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Mary Carolyn Brown
202 862 5990
carolyn.brown@hklaw.com

January 11, 2005

VIA HAND DELIVERY

Board of Zoning Adjustment
for the District of Columbia
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

Re: BZA Appeal No. 17109
1819 Belmont Rd., N.W.

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Dear Members of the Board:

On behalf of Montrose, LLC, Intervenor in the above-referenced case, we are filing herewith an original plus twenty copies of its Brief on Penthouse Setback Interpretations un the 1910 Height Act and the Zoning Regulations.

We look forward to the decision in this matter scheduled for February 1, 2005.

Respectfully submitted,



Mary Carolyn Brown

Enclosures

cc: Gail Montplaisir, Montrose, LLC

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BZA
Case No. 17109
Exhibit No. 87

**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

APPEAL OF:

**Kalorama Citizens Association from the)
Administrative Decision of David Clarke,)
Director, Department of Consumer and)
Regulatory Affairs, from the issuance of)
Building Permit Nos. B455571 and B455876,)
dated October 6 and 16, 2003, respectively,)
to Montrose, LLC, to adjust the building height)
to 70 feet and to revise penthouse roof structure)
plans to construct a five-story apartment)
building in the R-5-D District at 1819 Belmont)
Road, N.W., Washington, D.C.)**

BZA Appeal No. 17109

Decision Date: February 1, 2005

**INTERVENOR'S BRIEF ON MEANING OF
"EXTERIOR WALL" UNDER 1910 HEIGHT ACT**

**I.
INTRODUCTION**

By action taken December 7, 2004, the Board of Zoning Adjustment ("Board" or "BZA") reopened the record in the above-referenced appeal case to receive additional briefing from the parties on the narrow issue of whether a side wall should be considered an exterior wall if the adjacent property shares a wall or if the adjacent owner may lawfully construct a shared wall between the buildings. The Board further invited the parties to discuss the ramifications of a ruling on this issue. Montrose, LLC, through undersigned counsel, submits this brief in response to the Board's request. As discussed in greater detail below, the side walls of the building at 1819 Belmont Road, N.W., can only be construed as common division walls on interior lot lines and thus are not subject to the setback provisions of the Height Act or the Zoning Regulations. Consequently, the appeal on this issue should be denied.

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II. ARGUMENT

A. Longstanding Interpretations of the Zoning Regulations and the Height Act Preclude the BZA from Requiring Setbacks Along Interior Lot Lines.

While the term “exterior walls” has been interpreted differently under the Height Act and the Zoning Regulations, neither the federal statute nor the local regulation requires roof structures to be set back from walls facing on interior lot lines. Rather, “exterior walls” under the 1910 Height Act has always been interpreted by the Zoning Administrator, the Board, the Zoning Commission and the National Capital Planning Commission to mean walls fronting on a street. *See* Report of the Zoning Advisory Council on Proposed Amendments to the Zoning Regulations, July 15, 1958, at 1 (Zoning Commission construes “exterior walls” to mean walls from the street sides only, an interpretation considered in harmony with the Act and not in violation thereof”); *see also* Memorandum from Zoning Administrator to the Office of Zoning, Zoning Commission Case No. 93-9C, November 24, 1993, at 1 (“[t]he setback requirements of a roof structure under provisions of the [Height of Buildings] Act of 1910 have always been interpreted by the Zoning Division as being required to set back from the property line which adjoins a street.”); *see also* Letter from the National Capital Planning Commission to the Zoning Secretariat, NCPC File No. Z.C. 84-10, June 3, 1986, at 1-2 (setbacks are measured from exterior walls fronting on a street to hide or screen penthouses from street views); *see also* Memorandum from the D.C. Office of Planning to the Zoning Commission, Re: Proposed Text Amendments for Roof Structures, February 3, 1984, at 6 (an Office of Attorney General Opinion states that the 1910 Height Act “requires a penthouse setback only from the lot line on the frontage facing the street”). Copies of these documents have been previously submitted to the Board in this appeal case or in BZA Case No. 17221, and are hereby incorporated by reference.

In contrast, the term “exterior walls” under the Zoning Regulations has been interpreted more inclusively to mean walls fronting on streets, alleys, yards or courts. However, the term “exterior walls” has never been interpreted to mean side walls constructed to the lot line where the adjacent owner has, or may, build a wall directly abutting the neighbor’s lot-line wall. According to the long-standing interpretation of the Zoning Administrator, such walls constitute “party walls” or “common division walls” that are “interior” for purposes of the Height Act and the Zoning Regulations and thus do not trigger the roof structure setback requirements. *See* Testimony of Faye Ogunneye, Chief, Zoning Review Branch, DCRA, BZA Appeal No. 17109, March 16, 2004, Transcript (“Mar. 16 Tr.”) at 169-71, 191-93; and 222. Even if the adjacent property is vacant, or if the abutting buildings are of unequal height, it is an interior wall for zoning purposes as long as the potential exists for the two walls to confront one another along an interior lot line. This interpretation is borne out by the numerous precedents that can be found throughout the city, as discussed below.

B. Numerous Roof Structures Exist Without Setbacks along Interior Lot Lines Where the Buildings Has Been Constructed to its Maximum Height Under the 1910 Height Act.

Many buildings in Washington have been constructed to their maximum height under the 1910 Height Act and include roof structures that are not set back along the interior lot lines. These roof structures were approved as a matter-of-right consistent with the long-standing interpretations of the 1910 Height Act and the Zoning Regulations.

1. Judiciary Tower Building, 450 H St., N.W.

For example, the Judiciary Tower Building located at 450 H Street, N.W., includes a roof structure that is not set back from its western lot line despite the building being constructed to its maximum permitted height of 110 feet under the 1910 Height Act. The relatively small building is located in a commercial district on a rectangular lot that fronts only on H Street, N.W., which

is 90 feet wide. Under the Height Act, buildings fronting on a commercial street may be constructed to a height equal to the width of the street plus twenty feet, but no more than 130 feet. See D.C. Code Ann. § 6-601.05(a) and (b) (2001 ed.).



450 H St NW



450 H St NW – aerial view

As shown in the above photographs, including an aerial view, and the real estate plat attached as Exhibit A, the penthouse is located flush with the western property line, just like the building at 1819 Belmont Road, N.W. Significantly, this building was reviewed and approved by the Board of Zoning Adjustment in BZA Case No. 14002 which granted waivers from the rear yard requirements and variances from the floor area ratio and parking requirements. Further, the application was processed prior to the time applicants were permitted to self-certify the areas of zoning relief required. Instead, the Zoning Review Branch conducted a thorough review of the project and concluded that relief from the roof structure setback requirements was not needed. A copy of BZA Order No. 14002 is attached hereto as Exhibit B.

2. The Ring Building, 18th and M Streets, N.W.

Located at the northwest corner of 18th and M Streets, N.W., the Ring Building has a roof structure that is not set back from its north property line. The Building is constructed to a height of approximately 130 feet, the maximum permitted under the 1910 Height Act.

Nevertheless, the roof structure is not set back from its north interior lot line because it does not constitute an exterior wall under the Height Act or the Zoning Regulations.



