

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



July 21, 2008

Whayne Quin
Holland+Knight
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20008

Re: Zoning Commission Case No. 03-12/03-13F – Square 769 LLC and DCHA (Minor modification to a PUD)

Dear Mr. Quin: *Whayne*

The Office of Zoning is in receipt of your July 11th response the NCPC recommendation regarding the above-referenced case.

The Zoning Regulations are strict regarding the timeliness of submissions into case records. The record on this case was closed on May 28, 2008. Your letter was received after the record closed. On July 14th, the Commission decided not to reopen the file to receive your submission. Accordingly, we are returning your submission to you.

If you have any questions, please do not hesitate to call me at (202) 727-0340.

Sincerely,

A handwritten signature in cursive script that reads "Sharon S. Schellin".

Sharon S. Schellin
Secretary to the Zoning Commission

Enclosure

ZONING COMMISSION
District of Columbia

CASE NO. 03-12F/03-13F

EXHIBIT NO. 32

441 4th Street, N.W., Suite 210-S, Washington, D.C. 20001

(202) 727-6311 • (202) 727-6072 fax

E-Mail: zoning_info@dcoz.dcgov.org • Web Site: <http://www.dcoz.dcgov.org>

ZONING COMMISSION
District of Columbia
CASE NO.03-12F/03-13F
EXHIBIT NO.32

Wayne S. Quin
202-663-7274
wayne.quin@hklaw.com

Kyrus L. Freeman
202-862-5978
kyrus.freeman@hklaw.com

Steven E. Sher
202-663-7278
steven.sher@hklaw.com

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RECEIVED
D.C. OFFICE OF ZONING

July 11, 2008

VIA HAND DELIVERY

D.C. Zoning Commission
441 4th Street, N.W., Suite 210
Washington, DC 2001

Re: Response to NCPC Staff Recommendation Regarding Zoning Commission Case No. 03-12F/03-13F (Application for Modifications to the Second-Stage Approval of a Planned Unit Development for an Office Building at 250 M Street, S.E.)

Dear Members of the Commission:

Pursuant to sections 3024.1 and 3024.3 of the Zoning Regulations, we hereby respectfully request that the Zoning Commission reopen the record in the above-referenced case and accept the Applicant's response to the National Capital Planning Commission's ("NCPC") recommendation on this case, as well as the NCPC Staff Recommendation which was adopted by NCPC on July 10, 2008 by a 5-4 vote and filed after the close of the record. NCPC's recommendation indicates that the proposed modification would be adverse to the federal interest because it purportedly does not conform to the requirements of the Height of Buildings Act of 1910 (the "Height Act" or the "Act") in that the building exceeds 110 feet.

The Proposed Building is Consistent with the Act

The height of the building has been reviewed by the District of Columbia Zoning Administrator, the Office of Attorney General of the District of Columbia as well as the Zoning Commission. Under the decisions of the Zoning Commission, reviewed by NCPC, the eastern portion of 2nd Street, S.E., will be restored as it was originally directed by President George Washington. The measurement of height for the subject building is consistent with the application of the Height of Buildings Act of 1910 (the "Height Act" or the "Act") by the District of Columbia for many years as confirmed in a judicial decision in which NCPC participated.

NCPC overlooks the fact that the Height Act is essentially a local law, by its terms, applied, and enforced by District of Columbia officials. NCPC, of course,

provides an important role in considering what could be adverse to the federal interests. But the Height Act is a local law enacted by Congress as the legislative body at the time for issues affecting the District of Columbia. All operative and enforcement provisions are vested in the Mayor, the Office of Attorney General and the City Council (the Schedule of Heights) as successors to the Board of Commissioners. No federal agency, including NCPC, was given any role in determining heights under the Act.

The Height Act had its genesis in the bill drafted in 1898 by the Board of Commissioners of the District of Columbia and referred to the House Committee on the District of Columbia for enactment. Both the 1898 Height Act and the 1910 Height Act were enacted substantially prior to NCPC's and its predecessors' creation. NCPC is not given any operative or enforcement authority in the essential terms of the Act. NCPC certainly has the right to make a recommendation to the Zoning Commission, including its views on the Height Act. However, applicant submits that NCPC should respect the framework of the Act and the consistent application by the District officials authorized to implement the Act.

