 you want? Can they suggest ways that will make it more sensible
15 and doable, so that we don't have a great hope and then a big
16 collapse? Please read it over --

17 CHAIRPERSON MITTEN: That's a very sound
18 recommendation.

19 MR. WILLIAMS: Please read it over. I'd be
20 delighted to answer any other questions you have.

21 CHAIRPERSON MITTEN: Thank you. Thank you. If you
22 would hold your seat. Then we'll have Ms. Miller testify and
23 then we'll ask both of you questions.

24 So please feel free to proceed. You need to turn
25 on the microphone. And you'll have -- Ms. Miller is representing

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1 the Cleveland Park Historical Society, so she'll have five
2 minutes.

3 MS. MILLER: Okay. I don't think that I will
4 actually take the five minutes, but we'll see.

5 CHAIRPERSON MITTEN: Could you introduce yourself
6 to the record first?

7 MS. MILLER: Yes. My name is Ruthanne Miller. I
8 am currently holding the position of vice president of Cleveland
9 Park Historic Society for legal and regulatory affairs.

10 Cleveland Park Historic Society has about 650
11 current members, that are both merchants and households. I --
12 prior to this position, I was ANC commissioner for Cleveland Park
13 and also chair of any 3C.

14 So during the past three years, I've been very well
15 exposed to this issue. And it's a very contentious one in our
16 neighborhood.

17 And the testimony that I want to present is -- goes
18 to the point that we would like these regulations to be as clear
19 as possible, so we don't have this contention in our neighborhood
20 any more, and that we don't have the business stagnation that's
21 occurred, especially with respect to eating and drinking
22 establishments.

23 And when I looked over the proposed regulations, in
24 our view they were -- they went a long way to clarifying, but not
25 far enough. And therefore, in my testimony I recommend that you

1 define what is an eating and drinking establishment and not leave
2 it so much up to interpretation, as clearly as you can.

3 Cleveland Park has all sorts of types of eating and
4 drinking establishments. And therefore, if you can say an eating
5 establishment includes delicatessens, cafes, coffee shops -- yes
6 or no, does it include bakeries? Does it include convenience
7 stores, which I would not -- which we would say it should not.

8 But what's been happening in our neighborhood is
9 that some people are saying a health food store that happens to
10 sell prepared sandwiches is -- should be covered by this
11 provision, and other people are saying it should not.

12 In my written testimony, I include excerpts from
13 the original hearing, in which the testimony seems to go towards
14 bars and restaurants. However, I understand that other problems
15 arise over the years where you may want to extend it further. I
16 mean, this is bars, restaurants, delicatessens and eating
17 establishments, similar types of eating establishments.

18 But in any event, at some point you should look at
19 the eating establishments that are there and say, okay, the movie
20 theater sells popcorn, but that's not an eating establishment.
21 Or the pizza place, you know, has more carry out than pizza.

22 It's just they're there. You have to make -- there
23 has to be a measurement done now anyway. Somebody's got to be
24 making the determination, whether that type of eating
25 establishment does or does not fall within the regulations.

1 So when that determination is made, I would suggest
2 that you write it out. Okay, yes, bakeries are counted. That's
3 why we measured the linear frontage of this particular place and
4 included it.

5 Uncertainty is really what's been the greatest
6 problem, I'd say, in Cleveland Park.

7 The other question is, that we go to in the
8 testimony, about vacancies. Should they be grandfathered, vacant
9 areas that used to be eating establishments? And we believe that
10 you should strike a balance here as to what is fair, and in doing
11 so, consider what will be the impact on overlay, if it's counted,
12 and what won't be.

13 For instance, if you count a vacant space that was
14 an eating establishment in the whole scheme of things, and the
15 number comes to 26 percent, and a business bought that building
16 relying on using it as an eating establishment, then the balance
17 may shift towards allowing that space to be used for an eating
18 establishment.

19 On the other hand, if you make your measurement and
20 it comes out to 40 percent, and that seems to us to go well
21 beyond the intent of the regulations, and then in that case you
22 might not want to allow the grandfathering of vacant spaces.