18th & M Sts NW

3. 1701 and 1705 K Street, N.W.

Similarly, the buildings at 1701 and 1705 K Street, N.W., each have penthouses that abut one another along the common division line of the two buildings. Each building is constructed to its maximum height of 130 feet as permitted under the Height Act. Nevertheless, the penthouses are not set back because they are not located along exterior walls as that term as been interpreted under the Height Act and Zoning Regulations.

[See Photos on Following Page]



1701 and 1705 K Streets, N.W.

4. 1627 K Street NW

Likewise, the roof structure of the Commonwealth Building located at 1627 K Street, N.W., is not set back from its west interior lot line. It, too, is built to a maximum height of 130 feet under the Height Act.



1627 K Street, N.W.



1627 K Street, N.W.

5. Other Examples

Numerous other examples exist demonstrating that common division walls have consistently been interpreted to be “interior” walls for purposes of roof structure setbacks under the Height Act and the Zoning Regulations, including the former Garfinckel’s Building at 1401 F Street, N.W. *See* Exhibit C.

In many other instances, roof structures are not set back from the exterior walls of the buildings along yards or courts, further demonstrating that the Height Act has been consistently construed to require roof structure setbacks along street frontages only. *See*, for example, aerial photographs and plat for The Roosevelt, 16th and W Streets, N.W.; the Washington Hilton Hotel, Connecticut and Florida Avenues, N.W.; and the apartment building at Connecticut Ave. and Garfield St., N.W., attached as Exhibit D.

Finally, numerous other examples abound demonstrating that neither roof decks nor railings are considered roof structures for purposes of the Height Act. *See*, for example, aerial photographs and real estate plats as Exhibit E.

Thus, because the Height Act has historically been interpreted to allow these types of roof structures without setbacks, it is only logical that common division walls abutting interior lot lines, which are less visible from the street, would not require roof structure setbacks, either.

C. Interpretations that Lead to Illogical Consequences are to be Avoided.

An interpretation that would require setbacks along common division walls abutting lot lines would lead to illogical and absurd consequences, which are to be avoided. Courts have consistently held that agencies should "not wallow in literalism where the plain language of a statute would lead to absurd consequences which the legislature could not have intended."

Parreco v. District of Columbia Rental Housing Commission, 567 A.2d 43, 46 (D.C. 1989),

citing United States v. Brown, 333 U.S. 18, 27, 92 L.Ed. 442, 68 S. Ct. 376 (1948); *Holt v. United States*, 565 A.2d 970, slip op. at 4 (D.C. 1989) (*en banc*).

Here, if the Board were to interpret the Height Act and Zoning Regulations to require penthouse setbacks along common division walls between properties, no property owner would be willing to be the first to construct a building to its full potential under the height limits because his penthouse would have to be setback from all, presumably four, walls. Any subsequent abutting owner could only match the height of the first building unless he conceded to setting back the roof structures on a taller building.

Further, properties would be treated differently depending on the grade of the street. If one person's property enjoyed a higher elevation than his neighbors, he would have less flexibility to deviate from penthouse setbacks because his building would be taller and the penthouse purportedly more visible from the street than others in the same block. "Matter of right" zoning would be rendered meaningless because each property would be treated differently based on elevation and its visibility from undefined vantage points along a street. Yet the Height and the Zoning Regulations specifically recognize that grade changes must be taken into account when measuring height, otherwise the measuring point would be taken from mean sea level or from some fixed point for the entire city rather than from the level of the curb opposite the middle of the individual building.

It is a fundamental principle of zoning law that each property within each zone district must be treated equally for purposes of matter of right zoning. It is only when the uniqueness of each property creates practical difficulties in complying with the requirements that deviations should occur; the unique qualities of a property should not trigger immediate, unequal application of the regulations. Here, if in determining the meaning of "exterior walls" under the

Zoning Regulations and the Height Act, a building is judged on its relative height in relationship to other existing buildings along the street, on views from 18th Street rather than Columbia Road, for example, or on the relative merit of its architectural design, a sliding scale of arbitrary and subjective standards is created that renders matter-of-right zoning meaningless.

Such arbitrary and unreasonable standards, however, are avoided when common division walls are interpreted as “interior” walls. The purpose of the setback requirements under the Height Act and Zoning Regulations is to protect street views. Because a person can stand on a street and face a building, setbacks are required along the street elevation. Conversely, because a person cannot stand in front of a common division wall, there is no requirement for a setback along these side walls on interior lot lines.

The Zoning Commission had the opportunity require setbacks along common division walls when it amended the roof structure regulations in 1984 but chose not to do so. The Office of Planning suggested clarifying the text by stating that penthouses must be set back from all *perimeter* walls of a building, thus including common division walls and walls fronting on yards, streets or alleys. The Zoning Commission *expressly rejected* this proposed amendment stating that the Zoning Regulation should be consistent with the language of the 1910 Height Act, the meaning of which was clear: that setbacks are required from all exterior walls. Because the Zoning Commission specifically rejected this clarifying language and chose to follow the 1910 Height Act language, which applies only to street frontage walls, the Commission clearly intended the Zoning Regulations to be interpreted in the same manner as the 1910 Height Act. *Id.* That is, penthouse setback requirements apply only to the street frontage of 1819 Belmont Road.

E. Established Precedents Apply to 1819 Belmont Road

The Appellants have previously suggested that any precedents cited by Montrose only demonstrate other instances of non-compliance with the Zoning Regulations, that these buildings had somehow “slipped under the radar screen” and were not a result of any long-standing interpretation by the Zoning Administrator or other governmental bodies. This argument only makes sense, however, if the Zoning Administrator also concluded that the permits for these buildings had been issued in error. Instead, however, the Zoning Administrator has consistently defended its long-standing interpretation that setbacks are not required along common division walls and he did not abuse his discretion in following these precedents.

F. Principle of *Stare Decisis* Precludes Board from Applying any New Interpretation Retroactively to Montrose.

Even if the Board in the present case determines that this consistent, historical interpretation is in error, the Board cannot apply its new interpretation retroactively to building permits already issued. Under the principle of *stare decisis*, an agency's change in a long-standing interpretation of a rule can only apply prospectively, not retroactively. *See Smith v. District of Columbia Board of Zoning Adjustment*, 342 A.2d 356 (D.C. 1975), a copy of which has been previously submitted to the Board.

In *Smith*, the petitioning homeowners added a deck on their home in reliance on a building permit issued by the District. They subsequently requested a variance and invoked the doctrines of estoppel and laches. The Board of Zoning Adjustment ruled against them without making findings with respect to these equitable issues or the homeowners' claim that the building permit for the deck was approved in accordance with a long-standing interpretation of the Zoning Regulations. The Court found that:

the Board made no findings relevant to petitioners' claim that the Zoning Administrator's approval of the deck was given pursuant to a long-standing interpretation of the Zoning Regulations which had been approved in the past by the Board, so that established principles of *stare decisis* require any change in that interpretation to be made prospective only. While the Board is of course not bound for all time by its prior positions, we think it should have considered this contention, not only in connection with its decision of the merits of the case, but also as it relates to petitioners' claim of estoppel.