Unfortunately, the recitation of the history of 2nd Street, S.E., in the Staff Report is inaccurate and incomplete in many respects. The Report does not credit the rationale for the Height Act, the treatment of streets in other similar situations which contain federal reservations, nor does it recognize the balancing of the height of buildings on either side of the proposed Canal Blocks Park facing M Street. Nor does the report acknowledge the economic contribution of the height and gross floor area in supporting the one-for-one replacement of 695 public housing units in the overall Capper/Carrollsborg mixed-use development.

Legal Background of 2nd Street, S.E.

In *Chesapeake and Potomac Telephone Company v. District of Columbia*, 106 Wash. L. Rptr. 1065 (1978), *affirmed*, *United States v. Chesapeake & Potomac Telephone Co.*, 418 A.2d 114 (D.C. 1980), the Court summarized the history of how the District of Columbia was established. (**TAB A**). As set forth in these cases, in 1791 President Washington appointed Commissioners to locate and lay out the District's boundaries. As part of this process, negotiations were entered into between the Commissioners and the original proprietors which resulted in agreements providing for the disposition of land within the original city pursuant to deeds of trust which ultimately divided all land into three categories: (1) the fee title to streets was to be vested in the United States as directed by the President; (2) the land appropriations or reservations for the use of the United States were to be purchased by the Commissioners with fee title vesting in the United States; and (3) the entire residue of the land, after being laid out in squares, parcels and lots was to be divided equally with one-half the land conveyed to the original proprietors and the other one-half assigned to the Commissioners to be sold. Attached at **TAB B** is an essay that describes how the original streets were designated.

Subsequent to the execution of these deeds of trust and following the L'Enfant Plan, a map was prepared showing the layout of the District. A copy of a portion of this map, which is known as the "Dermott" or "Tin Case Map," is attached hereto at **TAB C**. In 1797, President Washington directed that the streets be conveyed to the United States as shown on that map, which designated the original 2nd Street as a single street with a canal centered in the street in a north-south manner. Without going further into history, space between the two parts of 2nd Street was designated as U.S. Reservations 17B, 17C, and 17D. In addition, although both the western and eastern portions of 2nd Street have been constructed and currently exist, the eastern portion of 2nd Street, S.E., and L Street, S.E., were legally closed in 1965 and the land area was incorporated into the adjacent U.S. Reservations with a portion to the property owner in Square 769. A copy of the street closing recorded in Book 148, at page 107, in the records of the Surveyor of the District of Columbia, is attached hereto at **TAB D**. A copy of the Assessment and Taxation Plat indicating how the closed street was incorporated into the adjacent ownerships is attached hereto at **TAB E**. Pursuant to the Transfer of Jurisdiction plat recorded in Book 158, at page 50, in 1971, the Federal government transferred jurisdiction over U.S. Reservations 17B, 17C, and 17D to the District. (**TAB F**). It should be noted that pursuant to the recorded street closing, title to the eastern portion of 2nd Street, except as otherwise shown, vested in the United States (National Capital Housing Authority). By virtue of the District of Columbia Government and Governmental Reorganization Act, Sec. 202(a), that Agency became an agency of the District of Columbia (now the District of Columbia Housing Authority).

As part of the Capper/Carrollsborg redevelopment which was approved as a planned unit development by the Zoning Commission, the Council, at the request of the Applicant, enacted legislation to reopen the eastern side of 2nd Street to restore it to its original configuration as part of 2nd Street on the east side of U.S. Reservations 17B, 17C, and 17D. These Reservations are to become the Canal Blocks Park. Copies of the street dedication plats are attached hereto as **TAB G** and a copy of the legislation approving the street reopening is attached hereto as **TAB H**. In order to avoid confusion, as to street names on the ground, the eastern part of 2nd Street is to be named 2nd Place, S.E.

Language and Application of 1910 Height Act

D.C. Code Section 6-601.05(a), which is attached hereto as **TAB I**, provides in pertinent part that:

No building shall be erected, altered, or raised in the District of Columbia in any manner so as to exceed in height above the sidewalk the width of the street, avenue, or highway in its front, increased by 20 feet; *but where a building or proposed building confronts a public space or reservation formed at the intersection of 2 or more streets, avenues, or highways, the course of which is not interrupted by said public space or reservation, the*

limit of height of the building shall be determined from the width of the widest street, avenue, or highway.