23 So that about summarizes it.

24 CHAIRPERSON MITTEN: Did you have some written
25 testimony that you wanted to submit to us?

1 MS. MILLER: I do. And part of the reason I was
2 late was I didn't complete Xeroxing my last attachment.

3 CHAIRPERSON MITTEN: Okay.

4 MS. MILLER: Would you like me to submit it all
5 together tomorrow or --

6 CHAIRPERSON MITTEN: Yeah. I think we'll be
7 leaving the record for, you know, some period of time.

8 MS. MILLER: Okay.

9 CHAIRPERSON MITTEN: So if that would be more
10 convenient for you, to make sure it's all together, that's fine.

11 MS. MILLER: Okay. Thank you.

12 CHAIRPERSON MITTEN: Thank you. Any questions for
13 Mr. Williams or Ms. Miller? Well, we look forward to reading
14 your very thorough submission and we look forward to getting
15 yours.

16 MS. MILLER: Thank you.

17 MR. WILLIAMS: Thank you.

18 CHAIRPERSON MITTEN: Anyone else who'd like to
19 testify in support of the proposed text amendment?

20 All right. We'll move to organizations and persons
21 in opposition. And on the witness list, we have Constance
22 Collins Davis, from Urban Investments Advisors. If you'd come to
23 the table. And Chris Collins. Only one of you is going to get
24 the five minutes, so I'll let you decide who it will be.

25 MS. DAVIS: I think I'm the lucky one.

1 CHAIRPERSON MITTEN: All right. Just -- if you're
2 going to go first, yeah, turn on the microphone. And did you
3 turn in your witness cards for us?

4 MS. DAVIS: We did.

5 CHAIRPERSON MITTEN: Terrific. Okay.

6 MS. DAVIS: Good evening. My name is Constance
7 Collins Davis. I'm the chief operating officer of Urban
8 Investment Advisors, which is the investment advisor and agent
9 for Starwood Urban, LLC.

10 One of the subsidiaries of Starwood Urban is the
11 owner of a property located at 3500 to 3518 Connecticut Avenue.
12 It's owned by Starwood Urban, retail 5. That property was
13 purchased by us in November of 1999. And we have been working
14 since that time on a very substantial renovation of the project,
15 including everything from new roofs and HVAC, to new store fronts
16 and upgraded electrical, water, interior, café improvements as
17 well.

18 And we've been doing all of that in preparation for
19 releasing the property to a combination of eating and drinking
20 establishments, as well as other permitted uses in the Cleveland
21 Park area.

22 When we purchased the property, there were seven
23 eating and drinking establishments at that location, with a
24 combined total of 219 linear feet of ground floor street
25 frontage, in addition to other non-eating and drinking uses.

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1 The eating and drinking uses, in every case,
2 predated the establishment of the neighborhood commercial overlay
3 regulations, which became effective in November of 1989.

4 As part of our renovation of that project, five of
5 the seven eating and drinking uses, with ground floor street
6 frontage, closed and vacated the premises. They vacated between
7 approximately April and September of 2000.

8 We retained two existing restaurants that continue
9 in business today and remained open throughout the renovation
10 process. We can -- we also retained a number of other tenants
11 who were moved in temporary locations as we undertook the
12 renovations.

13 But since that time, we've been in the process of
14 seeking to lease the remainder of the qualifying vacant ground
15 floor linear frontage from other eating and drinking uses, with
16 the remainder of the building devoted to other permitted uses.

17 We understand the concerns of the community
18 regarding the limitations in the 1989 overlay regulations, and we
19 understand that they have potentially been exceeded. But we do
20 believe that the eating and drinking uses at our property
21 predated the enactment of the overlay and that we're essentially
22 grandfathered under the zoning regulations.

23 We have several concerns with the proposed new
24 regulations. They're detailed in another submission that we'll
25 submit with my testimony. Because of the five minutes, I'm going

1 to go to the most important one, in terms of having the greatest
2 hardship on us as property owner. And that's the three year
3 rule.

4 I guess section 13.025(g) states that, "Eating and
5 drinking use may move into a space formerly occupied by an eating
6 and drinking use, provided the space has remained vacant for a
7 period of the years or less."

8 We understand that three year limitation is
9 intended to analogize the grandfather use to a nonconforming use.

10 As our written submission sets forth in greater detail, the
11 three year zoning provisions that deal with nonconforming uses
12 created a presumption of discontinuance if the use is not
13 reestablished within three years.

14 The presumption is a rebuttable one, however, by
15 evidence indicating that there's no intention to abandon the
16 nonconforming use.

17 We understand the D.C. Court of Appeals has held
18 that abandonment of a nonconforming use after three years must be
19 demonstrated by both an intent to abandon and some overt action
20 to abandon.

21 Leasing activities and renovation work of the type
22 that we've been engaged in have typically been held sufficient
23 indicators of no intention to abandon.