Smith, 342 A.2d at 359.

Here, the Zoning Administrator approved the penthouse (as well as the roof deck and railing) pursuant to a long-standing interpretation of the Zoning Regulations by the Zoning Administrator's office, the Board itself, and the Zoning Commission. Consistent with the holding of *Smith*, if the Board now wishes to change that long-standing interpretation, it may only apply that new interpretation prospectively. Thus, under the principle of *stare decisis*, the Board is precluded under *Smith* from retroactively requiring Montrose to set back the penthouse from the common division walls (or remove the roof deck and railing) in order to comply with this new interpretation.

If the Board were to reject the long-standing interpretations of the Height Act and Zoning Regulations, numerous buildings, including those cited above, would be rendered non-conforming. These buildings could potentially be subject to civil infractions and fines. Additionally, owners could face difficulties in financing or re-financing these buildings due to uncertainties over the building's compliance with the Zoning Regulations. Further, several projects that are now being developed may have to be redesigned to comport with this new interpretation. Given the far-reach and negative consequences, the Board should not overturn the long-standing interpretations on roof structure setbacks.

**III.
CONCLUSION**

For the reasons stated above, Intervenor Montrose, LLC, respectfully requests the Board to deny the appeal in the above-referenced case.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: 

Mary Carolyn Brown
2099 Pennsylvania Ave., N.W., #100
Washington, D.C. 20006
(202) 955-3000

January 11, 2005

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Intervenor Montrose LLC was served this 11th day of January, 2005, by hand-delivery, or first-class mail postage prepaid, on the following:

Alan J. Roth
Chair, Advisory Neighborhood Commission 1C
1845 Vernon Street, N.W.
Washington, D.C. 20009

Kalorama Citizens Association
c/o Anne Hughes Hargrove
1827 Belmont Road, N.W.,
Washington, D.C. 20009

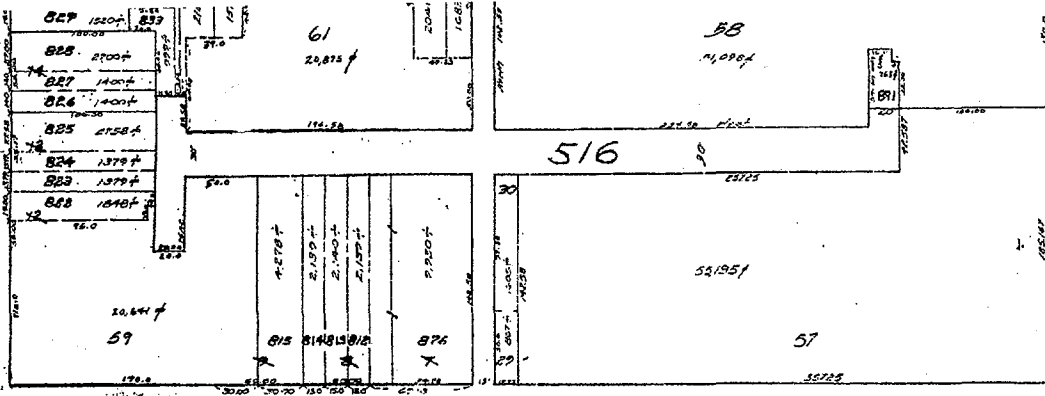
Laurie Gisolfi Gilbert
Office of General Counsel, DCRA
941 North Capitol St., N.E., Suite 9400
Washington, D.C. 20001

Toye Bello
Zoning Administrator
D.C. Department of Consumer & Regulatory Affairs
941 North Capitol Street, N.E., Second Floor
Washington, D.C. 20001

