

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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ZONING COMMISSION

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PUBLIC HEARING

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IN THE MATTER OF:	
TEXT AMENDMENTS TO NEIGHBORHOOD	
COMMERCIAL OVERLAY DISTRICT:	Case No. 02-06
LIMITATION FOR EATING OR	
DRINKING ESTABLISHMENTS	
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Monday,
September 26, 2005

Old Counsel Chambers
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 7:30 p.m. in the Old Counsel Chambers at 441 4th Street, Northwest, Washington, D.C., Carol J. Mitten, Chairperson, presiding.

ZONING COMMISSION MEMBERS PRESENT:

CAROL J. MITTEN	Chairperson
ANTHONY J. HOOD	Vice-Chairperson
KEVIN HILDEBRAND	Commissioner (AOC)
GREGORY JEFFRIES	Commissioner
JOHN PARSONS	Commissioner (NPS)

OFFICE OF ZONING STAFF PRESENT:

SHARON S. SCHELLIN Acting Secretary

OFFICE OF PLANNING STAFF PRESENT:

JENNIFER STEINGASSER

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

ALAN BERGSTEIN, ESQ.

This transcript constitutes the minutes from the public hearing held on September 26, 2005.

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I N D E X

Preliminary Matters (None)

Office of Planning Report 5

Witnesses:

Bruce Beckner 15

Peter Espenschied 21

Adjourn 33

P R O C E E D I N G S

6:38 P.M.

CHAIRPERSON MITTEN: Good evening, ladies and gentlemen. This is a public hearing of the Zoning Commission of the District of Columbia for Monday, September 26, 2005.

My name is Carol Mitten and joining me this evening are Vice Chairman Anthony Hood and Commissioners Kevin Hildebrand and John Parsons.

The subject of this evening's hearing is Zoning Commission Case No. 02-06. This is a further hearing on this matter and the Commission wishes to hear public testimony concerning whether it would be preferable to no longer make the status of eating and drinking establishments in the neighborhood commercial overlay districts dependent upon a measurement, but rather designate whether the uses are permitted by right or through special exception, sort of on a blanket basis, with respect to each and every existing or proposed NC overlay district.

Testimony should not advocate for matter of right or special exception status within a particular location.

The Commission will only hear recommendations, such recommendations if after a decision meeting it elects to proceed with that alternative. So we're hearing measurement alternatives versus matter of right, special exception

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1 on a blanket basis.

2 Because this approach would be an
3 alternative to the current procedures, the Commission
4 also invites testimony with respect to the advertised
5 amendments to Section 1302.5 of the zoning
6 regulations.

7 Notice of today's hearing was published in
8 the D.C. Register on May 27, 2005 and copies of that
9 hearing announcement are available on the table near
10 the door.

11 This hearing will be conducted in
12 accordance with the provisions of 11 DCMR Section 3021
13 and the order of procedure will be as follows. We'll
14 take up any preliminary matters. Then we'll hear from
15 the Office of Planning. Any other Government
16 agencies, any ANCs that would care to comment,
17 organizations and persons in support; and
18 organizations and persons in opposition.

19 The following time constraints will be
20 maintained in the hearing. Organizations will have
21 five minutes and individuals will have three minutes.

22 The Commission intends to adhere to these time limits
23 as strictly as possible in order to hear this case in
24 a reasonable period of time and I would just remind
25 everyone we have another hearing after this one, so
26 we're going to try and stick to that.

27 The Commission reserves the right to
28 change the time limits for presentations, if

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1 necessary, and notes that no time shall be ceded. All
2 persons appearing before the Commission are to fill
3 out two witness cards and those cards are also on the
4 table near the door. Upon coming forward to speak to
5 the Commission, please give both cards to the
6 reporters who are sitting to our right.

7 Please be advised that this proceeding is
8 being recorded by the court reporter. Accordingly, we
9 ask you to refrain from making any disruptive noises
10 in the hearing room. When presenting information to
11 the Commission, please turn on and speak into the
12 microphone at the tables in front of us and first
13 state your name and home address.

14 When you're finished speaking, please turn
15 the microphone off so that it's not picking up any
16 sound or background noise.

17 The decision of the Commission in this
18 case must be based on the public record. To avoid any
19 appearance to the contrary, the Commission requests
20 that persons present not engage the members of the
21 Commission in conversation during a recess or at any
22 other time. And Ms. Schellin will be available
23 throughout the hearing to answer any procedural
24 questions. So I'd ask you to please turn off all
25 beepers and cell phones at the time, so as not to
26 disrupt the hearing.

27 And now we'll take up any preliminary
28 matters.

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1 Ms. Schellin?