24 The restaurants in this overlay are conforming
25 uses, not nonconforming uses, and yet the regulations, if not

1 creating a rebuttable presumption, essentially put us in a more
2 disadvantaged position than we would with a nonconforming use in
3 the same type of overlay.

4 In our particular case, this three year rule has a
5 tremendous impact on our overall project. Five of those uses
6 that we had for eating and drinking we're vacated in mid-2000.
7 That means an absolute three year provision, if adopted in its
8 current form, would cause our uses to expire in mid-2003,
9 somewhere between April and September, depending on the existing
10 space.

11 While we have been actively --

12 CHAIRPERSON MITTEN: Can you try and summarize?
13 And then maybe Mr. Collins can pick up any thoughts that you
14 didn't get to.

15 MS. DAVIS: While we've been actively seeking to
16 re-lease, the fact that these rules are in flux has meant -- has
17 created a tremendous chilling effect on our ability to lease.

18 Tenants spend hundreds of thousands of dollars to
19 build out their space. They're afraid to do so. They're afraid
20 to even negotiate leases if they don't know that they will have a
21 recognized use for a restaurant or eating establishment in that
22 location.

23 We likewise face the same issue. We spent millions
24 of dollars on this project, renovating it for this exact purpose,
25 intended and relying on those grandfather provisions.

1 If we cannot re-lease it, it would be a huge loss
2 to us. And the prospective tenants that we're working with are
3 essentially afraid to continue working with us, or new tenants
4 are very much discouraged from working with us, because there are
5 no clear rules and because our grandfather rights are in jeopardy
6 at this point.

7 CHAIRPERSON MITTEN: Thank you. Mr. Collins?

8 MR. COLLINS: Thank you very much. There's no
9 relation between Constance Collins Davis and Christopher Collins.
10 It's just a happy coincidence.

11 The point that Constance has made is the central
12 issue, although it's not the only issue. And it's one that, with
13 all due respect, I think the Office of Planning has kind of
14 missed the point, the issue of the three years and whether it's
15 conforming or non-conforming.

16 So I think there's no disagreement. Everyone
17 agrees that these uses are not nonconforming. However, the three
18 year rule was adopted or developed by DCRA in an effort to
19 analogize these uses to nonconforming uses. There's significant
20 amount -- more comprehensive package to you -- there's a
21 significant amount of not only case law but administrative
22 interpretations, indicating that the three years is a rebuttable
23 presumption. And the DCRA has allowed --

24 The clock is ticking. You shouldn't be penalized
25 if you're in the middle of renovating or middle of negotiating a

1 lease and the three years is up. And the way the regulation is
2 written now, you're out of luck.

3 So I would urge you to take a look at the
4 significant amount of -- most of our more thick submission deals
5 with that issue and it deals with it very comprehensively.

6 We do have other issues. I'd like to summarize
7 them quickly.

8 The -- on 1302.5(b), the advertised text states
9 that these -- it should be based upon the certified and recorded
10 plats of the surveyor's office.

11 Well, the point is, not all records of the
12 surveyor's office are certified and recorded, but they're still
13 good records. And you shouldn't be able to -- or need to rely
14 only upon the certified and recorded. So there's some language
15 proposed there to how that should be changed.

16 Section 1302.5(c) indicates that the total linear
17 frontage for eating and drinking establishments should be based
18 upon existing records of certificates of occupancy by address,
19 verified through field observations.

20 Well, Constance's testimony has a very good example
21 of why that wouldn't work, because of the use of an address when
22 -- to cover one part of a use, when the whole use actually had
23 two bays, two store front bays in the same building.

24 And when the doorway was only one of the bays, that
25 was the address used, but both bays were occupied. And to use

1 only that one address suggests that only one-half of the bay was
2 actually occupied. Luckily, commonsense prevailed and people
3 were able to look at that issue and make a determination.

4 So we're suggesting that the language should
5 include other records of the DCRA and it's more fully in the
6 submission.

7 CHAIRPERSON MITTEN: Okay.

8 MR. DAVIS: Finally --

9 CHAIRPERSON MITTEN: I'm going to need you to
10 summarize.

11 MR. DAVIS: I will.

12 CHAIRPERSON MITTEN: Thank you.

13 MR. DAVIS: And finally, one point which you
14 raised, Madam Chair, about -- before -- about linear street
15 frontage versus space. 1302.5(g)(1) talks about users intending
16 to occupy the same space vacated by the eating and drinking
17 establishment. To be consistent with the regulation, it should
18 the same ground floor linear street frontage.