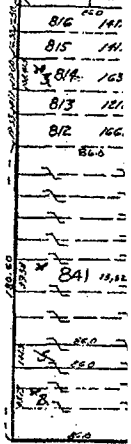


EXHIBIT A

STREET 7

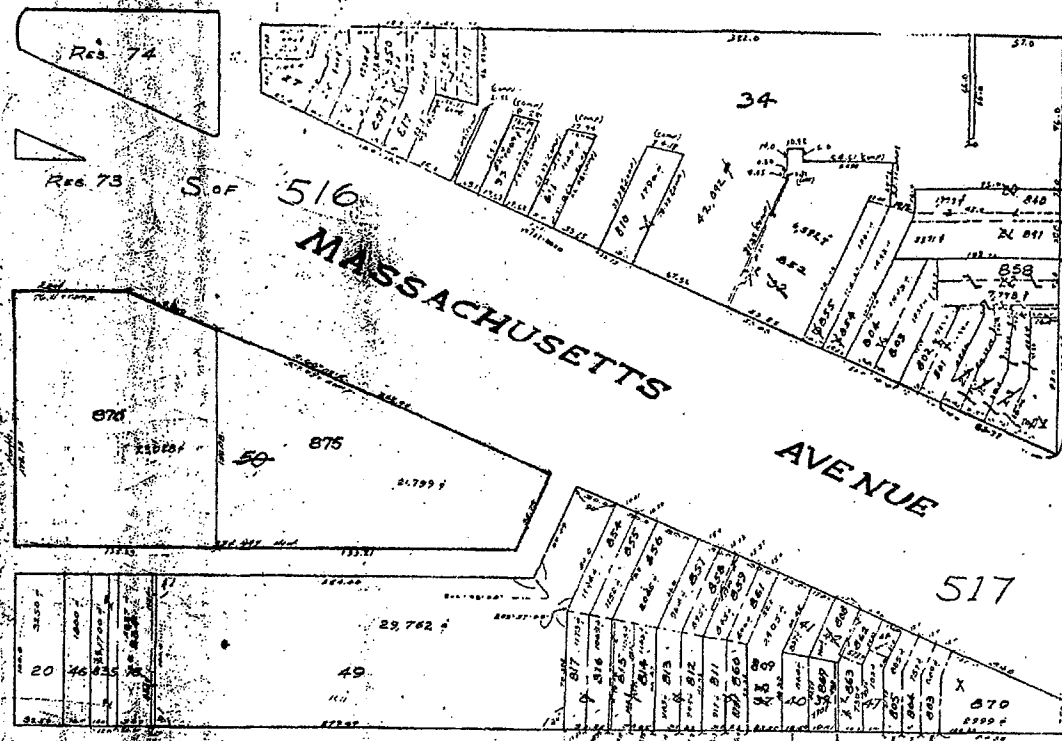


STREET

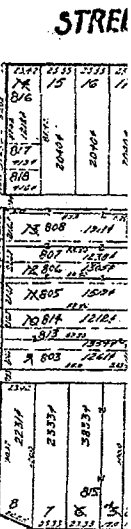


I

5-TH

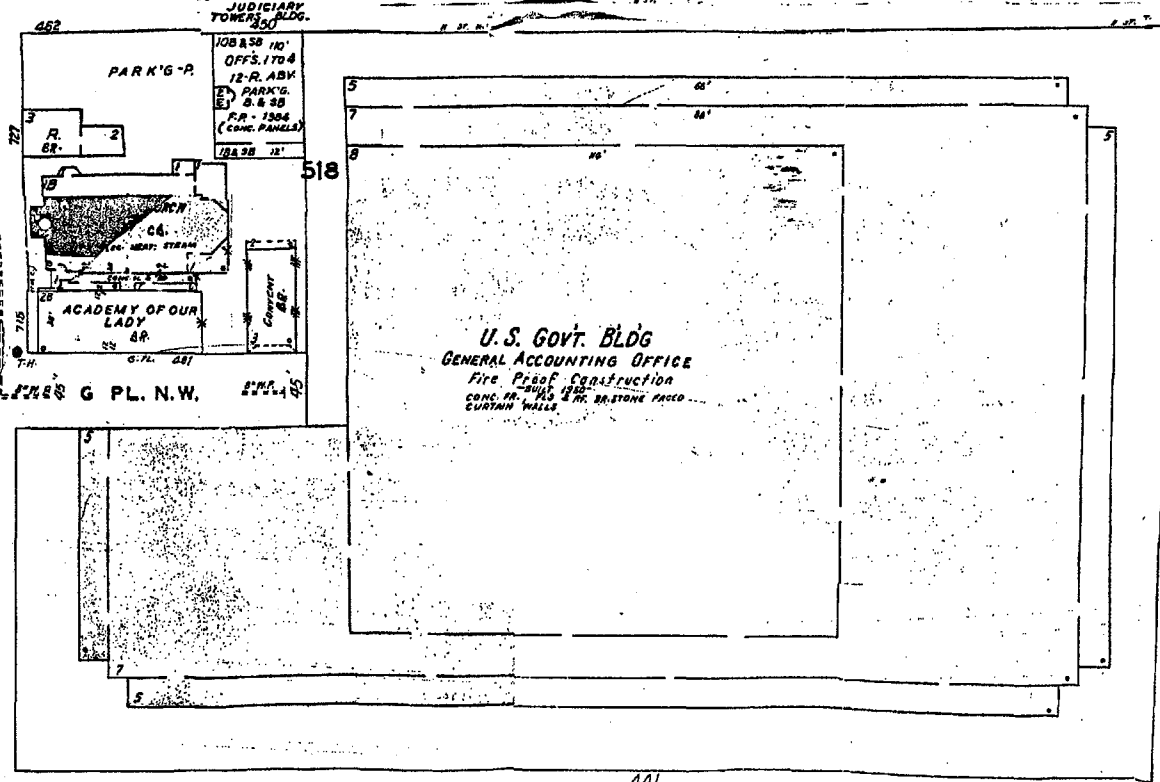
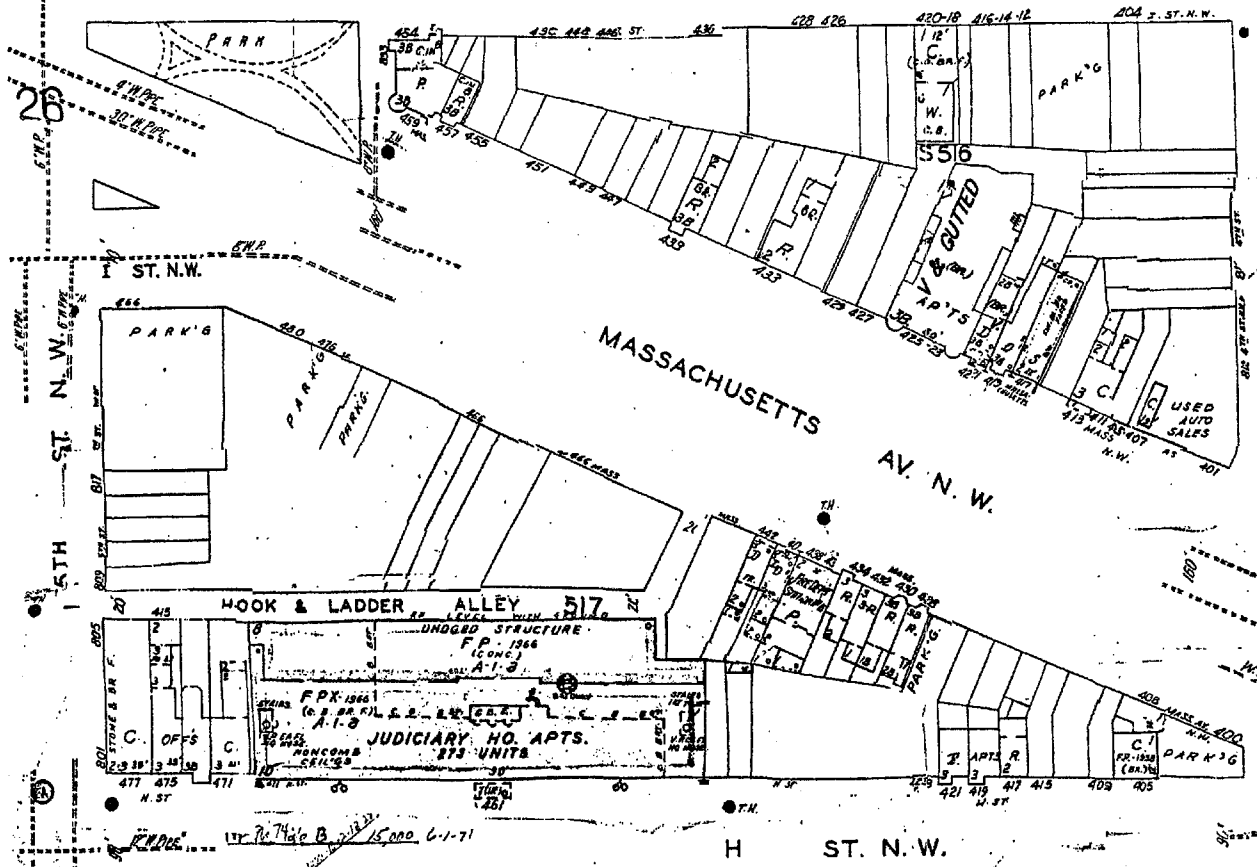


4-TH



CHESTER A. ARTHUR FEDERAL OFF. BLDG.

I ST. N.W.



G ST. N.W.

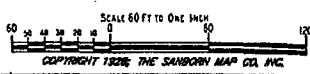


EXHIBIT B

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 14002 of Judiciary Tower Associates, pursuant to Sub-section 8207.2 and Paragraph 8207.11 of the Zoning Regulations, for special exceptions under Paragraph 4101.44 to construct a special purpose office building and under Sub-section 4303.4 to waive the rear yard requirements and for variances from the floor area ratio requirements (Sub-section 4301.1), and the parking requirements (Sub-section 7202.1) or in the alternative variances from three parking spaces (Sub-section 7202.1) and from the prohibition against required parking spaces measuring less than nine feet by nineteen feet for two spaces (Sub-section 7204.1) to permit the proposed construction of a new special purpose office building and an apartment house of eight units in an HR/SP-2 District at premises 450 H Street, N.W. (Square 518, Lots 5, 6 and 7).