2 MS. SCHELLIN: Staff has no preliminary
3 matters.

4 CHAIRPERSON MITTEN: Thank you. So I
5 guess we're ready to hear from the Office of Planning.
6 Ms. Steingasser.

7 MS. STEINGASSER: Madam Chair,
8 Commissioners, my presentation is going to be very
9 brief. Rather than try to provide any additional
10 detailed language, the Office of Planning is making
11 recommendations on the concepts before you and the
12 ones that we found to be efficient and then we would
13 work with Office of Attorney General to craft the
14 appropriate language in a legal form once the
15 Commission takes their action.

16 We've been working with the Cleveland Park
17 Citizens' Association and a lot of their proposals are
18 before you. We do agree, in concept, with
19 maintaining, and we recommend maintaining the 25
20 percent matter of right trigger.

21 We looked to the neighborhood. The
22 neighborhood commercial overlay is more neighborhood-
23 initiated overlay as opposed to one that the Office of
24 Planning would recommend city-wide. As a result of
25 that we looked to the neighborhood concerns, how they
26 felt that their objectives were being best served.
27 They strongly recommended both the ANC and Cleveland
28 Park and I believe ANC-6A has submitted a letter of

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1 maintenance of the 25 percent matter of right trigger,
2 so we also agree with that.

3 We are also recommending inclusion of the
4 definition of eating and drinking establishment that
5 was proposed by the CPCA, with the one change that it
6 read as opposed to eating and drinking establishment
7 that have a current license to be required to have a
8 license, recognizing that some uses may not have that
9 license yet and that in order to get that license, you
10 must have a Certificate of Occupancy. So that kept
11 that system moving forward.

12 We also recommend deletion of the
13 accessory uses, the gas station and a grocery use. I
14 believe that was advertise as subsection E. We
15 recommend that be deleted and to avoid a great deal of
16 confusion.

17 We also recommend adopting a provision as
18 was presented, I believe by CPCA. Mine is dated
19 September 13th. It recognizes and entitles someone
20 with a valid building permit to obtain their
21 Certificate of Occupancy even if during the period
22 between the issuance of the building permit and the
23 completion of construction an issuance of the CO at 25
24 percent is a lapse. There was a lot of discussion at
25 the various hearings about how to -- how not to have a
26 race to that 25 percent. If someone is getting their
27 building permit and trying to do their legitimate work
28 and perhaps they have space that has major renovations

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1 versus repainting and minor electrical, in the
2 meantime they get thrown into a special exception
3 which has not been financed for. So we do recommend
4 inclusion of some type of provision that allows for
5 capturing that, that they've gotten their building
6 permit and it was issued as a matter of right within
7 that 25 percent that that be respected when they come
8 for C of O.

9 We also recommend adoption of the
10 advertised subsection H which establishes that after
11 one year, if the property has not been -- if the
12 linear street frontage has not been measured, it be
13 assumed that the 25 percent is eclipsed. What that
14 does is kind of puts the burden back on to the
15 applicants to provide evidence that keeps that
16 threshold current and keeps that documented. So we do
17 recommend continuation of that and we also recommend,
18 as I'm sure we all do, the correction of frontage,
19 footage to frontage. It's a common typo.

20 That completes my recommendation.

21 CHAIRPERSON MITTEN: I just wanted to ask
22 a couple of questions that came immediately to mind.
23 One is if the building permit is going to be trigger,
24 then what you were describing about where someone
25 might have their building permit and they were within
26 the 25 percent and then somehow during that time it
27 would be eclipsed that they wouldn't be thrown into a
28 special exception, but it couldn't be eclipsed, right?

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MS. STEINGASSER: It should not be eclipsed.

CHAIRPERSON MITTEN: Okay.

MS. STEINGASSER: But there was a lot of discussion about what if it was, if somehow that monitoring lapsed and other building permits were issued or other COs were issued without the knowledge that that margin had been taken up by a previously existing building permit. So it's just kind of a way to recognize that.

CHAIRPERSON MITTEN: Okay, you know, I had to go back and read a few things to remind myself how we got to this point. And one of the reasons why we're entertaining -- you know, we have the idea okay, do we just keep this notion of measurement in place indefinitely and just try to make it better so there's not so much confusion, or do we make it better in the short term and then bring individual cases where we take each of the places where the NC overlay has been mapped and decide like based on the measurements that we were shown for Cleveland Park, they're at 25 percent.

So rather than having kind of tottering back and forth, it's 24.7 and now it's 26.2 and going back and forth and having this constant monitoring which is laborious, just saying okay, everybody from now on is special exception just to simplify it. So

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1 what does the Office of Planning think about that as
2 -- and it won't detract at all from what you said
3 about simplifying the measurements because it may be
4 that in some places that's what stays in place and in
5 other places not. But do you have any reaction to
6 just the notion of in certain neighborhoods where we
7 would just go in and say they're at that threshold now
8 and we should just simplify everyone's life and say
9 it's -- everything is moving forward by special
10 exception?