Based upon the language of the Act, as well as the legal history of 2nd Street as outlined above, since 2nd Street and 2nd Place are being restored to the original single street configuration, the Applicant is permitted to use the full width of 2nd Street as the basis for determining the height of the proposed office building.

In addition, based upon the consistent and reasonable interpretation of the Surveyor of the District of Columbia and the Office of the Corporation Council (now the Office of the Attorney General), the split street may be combined for purposes of the Height Act. The U.S. District Court for the District of Columbia has confirmed the interpretation that when a building fronts on a street which includes public space in the center, the width of street is determined by measuring full across the entire public space. In *Techworld Development v. D.C. Preservation League*, 648 F. Supp. 106, 121 (D.D.C. 1986) (**TAB J**),¹ the Court upheld a determination that a building can be constructed to a height of 130 feet based upon measuring across two portions of the same street with an intervening reservation, citing specifically, the Army Navy Club and the Farragut Building on Farragut Square and the Prudential Building on McPherson Square.

For the convenience of the Commission, a portion of the Baist Atlas showing McPherson Square splitting 15th Street is attached hereto at **TAB K** and a portion showing Farragut Square splitting 17th Street is attached hereto at **TAB L**. In both cases, buildings fronting on the streets and reservations were determined to comply with the Height Act, at 130 feet, notwithstanding the fact that the portions of the streets immediately confronting the properties are less than 110 feet.

Attached at **TAB M** are three sets of aerial photos with corresponding plats: M-1 showing 2nd Street, SE, between I and M with Reservations in center; M-2 showing E Street, N.W. between 18th and 20th Streets with Reservations in center; and M-3 showing E Street, S.E., between 4th and 6th Streets also with Reservations in center. These exhibits confirm that a single street may have two portions on either side of a public space or reservation.

Erroneously, the Staff Report argues that 2nd Street is now three separate rights-of-way, citing Sanborn Maps and the 1956 Baist Atlas. First, there is no basis to call the three Federal Reservations (17B, 17C and 17D) a "right-of-way." Second, the eastern portion of 2nd Street is just as much a part of 2nd Street as it was under the Dermott Map directed by President Washington. Third, it is peculiar that Staff would cite Sanborn and Baist plats, which are not official and contain many errors, rather than the official plats recorded in the Office of the Surveyor of the District of Columbia (See **TAB E**). The

¹ The United States Court of Appeals for the District of Columbia Circuit granted a motion to dismiss the decision below as moot based upon a settlement agreement.

property lines of the private property on either side of 2nd Street are and have been 250 feet apart (with the Reservations being 100 feet in width) since 1797.

Conclusion

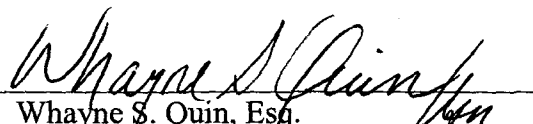
One of the obvious relationships embodied in the Height Act is the relationship of the widths of streets, public spaces and reservations to permitted heights. The wider the street, whether adjacent to public space or reservation or not, the higher the fronting building can be. Where there is a public space or reservation adjacent to a street, that space or reservation must be taken into consideration by the very language of the Act as intended by Congress. Here the distance between property lines, inclusive of 2nd Street and Reservation 17D, is 250 feet (150 feet of 2nd Street alone and 100 feet for the reservation).

The long term application of the Act is consistent and clear. Property owners and officials responsible and vested with authority for applying the Act have relied upon this consistent application. That is not debatable. As the United States District Court said in *Techworld* at 122, undoing this longstanding ruling would have a "pernicious result." Moreover, the urban design result of balancing the buildings on either side of the Canal Blocks Park fronting M Street is a strong benefit of the permitted height.

For these reasons, the Applicant respectfully requests that that Zoning Commission find, consistent with years of past precedent, that the proposed building complies with the Height Act.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: 
Wayne S. Quin, Esq.
Kyrus L. Freeman, Esq.
Steven E. Sher, Director of Zoning and
Land Use Services

Attachments

cc: Steve Cochran, D.C. Office of Planning (By Hand)
Advisory Neighborhood Commission 6D (By Mail)