HEARING DATE: August 3, 1983
DECISION DATE: September 7, 1983

FINDINGS OF FACT:

1. The opposition, as a preliminary matter at the public hearing, requested that the hearing on the subject application be continued. The opposition argued that the property was not posted for the full fifteen days as required under the Supplemental Rules of Practice and Procedure before the Board of Zoning Adjustment. On several days during the fifteen day period there was no sign on the property. Secondly, the Office of Planning report was not in the file and available to the opposition's careful review. Thirdly, there was no evidence in the file that the General Accounting Office (GAO) had given permission to the applicant to use its ramp. Upon review of the file and questioning of the witnesses, the Chairman ruled that the property had been sufficiently posted and that the Office of Planning report had been filed properly. As to the issue of the easement from the GAO, the Chairman ruled that this was a substantive issue that would be addressed as the merits of the case were heard.

2. The subject site is located on the south side of H Street between 4th and 5th Streets, N.W., approximately 122 feet east of the intersection of 5th and H Streets. The site is known as premises 450 H Street, N.W. It is in an HR/SP-2 District.

3. The site is rectangular in shape, containing 3,834 square feet of land with fifty-four feet of frontage on H Street. The site is improved with a one-story structure located on Lot 7 which is occupied by a dry cleaning establishment, a nonconforming use.

4. To the east of the site is the General Accounting Office, a 110 foot high structure with a garage ramp entrance abutting the site to the east. The GAO building visually dominates the area, and occupies all of the subject square other than the subject site and the adjacent religious institution.

5. Immediately to the west and south of the site is the St. Mary Mother of God Church, its parking lot, its rectory, an orphanage and the parish house. A portion of the parish house continues in church use. A second portion was approved by the Board for SP office use in Application No. 13911, by order dated June 28, 1983. Built in 1891, the St. Mary's Church is a Category III Landmark. Further south of the Church is the GAO building occupying the remainder of the square.

6. To the north across H Street from the site is the ten-story Judiciary House apartment complex as well as three and four-story row dwellings occupied with office uses permitted in the SP District.

7. The site is located on the eastern edge of Chinatown which contains a mix of retail, housing and office uses. The site is also on the northern edge of the Judiciary Square area, a governmental center around which new privately owned office buildings are being developed.

8. The zoning pattern is generally C-3-C and C-4 to the east, west and south, outside of the three block wide Judiciary Square area zoned SP-2. Within the SP-2 area, there have been three approved planned unit developments and map changes to C-3-C.

9. The applicant proposes to demolish the existing building, terminate the nonconforming use and build a new mixed-use office and apartment structure. The mixed-use structure will be 110 feet in height and is proposed to contain six floors of office use and four floors of residential use.

10. The ground through sixth floors of the proposed structure are proposed to be leased to professional office firms. The seventh through tenth floors are proposed to be developed as eight apartment units, with two units per floor. Eight parking spaces are proposed to be located on the first sub-grade level with access from the GAO Building

garage ramp. There will be two additional levels below the parking level with leasable space.

11. The Commission of Fine Arts has architectural review authority over the proposed development under the Shipstead-Luce Act. On February 3, 1983, the Commission of Fine Arts approved preliminary design of the proposed project including a finishing material of limestone and glass.

12. The architect for the applicant testified that the Commission of Fine Arts found that the project was an urban design asset in that a building of the proposed height prevented the massive GAO Building from visually over-powering both the site in question and the St. Mary's Church. The Board concurs.

13. No windows for the proposed apartment units are located within forty feet directly in front of another building. The GAO Building steps back twenty-five feet from the H Street building face at a point just below the lowest residential level of the proposed project. Thus, while residents on the east side of the proposed structure would see the nearby western face of the GAO Building, the space directly in front of them would be clear. The closest adjacent buildings opposite the residential windows on the north, south and west sides of the proposed project are substantially more than forty feet away. The project's upper residential floors will be approximately fifty feet on a diagonal from the louvers of the GAO Building's mechanical floor. However, the 8.67 feet of the rear yard for which relief is requested will not make an appreciable difference.

14. The office windows along approximately forty-four feet of the ground floor and approximately twenty-nine feet of floors two through six, on the east side of the proposed structure, face on windows of the GAO Building twenty-six feet away across its parking ramp. While this separation is less than the required thirty feet, it is not critical and is not a direct result of the reduced size of the rear yard. There is also a very minor six foot overlap of the Church on the southwest side of the subject structure, resulting in a twelve foot separation between office windows at the ground floor and the blank wall of the church at that point.

15. Service activities will be provided to the proposed structure through the GAO ramp. Trash would be loaded from the GAO ramp. Major deliveries to the apartment units would occur on H Street.

16. The applicant testified that the provision of residential as well as commercial use on the site, in accordance with the HR overlay zone results in the necessity of devoting further area in the building to a double

elevator service core. Problems with security and the desire of the residents of the building to maintain their privacy and be out of the flow of visitors and occasional deliveries to office functions on the SP office floors necessitate a separate elevator for their use. This results in an unusually high core factor for the building. The Board concurs with the applicant. The Board finds however, that due to the smallness of the site, the core area to accommodate the mixed use is of minimal size and would in any case consume a high percentage of the floor area.

17. No new residential housing has been provided in the general area of the site that has not received a government subsidy.

18. The subject site is surrounded by existing office and institutional uses, none of which front directly upon it. The site fronts on the ninety foot wide right-of-way of H Street to the north and is separated from the GAO Building by the twenty-two foot wide ramp on the GAO property on the east and a 14.25 rear yard is provided. Therefore, there is sufficient area to protect the light, air, and privacy of users of the proposed structure as well as neighboring uses.

19. The General Services Administration has agreed to grant the applicant an easement for the use of the GAO Building's ramp, as set forth in Exhibit No. 30 of the record.

20. The applicant proposes to provide a total of eight parking spaces to serve the building. Six spaces measure 8.5 feet by 18.5 feet and two spaces for compact cars measure seven feet by 18.5 feet.

21. Within a two block radius of the site, there are sixty-one curbside metered parking spaces and 418 off-street spaces available in three parking lots and one garage. There is adequate and convenient off-street parking available to the site.

22. The applicant's traffic expert determined that the proposed office space would contain approximately fifty-four employees. It is expected that approximately eighty percent of the employees would use public transportation, approximately five percent would walk to work or be dropped off by others and approximately fifteen percent would arrive at work by private car. An average car occupancy is expected to be 1.8 persons. It is anticipated that the ownership among the residents of the eight apartment units will be one car per four units or two cars. The total peak hour traffic that would be generated by the proposed development would be six trips. The expert was of the opinion that there would be no effect on current traffic operating conditions. The Board concurs.

23. H Street is a minor arterial street, seventy feet wide in front of the site, which provides six lanes of traffic. The curb lane is restricted to buses and right turning vehicles in the peak direction during the peak periods. During the rest of the day, one-hour metered parking is allowed on both sides of the street. Fifth Street is a local street, forty-four feet wide in the immediate vicinity of the site. Two-hour metered parking is allowed between 7:00 A.M. and 6:30 P.M. on both sides of the street.

24. The site is approximately 1500 feet from both the Gallery Place and Judiciary Square Stations on Metrorail's Red Line. Five Metrobus lines pass through the intersection of 5th and H Streets. The 80 and 81 Metrobus routes pass in front of the site every five minutes.