11 MS. STEINGASSER: I guess -- I do agree.
12 If there are, and Office of Planning has stated our
13 willingness to do that, to go out and survey and
14 establish the different levels within these overlays.

15 I do agree that the simplification of having special
16 exceptions so when someone shows up within an overlay,
17 ZA can say you're special exception as of today and
18 just kind of drawing that threshold at that point.

19 And it would also accommodate 8th Street
20 which is at 50 percent threshold, so I'm not opposed
21 to that and certainly not opposed to simplifying the
22 administration of it because I think that's very
23 important to its success which is the question.

24 CHAIRPERSON MITTEN: Because I think what
25 we recognize is that there are certain neighborhoods
26 where they're at that point. They're tottering back
27 and forth and that's sort of one scenario. And then
28 there's another scenario where we look ahead and we

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1 say we want to make sure that we want to prevent there
2 from being a proliferation of eating and drinking
3 establishments, so that when we get close to it, we
4 won't exceed it and we're not close to it now, but we
5 can look ahead, 5 to 10 years and see that that might
6 be an issue.

7 So in those places I would think perhaps
8 we would have the measurement in place and maybe
9 revisit it. It just seems like an awful lot of work
10 for the Zoning Administrator to maintain these things
11 and keep them up to date.

12 MS. STEINGASSER: I guess I would -- I'm
13 having flashbacks of all the other hearings we've had,
14 but if it's 25 percent today and we declare any future
15 use as special exception, how do we accommodate for
16 when it drops down and several of the restaurants say
17 close and go out of business and then it's back down
18 to 10 or 15 percent? Would we still then, everything
19 within that overlay is a special exception, every
20 eating or drinking establishment?

21 CHAIRPERSON MITTEN: I guess if we thought
22 all it would take would be a couple of large
23 restaurants to really break that down, but I mean it
24 seems to me if what's typical in the neighborhoods
25 we've visited so far which is that these
26 establishments are willing and have the capacity to
27 pay higher rents, that from an economic perspective,
28 that's not going to be a long term, just because a few

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1 of them might go out of business, I think it would be
2 a long-term situation where there's going to be a
3 lengthy period where it would be below the threshold
4 if they were at the threshold at one point.

5 MS. STEINGASSER: I'm not going to deny it
6 makes it easier. We would look, as we have with
7 Cleveland Park, and the 8th Street, to the particular
8 ANCs to see what they -- how they feel about what's,
9 which technique fulfills their objectives and that's -
10 - that was one of the reasons we agreed to the 25
11 percent trigger, is the neighborhood seemed to express
12 that that was -- met the objectives when these were
13 originally designed.

14 CHAIRPERSON MITTEN: Okay, anybody else
15 have questions for Ms. Steingasser?

16 I had a couple of other ones. If we use
17 the business license or an ABC license as a trigger,
18 and I think we're trying to get away from this idea
19 that if user Certificate of Occupancy, you don't know
20 exactly when the use is discontinued or when the
21 three-year period might start and that this somehow
22 more -- that there's a more timely -- there's more
23 timely knowledge of when a business is no longer
24 operating. So I don't -- I was just wondering what do
25 -- what happens if a business license -- the business
26 goes out business, the establishment goes out of
27 business? What happens with the business license?

28 MS. STEINGASSER: The license lapses.

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1 CHAIRPERSON MITTEN: After the annual
2 license?

3 MS. STEINGASSER: Yes.

4 CHAIRPERSON MITTEN: Okay, but they don't
5 have to turn it back in. It's just at the end of a
6 12-month period?

7 MS. STEINGASSER: Yes.

8 CHAIRPERSON MITTEN: And then I know for
9 ABC licenses, I'm not super conversant on them, but I
10 know that there's a provision where you can take an
11 ABC license and put it in safekeeping or you can kind
12 of keep it alive without using it?

13 MS. STEINGASSER: Uh-huh.

14 CHAIRPERSON MITTEN: And I was wondering
15 about having somebody with a long-term place holder
16 using an ABC license.

17 MS. STEINGASSER: I don't know.

18 CHAIRPERSON MITTEN: Okay. And then I was
19 wondering if you had thought at all about, and I don't
20 know -- this is probably true in some of the places
21 that we've mapped the neighborhood commercial overlay,
22 but not all of them certainly, that when we -- if we
23 talk about ground floor frontage, not every ground
24 floor is at grade and some areas actually have -- they
25 don't work particularly well, but there's two retail
26 levels. There's one that's half a level below grade
27 and there's one that's half a level above grade. And
28 I was wondering if you had given any thought to how we

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1 would control, in those circumstances, what would we
2 be counting?

3 MS. STEINGASSER: I guess we'd have to
4 look to the zoning regs and their definition of ground
5 floor. Only one level could be ground floor. The
6 other would either be basement or cellar.