19 So in summary, we ask that you please look at all
20 the issues that were addressed here and all the report to us,
21 especially the three year rule, which if it was to be applied to
22 Urban Investment Advisors the way it's written, we are coming
23 clean saying we abandoned -- we vacated spaces in the year 2000.

24 You know, it's not difficult to figure out with
25 this hearing on July 19th, the record will be open for a certain

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1 period of time. It's got to be referred to NCPC, proposed
2 action, finalized action. This may not be finalized until the
3 fourth quarter of this year, simply.

4 And then to be able to say, okay, now we know what
5 the rules are, we can tell our prospective tenants we now have
6 rules, it won't happen. You can't open. You know, from the time
7 you sign a lease or negotiate a lease to opening a restaurant,
8 you know, the three years is gonna run.

9 CHAIRPERSON MITTEN: I understand.

10 MR. DAVIS: And we got a real difficult time.

11 CHAIRPERSON MITTEN: Okay. And we appreciate
12 having, you know, tangible examples of, you know, the worst case
13 scenario, because it helps us understand the consequences.

14 Let me ask you a question because I think it's a
15 legal question and I'm sure at some point we'll be asking Mr.
16 Bergstein for his opinion. But since you're here, we'll ask you,
17 too.

18 MR. DAVIS: All right.

19 CHAIRPERSON MITTEN: Let's just set aside how Urban
20 Investments might be squeezed by the three year rule. Let me ask
21 you a more generic question, which is, I understand that actually
22 section 2005 about discontinuance doesn't tell the whole story
23 because of the case law.

24 So I understand that there has to be this intent to
25 abandon. Do you think that as a legal matter, we can sort of

1 say, we're not -- we're actually not -- whatever DCRA's intention
2 was about the three year rule, we as the Zoning Commission are
3 not trying to have an analogy to the discontinuance provision?
4 We're having our own separate provision as it applies, whatever
5 that provision looks like, hopefully being sensitive to, you
6 know, existing conditions.

7 Do you think that as a legal matter, we can do
8 that? That we can say, we can craft something, whether it's
9 with, you know, some overt statement on the part of a property
10 owner that they don't intend to abandon and maybe having some
11 allowance for the fact that it takes time to renovate and re-
12 lease and so forth?

13 Do you see the provisions for discontinuance as not
14 permitting us to craft something specific to the neighborhood
15 commercial overlay that would, you know, add some flexibility for
16 property owners who are sitting there waiting for the opportunity
17 to lease to an eating or drinking establishment while someone's,
18 you know, not occupying a space that they're sort of holding?

19 MR. DAVIS: Well, if you adopt the regulation as
20 proposed, which I understand is what you're asking, what you're
21 doing is going against a body of zoning law and regulations that
22 have existed not only in this city, but around the country, about
23 uses generally classified. Either it's conforming or
24 nonconforming.

25 Conforming uses are clear. Those are the uses that

1 are permitted in that area. Nonconforming uses are uses that
2 preexisted the regulations. And the intention of the
3 nonconforming use regulations is to, in most all jurisdictions,
4 is to require those uses to -- or to encourage those uses to
5 wither and die over a certain period of time.

6 D.C. and many other jurisdictions have adopted a
7 provision that allows for these nonconforming uses to continue.
8 You can make -- you can make renovations, alterations to
9 nonconforming structures. You can allow nonconforming uses to
10 continue. You generally cannot expand a nonconforming use.

11 But nonconforming uses, there's case law in the
12 District, applying to the District, that allows nonconforming
13 uses to remain if the owner declare -- if there is no overt
14 intention to abandon the use.

15 What you're saying, by adopting the regulations
16 proposed, you're saying, okay, well we're going to carve out one
17 type of use -- actually a segment one type of use. Not all
18 eating and drinking establishments, but only those which are over
19 25 percent. And you have to then figure out which one of these
20 is over 25 percent. Which one put us over the top? If you can
21 do that, then you've got to carve out, okay, which of these are
22 we focusing on.

23 And in Cleveland Park, where the concern is here,
24 my understanding is that the percentages, as talked about, is
25 anywhere between like 24 and 27 percent.

1 The purpose of this regulation is really to get
2 that -- let's call it 27 percent -- is to get that down to 25
3 percent.

4 So how many uses are we talking about? And how big
5 a problem are we talking about? Are we talking about maybe three
6 uses, maybe two uses, that are over -- that would put us below
7 the 25 percent threshold?