25. The applicant testified that the subject site is a relatively narrow one for undertaking development such as is allowed at the height and bulk permitted under the Zoning Regulations. The applicant testified that with a lot width of fifty-four feet and area of approximately 3,800 square feet, parking can only be provided on one subgrade level since additional below grade level parking use would be impractical given the amount of area required for ramping down to additional below grade areas. The applicant further testified that a geotechnical report of the site revealed the existence of a relatively high water table which precluded further excavation.

26. The HR/SP-2 District allows a maximum floor area ratio of 8.5. Of the 8.5 FAR or 32,589 square feet of gross floor area, a maximum of 3.5 FAR or 13,419 square feet is permitted for office use. The remaining 5.0 FAR or 19,170 square feet, is available for residential use. The subject building contains 19,079 square feet of floor area proposed for office use, requiring a variance of 5,660 square feet. As proposed, 12,335.5 square feet of floor area would be for residential use.

27. The applicant testified that the small site area dictates that at least the minimum SP office floor area needed is the 3.5 FAR maximum. In order to accomplish the residential component of the project, a form of subsidy is needed to generate sufficient income from rental of office space on the site and is the basis for the FAR variance. The Board does not concur with the applicant's basis for the FAR variance. The economic considerations as stated are not an acceptable basis for a variance.

28. A rear yard of 22.92 feet is required and 14.25 feet is provided. The applicant is requesting a waiver of 8.67 feet or thirty-seven percent.

29. Nine off-street parking spaces are required for the proposed office use and two spaces are required for the apartments, totaling eleven spaces. Eight spaces are provided requiring a variance of three spaces or thirty-seven percent. None of these spaces are nine feet by nineteen feet.

30. The Office of Planning, by report dated July 27, 1983, recommended that the application be approved. The Office of Planning reported that the granting of the special exception for both SP office use and a partial rear yard waiver coupled with variances for office FAR and parking would not impair the intent or purpose of the Zoning Regulations. Existing plans and policies support the mix of uses in the area, particularly encouraging residential and hotel uses.

31. The Office of Planning was of the opinion that the size and location of the site are major contributors to the substantial practical difficulty the applicant faces in developing the subject site. The site is so small that the elevator core is twenty-five percent of a typical floor, resulting in a tremendously inefficient building. The site cannot be expanded because it is hemmed in by the GAO building and historic St. Mary's Church. Adding to this is the high cost of land Downtown and the free standing nature of the structure yielding expensive exterior materials in order to gain the necessary Fine Arts approval. The combination of mixed use policies and unique site, with no opportunity for a PUD (Planned Unit Development) results in a structure for which the proposed office and residential uses are permitted, the overall height and mass are permitted and the mix or relative proportion of uses, while not permitted without a variance, is essential to the viability of the project. The Board, for reasons discussed below, does not concur with the Office of Planning recommendations as to the FAR variance.

32. The D.C. Department of Transportation, by report dated July 26, 1983, indicated that it reviewed the application and found that, in recognition of the limited site, the proposed parking layout be revised to provide three to four spaces for full-sized cars and four to five spaces for compact cars. The eight spaces provided should be allocated to provide six spaces for office use and two spaces for residential use. The office parking spaces should be made available to residents in the evenings and on weekends. The applicant has agreed to the recommendations of the D.C. D.O.T. The D.C. Department of Transportation concluded that from a traffic capacity standpoint, the application will have a negligible impact on the surrounding streets. The Board concurs with the D.O.T. recommendations as to impact, but find that the parking layout as submitted by the applicant is reasonable.

33. The D.C. Department of Environmental Services by report dated July 8, 1983, stated it had no objections to the application.

34. Letters supporting the development were filed into the record from the D.C. Office of Business and Economic Development and the Department of Housing and Community Development.

35. A representative of St. Mary Mother of God Church, the property immediately to the west of the subject site, testified to the applicant's sensitivity to Church needs in terms of parking access, location and building materials for the proposed project. The Church concluded that, after careful study, it believed that no adverse impact on the Church will result and that granting the application will result in a good mix of uses for the neighborhood.

36. City Councilman John A. Wilson by letter dated July 26, 1983 stated his support of the application. He stated that it will provide needed jobs, housing and other services to the downtown without adverse impact on existing structures in the surrounding area.

37. There was opposition from the owner of property on the north side of H Street, across from the subject site. The opposition stated that a primary concern was the size of the proposed structure, which he realized was permitted as a matter of right. He testified that seven years experience in occupying office properties led him to believe that parking was difficult in the area and that curbside parking was always occupied. It was his opinion that the FAR variance requested would, if granted, exacerbate what is already a bad parking situation. He argued that the question of egress on GAO property was unresolved and that the applicant's use was likely to result in objection from GAO and have an adverse traffic impact on the neighborhood. He further testified that the parking layout was awkward at best. He further testified that three to four story commercial use is economic as his own use of property across the street from the subject site indicates.

38. The current occupant of the nonconforming dry cleaning establishment on a portion of the subject site also appeared in opposition. He testified that frequently his customers have to double park in front of the store because the parking demand on the street is so heavy.

39. A third opposing witness, an architect, testified that he saw no way to supply the three standard nine foot by nineteen foot spaces in the subject garage. He stated that the goal of SP zoning is to encourage mixed-uses so that granting the FAR variance here would be undesirable. A building would be "designable" on the subject site with five

floors devoted to apartment use and five floors to commercial use within the limits of the Zoning Regulations. There was a potential for the windows on the west elevation being completely blanked out if the building were sited face on the property line on the abutting property now occupied by St. Mary's Church. He offered no specific observations as to how, in his opinion, the applicant failed to meet any of the conditions to entitle it to the relief requested as set forth in the Zoning Regulations.

40. In response to the opposition, the Board finds that the assessment of the impact on parking and traffic in the neighborhood and the viability of the parking layout proposed are addressed by both the Department of Transportation and the applicant's expert traffic consultant and were found to be adequate on the basis of confirmed specific numerical surveys, which were not undertaken by opposing witnesses. The Board further finds that the applicant's proposal for new construction on the site is distinguishable from the opposing witness' experience in that he stated his property was a rehabilitation project rather than new construction and provided no residential use. There was no opposing economic analysis proffered to contradict the assessment made by applicant.

41. The applicant submitted a letter from the General Services Administration whereby the appropriate contracting officer agreed to enter an easement to permit use of the GAO ramp by the applicant. The Board finds that in light of the discussions the applicant had with GSA officials and GSA's agreement to use by the applicant of the ramp, the concerns raised by opposing witnesses are not well founded.

42. As a result of the analysis undertaken by the applicant's traffic engineer and by the D.C. Department of Transportation, the Board finds that there will be no adverse traffic impact resulting from traffic related to the proposed building.

43. As to the opposition architect's first observation, the Board notes that if the application is approved, any standard size parking spaces required by this Board must be provided or appropriate permits will not be issued. The Board, however, agrees that the FAR variance can not be granted but not solely for reasons stated by the opposition. The applicant has not substantiated the FAR variance. The Board further notes that Paragraph 8207.11 of the Zoning Regulations specifically give this Board authority to moderate the strict application of the Zoning Regulations, provided the applicant has met its burden of proof thereon. The Board notes, as to the third point, that no side yard is required.