7 CHAIRPERSON MITTEN: I guess I'm just
8 wondering, setting aside the technical thing, what
9 would we want to control? Do we want to control, do
10 we want to try and control what's going on on both
11 those retail levels or just one of those retail
12 levels?

13 MS. STEINGASSER: So if it was a
14 restaurant and a cellar?

15 CHAIRPERSON MITTEN: Yes.

16 MS. STEINGASSER: I think the intention
17 would certainly be to capture both.

18 CHAIRPERSON MITTEN: Okay.

19 MS. STEINGASSER: The ground floor
20 entrance to anything above grade and anything that
21 would be at that cellar level.

22 CHAIRPERSON MITTEN: Just another twist.
23 Okay, those are all my questions. Anyone else? And I
24 should note that we've been joined by Commissioner
25 Jeffries.

26 Okay, then we're ready to move on to
27 anyone representing an ANC and I have two people on my
28 list from ANC 3-C, Nancy McWood and Bruce Beckner, if

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1 you'd like to come forward. And if there's anyone
2 else representing any other ANC that would like to
3 come forward.

4 You need to give those to Staff, Mr.
5 Espenschied. Could you pull the microphone a little
6 closer, they weren't really getting you.

7 MR. BECKNER: Good evening, I'm Bruce
8 Beckner. I'm Commission for Single Member District 5
9 of ANC-3C. The SMD that I represent includes the
10 western side of the Connecticut Avenue commercial
11 overlay district and ANC-3C includes three of the four
12 neighborhood commercial overlay districts in our city,
13 Cleveland Park, Woodley Park and Wisconsin Avenue.

14 In the first part of my remarks, I'm
15 speaking for the Commission as a whole, however,
16 because our ANC has not considered the latest proposal
17 for which your Commission sought comment, nor the
18 counter proposal of the Cleveland Park Citizens'
19 Association which Ms. Steingasser has been discussing,
20 in the second part of remarks I speak only as a
21 representative of my SMD and not for the whole
22 Commission.

23 From our perspective, the commercial
24 overlay districts have two complementary objectives.
25 We think that when considering changes to the overlay
26 regulations, those changes have to be measured against
27 how well they would further those objectives. The
28 first objective is to regulate commercial development

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1 in a way that ensures that some of the commercial
2 establishments in the overlay district serve the
3 residents who live in the immediate area. This has
4 two benefits. It enhances those neighborhoods and it
5 reduces the needs of the residents of those
6 neighborhoods to use a car for shopping. In addition,
7 it's worth noting that all of the commercial overlay
8 districts in our ANC, including the one I represent,
9 have a substantial number of nearby apartment
10 buildings. And not all the folks who live in those
11 buildings own cars. Some of them are elderly and some
12 of them are low-income folks. So it's important for
13 them to be able to shop on foot.

14 The second objective is to limit the
15 number of establishments that attract patrons living
16 outside of the immediate area. Those patrons often
17 arrive in cars and there's very limited parking
18 available park commercial overlay district. In fact,
19 there's only one off-street parking lot of any size.
20 Many residents of single family and duplex houses
21 immediately adjacent to the commercial district have
22 no off-street parking of their own. So they are
23 competing with restaurant and bar patrons for a
24 limited supply of on-street parking. And RPP
25 restrictions do not apply in the evenings and on
26 weekends.

27 I'm not saying that bars and restaurants
28 are not a good thing and do not contribute to the

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1 vitality of a neighborhood. They do. But you can
2 have too much of a good thing.

3 Apparently, this Commission in our ANC
4 several years ago concluded that the commercial
5 overlay regulations, as written, were sufficiently
6 obtuse as to create problems in enforcement. This
7 creates problems for everyone, neighborhood residents,
8 land owners, business owners and at DCRA which has
9 enforcement responsibility for making this work.

10 The result was that the purposes I just
11 mentioned were not being fulfilled or were being
12 fulfilled with great difficulty and expense to
13 everyone. In October of 2003, our ANC proposed
14 revisions to those regulations in an effort to clarify
15 them and make them more enforceable. Since that time,
16 there have been further revisions in proposed drafts
17 and here's the point in my remarks where I can no
18 longer speak for the Commission as a whole, because it
19 has not considered the latest proposals, but can only
20 speak as a Single Member District representative.

21 In conjunction with the Cleveland Park
22 Citizens' Association, I and the chair of ANC-3C have
23 met with Dr. Patrick Canavan, the head of DCRA and
24 members of his staff to attempt to come up with a
25 proposal that alleviates the problems that others have
26 identified with the regulations and in the opinion of
27 those charged with enforcing them, would make them
28 more enforceable.