8 So what you're doing is you're crafting a
9 regulation to apply to maybe two or three uses in the whole of
10 Cleveland Park and maybe the whole of the entire city. Well, I
11 can't say that because other uses --

12 CHAIRPERSON MITTEN: Okay.

13 MR. DAVIS: So are you carving out one type of use
14 for discriminate treatment? Probably so.

15 CHAIRPERSON MITTEN: Okay. There's two things.
16 And maybe I didn't make my question direct enough. But I don't -
17 - just to your last point -- I don't see this as going back and
18 trying to -- I mean, there is an effect, an attempt to restore
19 the maximum, perhaps. I mean, we haven't -- this is still in
20 flux and we're, you know, there's a lot of very thoughtful
21 submissions that have been made and we intend to review them.

22 But we need certainty for all those places that
23 are, you know, if they're at 20 percent and they're coming up
24 against 25 percent, they have to have a way, DCRA has to have a
25 way, people have to know, how are we going to be counting these

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1 things, you know?

2 And when they get to the last space that's occupied
3 and there's a hardware store down the block and the last
4 restaurant that was occupied then goes out of business, and the
5 guy who's got the hardware store goes out of business, and that
6 property wants to lease to a restaurant. He's sitting waiting
7 for this other person, you know, who has this place holder.

8 So I don't see it as just trying to get the
9 existing condition back under the cap. It really is more -- it's
10 meant to accomplish more than that.

11 But what I asked -- the intent of my original
12 question was can we, through this regulation, whether it's as
13 written or as modified, can we sort of free our minds of the
14 notion of nonconforming use and say, look, we're just -- we don't
15 -- conforming, nonconforming -- we assume they're conforming if
16 they were granted a certificate of occupancy.

17 But what we don't want is we don't want people
18 being able to sit there indefinitely with a place holder, because
19 that doesn't help anybody.

20 So how can we make sure that that doesn't happen?
21 That's what I'm asking you, as a legal matter. Can we do that?
22 Or do you see that we're bound by the rules as they relate to
23 discontinuance of use? Because that is specific to a
24 nonconforming use.

25 MR. DAVIS: Well, I guess you have to assume, for

1 purpose of your hypothetical, that there is a financial incentive
2 to leave property vacant for an extended period of time.

3 CHAIRPERSON MITTEN: Well, let's say the market
4 isn't good or there's, you know -- or the property owner is, you
5 know, of a certain state of mind that, you know, maybe they're
6 not as aggressive as Starwood Urban is, in terms of releasing
7 their property, but someone else down the block is. And
8 meanwhile, they're hamstrung by what their neighbor is doing
9 because the neighbor is the one who has the block of space that
10 used to be an eating or drinking establishment.

11 Maybe what we'll do is we'll -- I'll just leave you
12 with my question and if you have any other thoughts about it --

13 MR. DAVIS: I have one more thought.

14 CHAIRPERSON MITTEN: Okay.

15 MR. DAVIS: And that is, there's two easy ways to
16 take care of this situation. One is to increase the percentage
17 to reflect the existing situation and then to aggressively
18 enforce the regulation.

19 CHAIRPERSON MITTEN: Okay.

20 MR. DAVIS: Then we wouldn't have any more -- need
21 any more discussion.

22 CHAIRPERSON MITTEN: But we would still need some
23 additional language. You're not suggesting that we should just
24 change the percentage and leave everything else alone?

25 MR. DAVIS: I'm talking specifically on this whole

1 three year issue.

2 CHAIRPERSON MITTEN: Okay.

3 MR. DAVIS: Because the three year issue really
4 goes to those uses which are caught in switches right now. And
5 once --

6 CHAIRPERSON MITTEN: You don't see that as applying
7 on a forward looking basis?

8 MR. DAVIS: Well, forward looking would assume that
9 someone -- well, certainly because you're going to be over the 25
10 percent until you get below.

11 CHAIRPERSON MITTEN: Well, you'll eventually come
12 up to it.

13 MR. DAVIS: So you get below. And if you get
14 below, then it shouldn't be an issue if there's good enforcement.
15 Because to get above, you'd have to do a special exception.

16 So this is really not -- it's really, this is
17 targeted, as I see it, more to getting you down to below the 25
18 percent than it is allowing you to go above 25 percent.

19 CHAIRPERSON MITTEN: You know, what you just said
20 raises an interesting issue that I'm going to direct to the
21 Office of Planning, which is, if -- say you're up to the 25
22 percent and then somebody gets a special exception, then what's
23 the baseline at that point, you know? Is the baseline now -- is
24 the special exception off on its own, not being calculated as
25 part of the 25 percent? Or does it mean, oh, well, now we're at

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1 28 percent, so everything's frozen?