44. Advisory Neighborhood 2C filed no recommendation on the application.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing findings of fact and the evidence of record, the Board concludes that the applicant is seeking special exceptions to use part of the subject premises for SP office use, and for waiver of the rear yard requirements. The record further shows that the applicant is seeking area variances from the floor area ratio requirements of Sub-section 4301.1 and the parking requirements of Article 72. The granting of the special exception relief requires that the applicant must demonstrate compliance with Paragraph 4101.44 and, as to rear yard waiver with the conditions of Sub-section 4303.4, and with the requirements of Sub-section 8207.2 of the Zoning Regulations. The Board concludes that the applicant has so complied. The Board concludes that the use, height, bulk and design of the structure are in harmony with the existing uses and structures on neighboring properties. The use of the structure will not create any dangerous or other objectionable traffic conditions. The Board further concludes that the approval of the special exceptions will be in harmony with the general purpose and intent of the Zoning Regulations and maps and will not tend to affect adversely the use of neighboring property in accordance with said regulations and map.

The Board further concludes that all the requirements of Sub-section 4303.3 et seq. have been met so that the applicant is entitled to a partial waiver of the rear yard requirements. The Board concludes that this action will not tend to affect adversely the use of neighboring property in accordance with said regulations and said map in that substantial areas of open space in the form of rights-of-way and loading ramps will maintain the light, air, ventilation and privacy of surrounding uses.

As to the parking variances, the Board concludes that the variances requested are area variances, the granting of which requires a showing of practical difficulty in the land itself. The Board concludes that the existence of water conditions on the site and the size of the site constitutes an exceptional condition in that from a practical standpoint, the site cannot accommodate more than one level of parking. The applicant has demonstrated that strict application of the parking requirement would result in peculiar and exceptional practical difficulties. The Board further concludes that the variance may be granted without substantial detriment to the public good and without substantially impairing the intent and integrity of the Zoning Regulations.

As to the floor area ratio variance, the Board concludes that that variance is also an area variance, the granting of which requires the showing of a practical difficulty inherent in the land itself. The Board concludes that the applicant has not demonstrated that such a practical difficulty exists that would substantiate exceeding the maximum FAR for office use in the SP-2 District. The additional economic burden imposed on the applicant by the Commission of Fine Arts is not a basis for variance relief before the Board. The size of the lot, the high water table and the high core factor are conditions of the property which do not support an increase in the rentable office floor area to subsidize the residential units. There was no persuasive evidence put forth by the applicant which clearly demonstrated a condition of the property which would substantiate an increase in the maximum office FAR. The mixed use development as proposed is inconsistent with the SP-2 District and the intent and purposes of the HR overlay provisions of the Regulations.


In view of the above the Board need not address the alternative relief of providing no parking, as eight spaces can be and are being provided. Accordingly, it is ORDERED that the floor area ratio variance is hereby DENIED and the special exceptions and parking variances from three spaces and the size requirements are GRANTED subject to the following CONDITIONS:

1. The fifth and sixth floors of the building shall be used for apartments in the same configuration as provided for on the seventh through tenth floors of the subject building.
2. Construction shall be in accordance with the plans marked as Exhibit No. 22A of the record except that modifications necessary to provide for residential use on the fifth and sixth floors, including changes in window treatment or the facade of the building, shall be permitted.

VOTE: 5-0 (Lindsley Williams, Douglas J. Patton, Carrie Thornhill, William F. McIntosh and Charles R. Norris to grant in part and deny in part).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY:



STEVEN E. SHER
Executive Director

OCT 13 1983

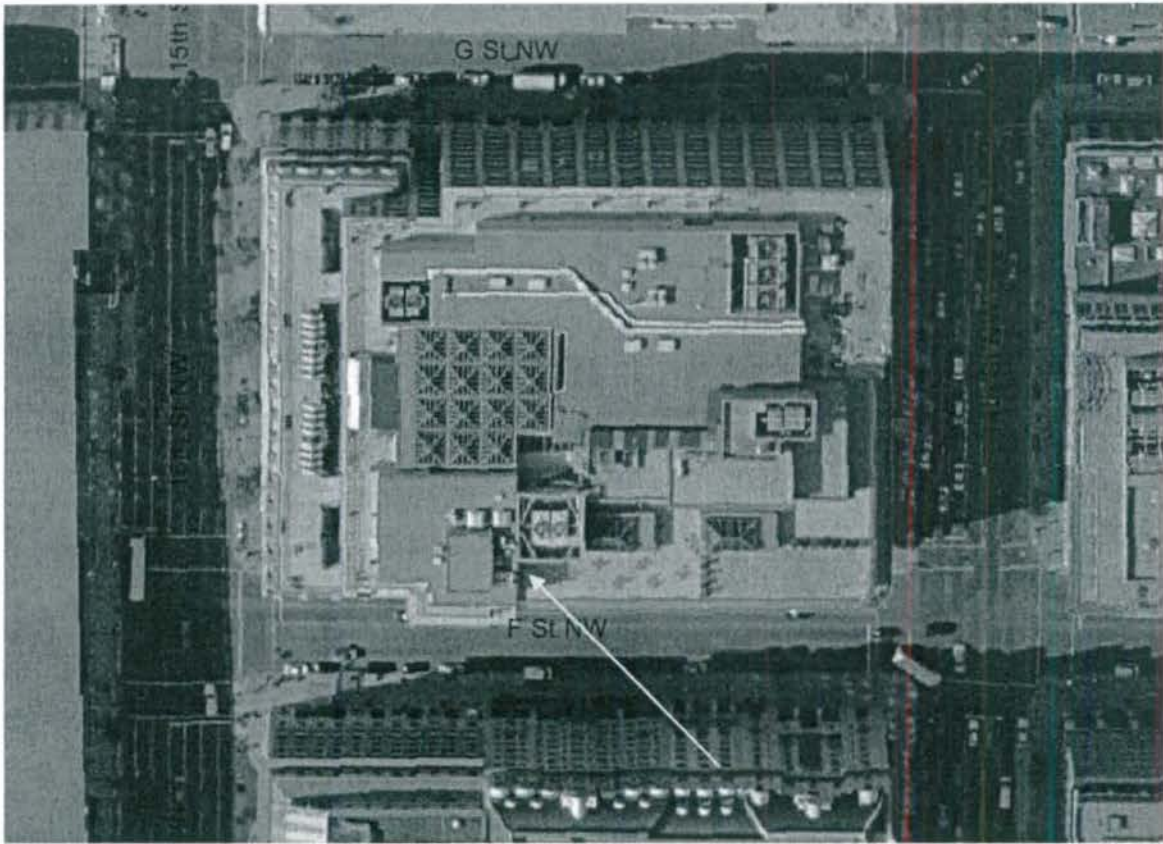
FINAL DATE OF ORDER: _____

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

14002order/KATE10

EXHIBIT C



Former Garfinckel's Building
1401 F Street, N.W.