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1 I can't say today that I have the proxy of
2 DCRA to endorse a particular proposal, but I can say
3 that our proposal has been drafted in light of the
4 comments made to us by DCRA. I believe the proposal
5 of the CPCA which Mr. Espenschied is going to discuss
6 is at the very least a good faith effort to respond to
7 those concerns. The major thrust to that proposal is
8 to remove the ambiguity that exists in the current
9 regulations and quite frankly, that exists in the
10 proposal put out for comment. As a general matter,
11 complexity breeds ambiguity and the proposal put out
12 for comment certainly is complicated.

13 The CPCA proposal, which I support,
14 defines the regulated establishments by the business
15 licenses that are issued to them and excludes
16 delicatessens, stores and gasoline stations that also
17 sell food.

18 Going back to the objectives that I
19 identified, I don't think the presence or absence of
20 delicatessens and other exclusively carry-out food
21 establishments really causes the adverse effects that
22 overlay districts are designed to limit.

23 To the extent that they may generate more
24 than their share of litter and people hanging out,
25 which is a comment that I got from DCRA about
26 delicatessens, there are other and better ways to deal
27 with those issues than through a commercial overlay.

28 The CPCA proposal provides certainly by

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1 establishing an objective unchanging measure, linear
2 street frontage as the basis for regulation and
3 requires a Zoning Administrator to keep a publicly
4 available record that allows anyone to determine with
5 certainty whether or not there is room for another
6 restaurant to bar in the overlay district. And I
7 think here, I know there was some questions and
8 comments of Ms. Steingasser regarding whether that was
9 difficult or not. It seems to me that since streets
10 are of a fixed length and parcels are defined on each
11 street, that it should be fairly simple to keep track
12 of which parcel is being used for one of the regulated
13 purposes. And we don't really see how that would be a
14 big burden to the Zoning Administrator to keep track
15 of those things, given that you've got a finite supply
16 of space and you know who's using every piece of it.

17 Finally, consistent with DCRA's practices
18 described to us, the CPCA proposal makes the issuance
19 of building permits a triggering event for determining
20 compliance with commercial overlay limits and also
21 protects the recipient of those permits from the
22 possibility that a Certificate of Occupancy will not
23 be issued for that use once construction is complete.

24 We think it's important that once someone commits the
25 money towards remodeling or developing a space for one
26 of those uses, that they have a high degree of
27 confidence that at the end of the process, assuming
28 they do everything else that's required of them, that

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1 they will get a C of O for that use.

2 My understanding is that the CPCA has
3 presented a detailed written critique of the
4 regulations that were submitted for comment. I have
5 reviewed the critique and I concur with it. I'm not
6 going to take up your time by repeating it here
7 orally.

8 My hope is that the Commission will
9 favorably consider this CPCA's proposal, perhaps
10 putting that proposal up for comment by the public and
11 by affected parties, including ANCs.

12 I'd like to conclude by saying that the
13 test of any regulation is whether or not it
14 accomplishes it's intended purposes and how
15 efficiently it does the job. Vague, ambiguous or
16 complex regulations often do not accomplish their
17 purposes and they impose substantial costs on everyone
18 involved.

19 I hope I can have your support for
20 simplicity in the form of proposed regulations
21 submitted to you by the CPCA.

22 Thank you very much.

23 CHAIRPERSON MITTEN: Thank you. Does
24 anyone have any questions for Mr. Beckner? Any
25 questions? Hold on one second.

26 Thank you very much.

27 MR. BECKNER: Thank you, Madam Chair.

28 CHAIRPERSON MITTEN: Anyone else

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1 representing an ANC in the neighborhood commercial
2 overlay case?

3 Okay, then we'll have Mr. Espenschied for
4 the Cleveland Parks Citizens' Association.

5 MR. ESPENSCHIED: Good evening,
6 Commissioners. I'm Peter Espenschied, vice president
7 of the Cleveland Parks' Citizen Association. I should
8 remark that George Idelson, our president, was very
9 much looking forward to and prepared for testifying at
10 this hearing as it was originally scheduled, but
11 unfortunately he also had a commitment to be out of
12 the country subsequent to it and is now in Australia
13 and can't testify from there.

14 CHAIRPERSON MITTEN: Okay. Because
15 there's no clock, I just want to remind you you have
16 five minutes and Ms. Schellin will give you a one-
17 minute warning, okay?

18 MR. ESPENSCHIED: In November 1989, the
19 Zoning Commission enacted Chapter 13, neighborhood
20 commercial overlay district. It's primary purpose was
21 to prevent restaurants and bars from overwhelming and
22 crowding out other needed and appropriate businesses
23 in neighborhood commercial areas and helping to
24 maintain a diversity of such other businesses of
25 affordable upper-story housing.