2 You need to turn on your mic.

3 PARTICIPANT: If I understand where the problem
4 would be, it's -- I mean, I guess, my response would be it still
5 stays the 25 percent. The special exception counts -- is a
6 special exception. But if I think -- understand where you were
7 going -- it's what happens then if you get another vacancy? Does
8 the special exception automatically fill back up to the 25
9 percent?

10 CHAIRPERSON MITTEN: Right. You said it better
11 than I did.

12 PARTICIPANT: That would be my assumption, but I
13 can see where we probably ought to, if we're clarifying things,
14 we ought to probably clarify that.

15 CHAIRPERSON MITTEN: We should -- let's try --
16 yeah. Let's think about, that, too. Let me see if anyone else
17 has any questions for these folks. Any questions? Thank you.

18 MR. DAVIS: Thank you.

19 CHAIRPERSON MITTEN: Anyone else who would like to
20 testify in opposition this evening? If you'd please come
21 forward. And I hope you filled out witness cards and turned them
22 in or are about to turn them in.

23 I recognize Mr. Espenschied. Is that right? Are
24 you representing a group this evening or are you testifying as an
25 individual?

1 MR. ESPENSCHIED: Well, I wanted to ask you a
2 question that gets to that. We have a slightly awkward
3 situation. Mr. George Idelson, who is with me, is the president
4 of the Cleveland Park Citizens Association and will be speaking
5 for it.

6 CHAIRPERSON MITTEN: Okay.

7 MR. ESPENSCHIED: I'm its vice president and hoping
8 to supplement that testimony somewhat.

9 But I would also, if you'll permit, informally
10 represent the views of ANC 3C. Because of an awkward situation,
11 it's unable to have anybody here tonight. Several of the
12 activists on this issue, and we've had a great deal of activity
13 on it in our community over the past few years, are unable to be
14 here tonight. One is away on government travel.

15 CHAIRPERSON MITTEN: Okay.

16 MR. ESPENSCHIED: One on a long planned vacation
17 and one has had a death in the immediate family a few days ago.

18 CHAIRPERSON MITTEN: Okay. Let me ask first. Who
19 is going to be taking the five minute slot for the Cleveland Park
20 Citizens --

21 MR. ESPENSCHIED: Well, I wanted to ask you if you
22 could allow us to have five plus three, with George going first?

23 CHAIRPERSON MITTEN: One of you will have five and
24 one of you will have three.

25 MR. ESPENSCHIED: But can one yield to the other --

1 CHAIRPERSON MITTEN: No.

2 MR. ESPENSCHIED: Oh.

3 CHAIRPERSON MITTEN: So you just decide who's going
4 to take five minutes and who is going to have three.

5 MR. ESPENSCHIED: Okay.

6 CHAIRPERSON MITTEN: And if there's anything you
7 don't get to, we'd be more than happy to have some written
8 testimony in supplement.

9 MR. ESPENSCHIED: Okay. We would like to ask you
10 to hold the record open --

11 CHAIRPERSON MITTEN: Absolutely.

12 MR. ESPENSCHIED: -- until the end of August so the
13 ANC could produce a resolution on this, which it's not. It's on
14 record on the substance, but does not have a resolution on the
15 specific text amendment.

16 CHAIRPERSON MITTEN: Okay. We will set a date that
17 -- it won't be the end of August, but it will be almost the
18 entire month of August, that will make sure we have enough time
19 to get this on our September meeting schedule.

20 MS. ABBOTT: Okay. Fourth Monday is when the ANC
21 meets.

22 CHAIRPERSON MITTEN: Well, we'll see. We'll have
23 Mr. Bastida working on the schedule while we listen to your
24 testimony. So who's going to take the five minutes?

25 MR. ESPENSCHIED: He's taking the five and I'm

1 going to take the three --

2 CHAIRPERSON MITTEN: That's fine. And yeah, if
3 you'd turn on the microphone there and introduce yourself for the
4 record as you begin.

5 MR. IDELSON: I'm George Idelson. I'm the newly
6 elected president of the Cleveland Park Citizens Association.

7 The Cleveland Park Citizens Association has spoken
8 clearly and often on the issue of compliance with the overlay
9 limits on restaurants. One, we believe in compliance.

10 In fact, compliance with city regulations is
11 central to our organization's mission. Indeed, it is written
12 into our constitution. And I, as president, am duty bound to
13 insist on it. And we do have a resolution on this issue and it
14 is going to be submitted for the record.

