Would the Amendment to the Overlay Remove the Height Limit in the CED?,
by Paul Boni, Esquire (February 19, 2010)

There is a serious risk that Bill No. 100014 (the amendment to the Overlay), if enacted, would eliminate the 300-foot height limit in the CED. The only possible protection is in the "Conflicting Provisions" section of the Overlay, which provides as follows:

> 14-1638 (2) *Conflicting Provisions.* The provisions of this Section apply in addition to any underlying zoning provisions or overlays applicable to any property in this District. When the provisions of this Section are in irreconcilable conflict with any other provision of this Title, the provisions of this Section shall apply; provided, however, that, in the event of any development or use authorized by or any conflict with any provision of Chapter 14-400, the provision of Chapter 14-400 shall apply; and provided further that the provisions of this Section shall not apply to any parking area permitted by Section 14-408(1)(a)(.1)(A) or (B) (relating to off-site parking for gaming facilities).

Citizens or the City could argue that the language regarding height in the proposed amendment would indeed conflict with the 300-foot height limit in the CED (in Chapter 14-400) and that, accordingly, the CED height limit would remain intact.

However, SugarHouse or Foxwoods could argue that the bill would not create any sort of conflict with the height limit in the CED. How could this be? Well, the bill does not actually impose a new conflicting height limit. A conflict would certainly exist if the amended Overlay imposed a height limit of 100 feet or a height limit of 500 feet. But the bill wouldn't do that. Rather, the bill provides quite clearly that "no height regulations shall apply to any parcel within the boundaries of this District." The casinos could argue that such language supercedes or removes any height regulations in any of the underlying categories by providing that any such height regulations no longer apply. So there would be no conflict whatsoever. In other words, through this amendment, City Council is reaching into all underlying zoning categories and removing the height limits. This does not set up a conflict and, therefore, the "Conflicting Provisions" section does not apply.

The casinos could point to other things to strengthen their argument:

1. The amended bill would expressly exempt the categories of R and C2 but the category of CED is absent from this list. If Council wanted to exempt CED, so the argument goes, it could have easily added "CED" to the list. Therefore, again, so the argument goes, we can infer that Council did not want to exempt the CED.

2. If the "Conflicting Provisions" section is crystal clear, then there would be no reason for the last part of that section ("and provided further that the provisions of this Section shall not apply to any parking area permitted by Section 14-408 (1)(a)(.1)(A) or (B) (relating to off-site parking for gaming facilities)"). Apparently, someone wanted to make so certain that the off-site parking provisions remained intact (i.e., they had enough doubt that the "Conflicting Provisions" section protected the CED), that they decided to expressly preserve the CED's

off-site parking provisions, even though this language would seem superfluous. This demonstrates that City Council knows how to use both a belt and suspenders. Or it means that the "Conflicting Provisions" section is not as airtight as one would hope.

3. A maxim of zoning jurisprudence is that courts should resolve any doubt in favor of the landowner (in this case, the casinos). Therefore, if the casinos can argue that there is ambiguity in any of the interpretations, they might win their case.

As you consider the strength of this argument, please recall the ridiculously flimsy arguments that the casinos have made successfully in their string of undefeated court cases: citizens have no standing; citizens have no right to vote; City Council cannot refuse to lay down the CED on the casino properties; City Council cannot refuse to strike roads and easements; an unelected Special Master can tell the City what to do; the City cannot revoke a submerged lands license; and, on, and on and on. In other words, even if City Council and the Law Department swear on a stack of bibles that this bill doesn't affect the height limits in the CED, the courts can rule otherwise.

There is a simple way to resolve this matter: in the amendment itself, add "CED" to R and C2 in the list of zoning categories to which the bill does not apply. We can solve this with three little letters.