26 Unfortunately, serious logical errors were
27 made in the drafting of key parts of Chapter 13. As a
28 result of that, it was never enforced. The Zoning

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1 Commission, in December 2002, 13 years later,
2 recognizing the existence of confusion, tasked the
3 Corporation Counsel with producing a proposed
4 replacement or amended text. It failed, however, to
5 isolate the true source of confusion and to address
6 the dysfunction that then existed at DCRA.

7 The two basic issues that were left in a
8 confused state of affairs by the original drafting
9 defects were one, the listed categories were so broad
10 that they included businesses plainly not meant to be
11 included and two, there were no clear and unambiguous
12 criteria for determining which properties were to be
13 counted against the 25 percent limitation.

14 The Attorney General's proposal that's now
15 on the table unfortunately does not offer any solution
16 to either of these primary problems. It also
17 generates several additional sources of confusion and
18 if adopted, we believe it would bog down and paralyze
19 the whole overlay process.

20 In short, the overlay was never enforced,
21 largely because of uncorrected and unnoticed drafting
22 errors. However, the errors are easily corrected.
23 Enforcement need to be neither difficult nor complex.

24 With a few simple text changes, the confusion
25 disappears and the overlay becomes virtually self-
26 enforcing.

27 We submitted to the Zoning Commission on
28 August 21, a detailed analysis of the current proposed

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1 text amendment and I don't want to take time to go
2 through that, but I'll be glad to answer any questions
3 you may have about our analysis of it. Subsequently,
4 we met as Commissioner Beckner indicated with both
5 Jennifer Steingasser for the Office of Planning and
6 with Dr. Canavan and Neil Stanley at DCRA, to get
7 their responses to our responses and to try to
8 formulate, which we have done a revision. It's not a
9 radical revision, of what we had proposed on August
10 21st. That revised proposal dated September 13, I
11 believe is now in front of you and it does differ
12 somewhat from what we had earlier submitted,
13 specifically to take into account and respond to the
14 issues that were raised in the discussions that I just
15 mentioned.

16 CHAIRPERSON MITTEN: Since we had a chance
17 to read your August 21st submission, could you
18 highlight for us what the changes are and what you
19 handed up tonight?

20 MR. ESPENSCHIED: The first change -- just
21 a moment. Please hold on just a moment.

22 (Pause.)

23 In our original text, we had suggested
24 that there be a process by which DCRA, after approving
25 permits for an establishment that would not bring the
26 percentage occupied over 25 percent, would issue a
27 letter to the Applicant stating that and in effect
28 guaranteeing that after the Applicant has finished

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1 doing whatever he has to do to prepare the premises
2 which could take months in some cases --

3 MS. SCHELLIN: One minute.

4 MR. ESPENSCHIED: -- and then comes back
5 to get the Certificate of Occupancy after all the
6 inspections are completed, there would not be another
7 gate, so to speak, for determining whether this
8 Applicant is still under the percentage. In other
9 words, that letter would be a form of guarantee that
10 the Applicant won't thereafter be held up because of
11 the percentage issue.

12 DCRA had a problem with issuing that
13 letter. I think they've had bad experiences with
14 issuing letters of assurance of a variety of sorts.
15 And so we modified this. And what you have in front
16 of you now has a statement at the end that says once
17 any such work permit has been issued to an Applicant
18 in good faith, and the permitted work has been
19 completed, the Government shall not later refuse to
20 issue that Applicant a Certificate of Occupancy on
21 grounds that the resulting frontage would exceed 25
22 percent.

23 Let me take a moment to explain where that
24 goes.

25 MS. SCHELLIN: Time.

26 CHAIRPERSON MITTEN: Just finish up on the
27 differences and then we'll ask questions.

28 MR. ESPENSCHIED: Fine. We recognize that

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1 at DCRA there has been an unpleasant history of
2 mistakes and oversights and so on and obviously we all
3 hope that that's being cleaned up. But nevertheless,
4 errors are always possible. And we want to make sure
5 that when a mistake is made, for example, the simplest
6 kind of mistake would be an Applicant goes to check on
7 the percentage. Is told yes, the percentage you would
8 add will still keep it under 25 percent and so we're
9 approving your permits.

10 And then he's at work for maybe months on
11 those permits. And somebody else comes along and asks
12 the same question and a different person at DCRA, for
13 whatever reason, fails to notice that they have given
14 the assurance to somebody already and gives the
15 assurance a second time to somebody. It can happen.
16 We don't want to presume a perfect system.

17 Our point is that the resulting conflict
18 should not produce a burden on the good-faith
19 Applicant. It should be the Government's burden, not
20 the Applicant's. What this would mean would be that
21 if both Applicants do go through to the point of
22 applying for a C of O, they both get it and we may
23 have a situation where for some period of time,
24 probably not very long, we're going to be over 25
25 percent. The natural solution to that is the
26 attrition caused by the fact that the next time and
27 maybe the next few times that somebody comes along,
28 they're not going to get the permits, work permits

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1 issued because we're over 25 percent or even if we're
2 not, even if we get down to say 24.9, the addition of
3 the next proposed one would bring it over 25.