15 And I will add that we, in a plenary session, took
16 up this issue and voted that resolution unanimously. It wasn't -
17 - it didn't come out of thin air. It was actually a voted
18 resolution by the general session.

19 Two, while the three year window in Section
20 13.02(f), grandfathering restaurant usage in vacant building
21 space, may seem like a neat compromise to some, we see it as a
22 novel theory in violation of the overlay that rescues a specific
23 developer for an ill conceived investment about which it had
24 ample warning.

25 Three, we don't know how this so-called compromise

1 was arrived at, but I can tell you for the record that neither I
2 nor any member of our zoning committee members was consulted.

3 To us, this is not just a parking issue.
4 Obviously, we all like nice restaurants. This is about locking
5 up retail space, real estate space, so that only high priced
6 renters, namely restaurants, can afford to come in.

7 We need more community services and don't want to
8 become another Adams Morgan. Furthermore, this amendment gifts
9 one particular developer with a prize. By locking up these
10 grandfathered spaces, no other renter could lease to a
11 restaurant, even should the usage ever drop below 25 percent.

12 What we ask for is simple. 1302(f) should read,
13 "Linear store frontage should no longer be included in the
14 measurement of such uses."

15 CHAIRPERSON MITTEN: Thank you. Mr. Espenschied?

16 MR. ESPENSCHIED: Yes.

17 CHAIRPERSON MITTEN: There you go.

18 MR. ESPENSCHIED: Yes. I'm Peter Espenschied. I'm
19 vice president of the Cleveland Park Citizens Association. I'm a
20 member of the planning and zoning committee of ANC 3C and co-
21 chairman of its consumer affairs committee.

22 ANC 3C and CPCA have worked collaboratively on this
23 issue over a long period. And on the issues that we're
24 discussing tonight, the positions are essentially the same.

25 We have a number of minor issues. Given the

1 limitation of time, I want to be brief on that. A small
2 terminology matter. We refer not to eating and drinking
3 establishments, but to restricted use establishments, since the
4 category includes delicatessens and carry-outs, not just eating
5 and drinking establishments.

6 We do think some clarification of the definition of
7 exactly what's included, along the lines of what's been said by a
8 couple of previous witnesses, would be valuable. Obviously, the
9 popcorn stand in the theater shouldn't be counted.

10 But on the other hand, we think that the idea of
11 simply eliminating all accessory uses in counting would lead to
12 abuses in the other direction.

13 For example, Magruder's Grocery Store, the
14 delicatessen operation is a large part of it, may in fact account
15 for a majority of their volume of business. But if not a
16 majority, it's certainly a big piece of it. They have a
17 delicatessen license. And deciding which is the accessory and
18 which is the principal use might present a problem.

19 It would be a good thing if you could craft the
20 regulation in such a way as to remove ambiguities. We're not
21 offering a formula for doing that, but I think it's important to
22 do. And it's not best done by simply including everything or
23 excluding everything that is an accessory use.

24 Our main issue, as Mr. Idelson indicated, is the
25 matter of this three year preservation. I'm going to say very

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1 frankly that I think that everybody who's worked on this issue in
2 the community knows that basically what's going on here is a
3 rescue operation for Starwood.

4 Starwood was fully warned when they first announced
5 their intentions, long before -- I mean when it was still
6 architectural plans. Long before they had done anything
7 physical, they were on notice that what they proposed to do,
8 namely evict the restaurants that were in their building and then
9 come in with other new restaurants, would violate the
10 requirements of the overlay district. Because we all knew,
11 although there were varying counts, that the overlay percentage
12 was well over what was permitted.

13 CHAIRPERSON MITTEN: You ned to summarize now.

14 MR. ESPENSCHIED: Okay. Apart from the fact that
15 the grandfathering is very specific, a point that I think is
16 nicely illustrated by Mr. Collins' suggestion that one simple
17 solution would just be to increase the percentage, and then you
18 don't have to change anything else. That obviously would take
19 care of Starwood. And I think that's what's the issue on the
20 part of the proponents.

21 Apart from that, however, there are two other bad
22 results from allowing any preservation of space after it has been
23 vacated.

24 CHAIRPERSON MITTEN: Tell us what those are and
25 then conclude, please.

1 MR. ESPENSCHIED: One is -- yes. One is that it --
2 it would unjustly exclude small restaurants who want to open at
3 some location other than the preserved space, but inside the
4 overlay district, if we are over the percentage limit, but just
5 over.

6 Right now, by most counts, we're over 30 percent.
7 But if we got down to say 26 percent, four percent was being held
8 in reserve and somebody came along who wanted to use 2 percent,
9 but not at that location where the 4 percent was, they would be
10 excluded. That's entirely unfair.

11 The other reason why this is a bad idea is that it
12 would greatly increase the complexity of DCRA's tracking
13 responsibilities. And unfortunately, we've all been witness to
14 the dysfunction of their ability even to do the basic keeping
15 track.

16 But they would have to establish a chronology of
17 issuances and occupancies. That would lead to more
18 controversies, probably more litigation ultimately, down the
19 road, and is totally unnecessary, all for the benefit of one
20 potential windfall gainer.

21 CHAIRPERSON MITTEN: Thank you. And are you going
22 to be submitting something in writing for us?

23 MR. ESPENSCHIED: Not now.

24 CHAIRPERSON MITTEN: Okay.

25 MR. ESPENSCHIED: But if you hold the record open,

1 we'll give you this in writing.

2 CHAIRPERSON MITTEN: Okay. Terrific. Thank you.
3 Any questions for Mr. Idelson or Mr. Espenschied?

4 VICE CHAIRMAN HOOD: Madam Chair, also I wanted to
5 ask if Mr. Idelson was going to submit his testimony? Okay.
6 Thank you.

7 CHAIRPERSON MITTEN: Anyone else have any
8 questions? Thank you, gentlemen. And we look forward to your
9 written submission. Thank you.

10 Anyone else who'd like to testify in opposition
11 this evening?

12 All right. As soon as you're done passing those
13 out, we'll ask you to help us out with the dates there.

14 SECRETARY BASTIDA: Madam Chairman, the -- has
15 Friday, August the 23rd --

16 CHAIRPERSON MITTEN: How does that work with the
17 fourth Monday of August?

18 CHAIRPERSON MITTEN: It works, that it gives me
19 enough time to do that, to prepare the package and send it to the
20 commissioners in a timely fashion.

21 CHAIRPERSON MITTEN: All right. August 23rd?

22 SECRETARY BASTIDA: Right. And I would just like
23 to clarify, also, that the record will be open to accept
24 anybody's comments, but that this is a rulemaking. And after the
25 Commission taken action, it will be published in the Register and

1 there would be another 30 additional days to make comments on
2 what the Commission proposes to do.

3 CHAIRPERSON MITTEN: I guess I won't have to read
4 that now in my closing statement.

5 SECRETARY BASTIDA: Oh, I'm sorry. I'm sorry. I
6 wasn't trying to --

7 CHAIRPERSON MITTEN: If you had a question, come
8 forward and get it on the microphone for us, please.

9 SECRETARY BASTIDA: Thank you.

10 MR. ESPENSCHIED: About the dates that were just
11 discussed, fourth Monday of August is August 26th. And I thought
12 I heard Mr. Bastida speak of the 23rd as a cutoff date.

13 CHAIRPERSON MITTEN: Yes.

14 MR. ESPENSCHIED: If the ANC was to produce a
15 resolution at that time, we'd need at least one or two days after
16 the night of the meeting to get it in. So I would suggest August
17 28th, if you could do that.

18 SECRETARY BASTIDA: That creates a problem with
19 getting the package. Why don't we leave it at the 23rd and you
20 try to expedite that meeting. And then if you exceed that time -
21 -

22 MR. ESPENSCHIED: That cannot be done.

23 SECRETARY BASTIDA: Eh?

24 MR. ESPENSCHIED: That cannot be done. We have to
25 -- the meeting date is fixed on the 26th. The 27th could be --

1 CHAIRPERSON MITTEN: Why don't we just suggest that
2 you ask for a waiver and then we'll just get that one item in
3 late? And we will take into consideration the fact that you're
4 telling us the situation at this point in time.

5 SECRETARY BASTIDA: Thank you, Madam Chairman. And
6 that seems like a reasonable option.

7 MR. ESPENSCHIED: Thank you.

8 CHAIRPERSON MITTEN: Thank you. So the record will
9 be closed on August 23rd and then we will have sort of a liberal
10 policy as it relates the ANC report.

11 And I'd like to thank you all. And we look forward
12 to reading the detailed submissions. And we very much appreciate
13 the time that people have taken in preparing, preparing the
14 submissions and your interest in the business of the Commission.

15 And I now declare this public hearing adjourned.

16 (Whereupon, the hearing in the above-entitled
17 matter was adjourned at 7:45 p.m.)

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