4 So attrition is the simple and harmless
5 way to solve that problem. We don't want to have
6 Applicants dealing with the D.C. Government who have
7 this chronic problem that they told me it was okay. I
8 made my investment and then I went back and they said
9 I couldn't do it.

10 CHAIRPERSON MITTEN: Are there any other
11 changes that you want to bring up?

12 MR. ESPENSCHIED: There are no other
13 material things. There are some de minimis wording
14 changes.

15 CHAIRPERSON MITTEN: Okay, let's see if
16 the Commission has any questions for you.

17 Does anybody have any questions? I just
18 had one or two, just to follow up on some things I had
19 asked Ms. Steingasser about. Do you know about if we
20 use ABC licenses, if you can kind of keep an ABC
21 license in place, even though the establishment is not
22 operating?

23 MR. ESPENSCHIED: We have used the word
24 "current" in our definition and maybe that would need
25 to be tightened to exclude place holders because we
26 certainly don't want place holders to be occupying a
27 part of the percentage.

28 CHAIRPERSON MITTEN: Okay. Then do you

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1 know about the -- I honestly don't know the answer to
2 this question, the transferability of a business
3 license?

4 MR. ESPENSCHIED: They are not
5 transferrable.

6 CHAIRPERSON MITTEN: I'm sorry?

7 MR. ESPENSCHIED: They are absolutely not
8 transferrable.

9 CHAIRPERSON MITTEN: Let's take this as a
10 for instance. That there's an operating business and
11 it's Joe's Pizza Parlor or whatever and Joe is getting
12 near retirement age and his kids don't want the
13 business and so he's going to sell the business and a
14 new business license would be triggered, but the
15 establishment would, for all intents and purposes,
16 it's the same thing. Maybe even still be operating as
17 Joe's Pizza Parlor, but because there's a new owner,
18 that there might need to be a new license issued.
19 What would we do in a case like that?

20 MR. ESPENSCHIED: Well, actually there
21 would, except in rare cases, be no problem there.
22 First of all, Joe has to keep renewing his business
23 license anyway because the business licenses have a
24 fixed term. I think some are one year. None are more
25 than two years, I'm pretty certain.

26 So they expire, regardless of whether you
27 are continuing with your business. You have to keep
28 renewing and DCRA has a system to sent out a renewal

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1 application and so on, which automatically keeps
2 track.

3 Now let's say that we are at 24.9 percent
4 and Joe isn't going to renew his license, but somebody
5 else wants to come in, whether it's his relatives or
6 somebody to whom he's selling the business, come into
7 the same place to do the same business, that would
8 bring you momentarily down to maybe 24.4 and then back
9 up to 24.9. As long as you were below 25 percent to
10 start with, you're still going to be below 25 percent
11 with a successor business.

12 CHAIRPERSON MITTEN: Yes, but assume that
13 what the situation was is that Joe has been there a
14 while. He didn't get a special exception and you're
15 over 25 percent and then he sells his business to
16 somebody and nothing changes except that it's not Joe
17 anymore, it's Mary and her sister Sue.

18 MR. ESPENSCHIED: You're suggesting a
19 situation where for some reason we are over 25 percent
20 at that time?

21 CHAIRPERSON MITTEN: Correct. Wouldn't --
22 unless we had some kind of a --

23 MR. ESPENSCHIED: There are two answers to
24 that. One is that in a large portion of cases, I
25 think in most cases, the businesses are incorporated
26 and a person can sell his stock in his small business
27 corporation to somebody else with no effect outside
28 the black box, so to speak.

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1 CHAIRPERSON MITTEN: Okay.

2 MR. ESPENSCHIED: So that wouldn't --
3 there would be nothing perceived at DCRA that has
4 changed. Joe may have Joe's Pizza incorporated and he
5 can sell his stock.

6 CHAIRPERSON MITTEN: Okay, I got that one.
7 What's the next one. Joe's a sole proprietor, what
8 happens?

9 MR. ESPENSCHIED: Now, the other case is
10 that in that rare situation where because of some
11 prior problem, we've gone over 25 percent, that's
12 where you would need a special exception.

13 CHAIRPERSON MITTEN: But it's the same
14 business. You're going to say the new owner has to
15 come in and --

16 MR. ESPENSCHIED: Under the rule we've
17 proposed, if you are over 25 percent and somebody is
18 applying for permits, you can't get them.

19 CHAIRPERSON MITTEN: Okay.

20 MR. ESPENSCHIED: Without going for a
21 special exception. But I really want to emphasize
22 that this is virtually the only situation in which
23 special exceptions should play any role here. In
24 general, we do not want and we're very strongly
25 opposed to the idea of introducing special exceptions
26 as a routine way of trying to contain a limit. That
27 just means you have an endless line at the BZA and
28 generate business for lawyers, but it's not in anybody

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1 else's interest.

2 CHAIRPERSON MITTEN: Okay. Thank you.
3 Anybody else have questions?

4 VICE CHAIR HOOD: Madam Chair, I'd like to
5 ask Mr. Espenschied a question. You have a scenario
6 of if an Applicant made a good faith effort and were
7 permitted work, your last statement I think on what
8 you submitted to us tonight, and that's taken in
9 having an understanding that that's only going to
10 happen one time, that someone, we're over the 25
11 percent and the work permits and everything were given
12 before the CFO, we realized that the Government has
13 already said you're under that 25 percent threshold.
14 We're already under that.

15 Now if that happens more than once, I know
16 it's an enforcement issue and it probably wouldn't
17 happen here in this city, because we're on the ball,
18 but if it happens more than once, where do we draw the
19 line?

20 I'm just trying to see from a regulatory
21 standpoint where do we draw the line on this good
22 faith effort?

23 MR. ESPENSCHIED: Your scenario is that
24 there have been maybe two or three successive mistakes
25 made?

26 VICE CHAIR HOOD: I'm just following up on
27 the scenario you made. I can understand the first
28 time, where the Applicant was told in a good faith

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1 effort by the Government that we're under 25 percent
2 threshold and they got their permits and they did
3 everything and when it came time for the C of O, there
4 was an issue and they were over the 25 percent and
5 you're saying don't hold -- don't let the Applicant
6 have the burden. That's one time. Now what happens
7 when it's the second time? It's the same situation.
8 Things are changed at DCRA. They're already over the
9 threshold, but now we're in the same neighborhood and
10 we're well over 25 percent because we made the mistake
11 the first time. What happens the second time?

12 MR. ESPENSCHIED: First, let me set some
13 perspective here. In doing our research and believe
14 me, we've spent a lot of time trying to get this
15 right, we saw that on the average a business frontage
16 occupies in the Cleveland Park overlay district about
17 one half of one percent of the total. So what we're
18 talking about is a practical matter and a typical
19 situation is we're at say 24.9, one new business
20 erroneously added would bring you to 25.4. And a
21 second would still probably not bring you over 26
22 percent. So this isn't going to make huge changes,
23 but if you had a succession of these, I guess a first
24 reaction is somebody should be fired at DCRA, because
25 they should be careful about this.

26 But we've gone further than that. We have
27 devised a simple program that the Zoning Administrator
28 can use to keep track of this. It really is simple

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1 and the idea that there's some overwhelming burden for
2 them to keep track is misleading. That's not so. One
3 doesn't have to go out with a measuring tape and do a
4 lot of detailed work. In fact, the real estate plats
5 are sufficient to work from. One wouldn't even have
6 to do the measurements in the first place, but they
7 can be done and in fact, we've done them and we
8 measured the whole thing and established what premises
9 we're using, what frontage and how this would work.

10 So it's not likely that the Zoning
11 Administrator is going to have a hard time keeping on
12 top of this.

13 Am I answering your question?

14 VICE CHAIR HOOD: You've answered it. I
15 just wondered where that tipping point was. Thank
16 you.

17 Thank you, Madam Chair.

18 CHAIRPERSON MITTEN: Thank you, Mr.
19 Espenschied and we'd like to extend our thanks to your
20 group for working so hard on this.

21 All right, is there anyone else who would
22 like to testify in the neighborhood commercial overlay
23 case in support or in opposition?

24 Ms. Steingasser, did you have anything you
25 wanted to add?

26 MS. STEINGASSER: No.

27 CHAIRPERSON MITTEN: Than I would just
28 like to remind folks that we'll be taking this up at

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1 one of our regular monthly meetings and the record is
2 closed as of tonight and if you have any questions
3 about the status of this case, further questions about
4 the status of this case, you can contact Ms. Schellin
5 in the Office of Zoning and then you should be aware
6 that should the Commission propose affirmative action,
7 the proposed action must be published in the D.C.
8 Register as a proposed rulemaking with a period of
9 time for comments.

10 In addition, the proposed rulemaking will
11 be referred to the National Capitol Planning
12 Commission for federal impact review and then we will
13 take final action at a public meeting following
14 receipt of public comments and the NCPC comments,
15 after which a written final rulemaking and order will
16 be published.

17 So that closes out the hearing on Case No.
18 02-06, the neighborhood commercial overlay.

19 And we can then move into the other
20 hearing for the evening. I've been told that we
21 should take a break because the other hearing was
22 advertised to start at 7:30, so we'll start at 7:30.

23 (Whereupon, at 7:20 p.m., the public
24 hearing was concluded.)

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