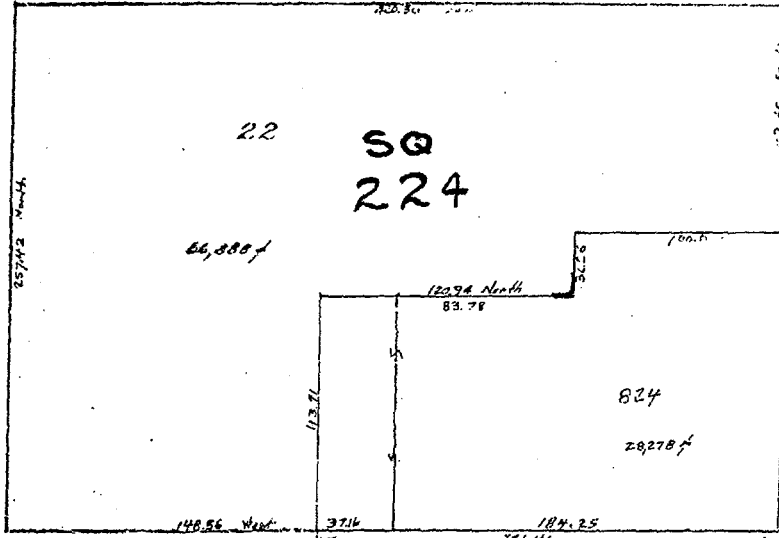
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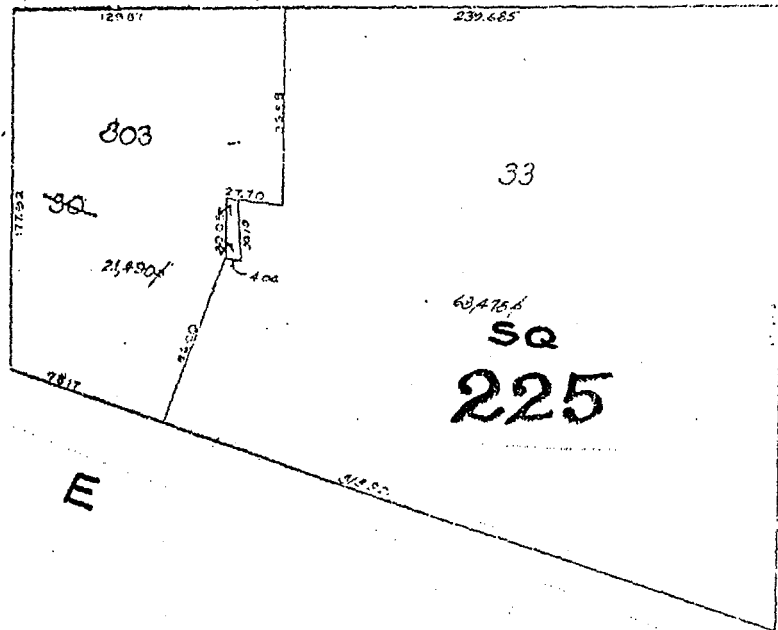
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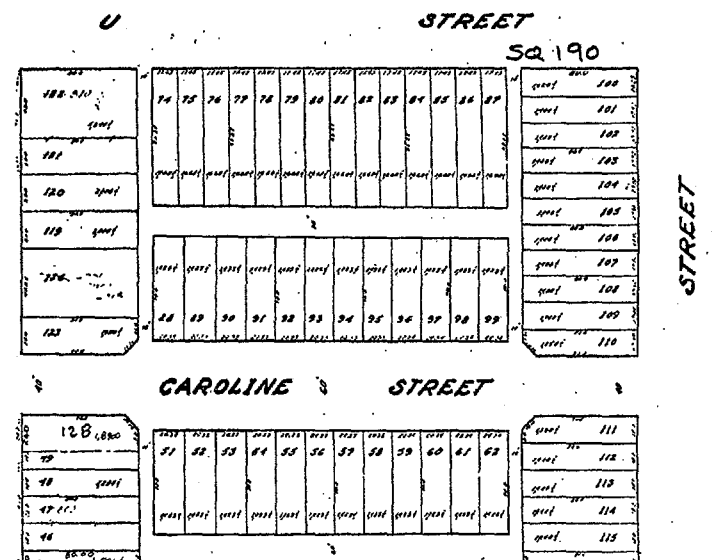
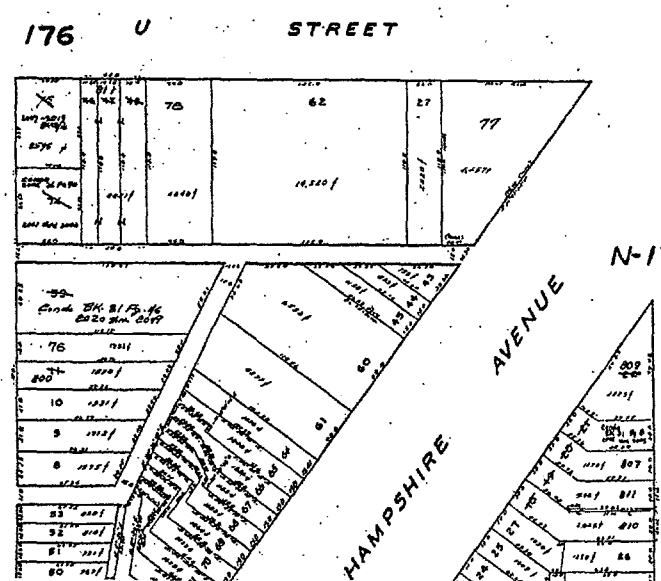
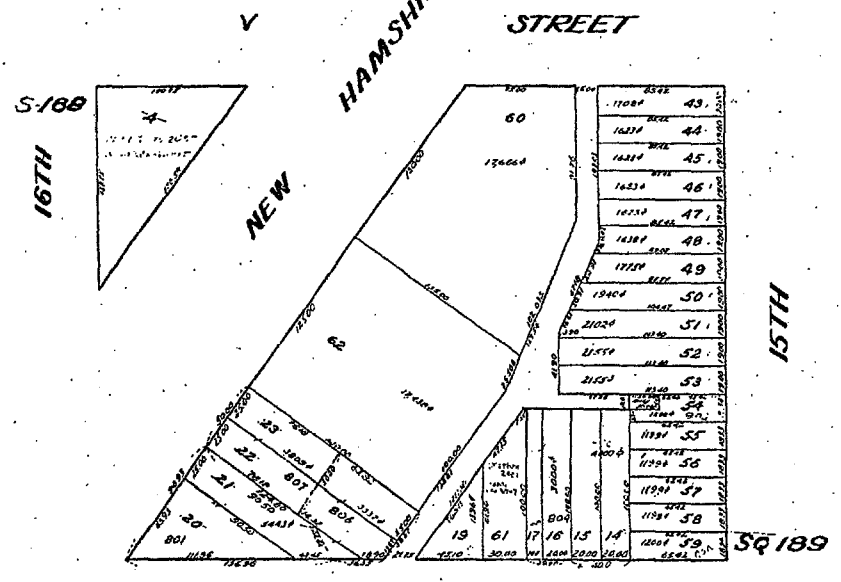
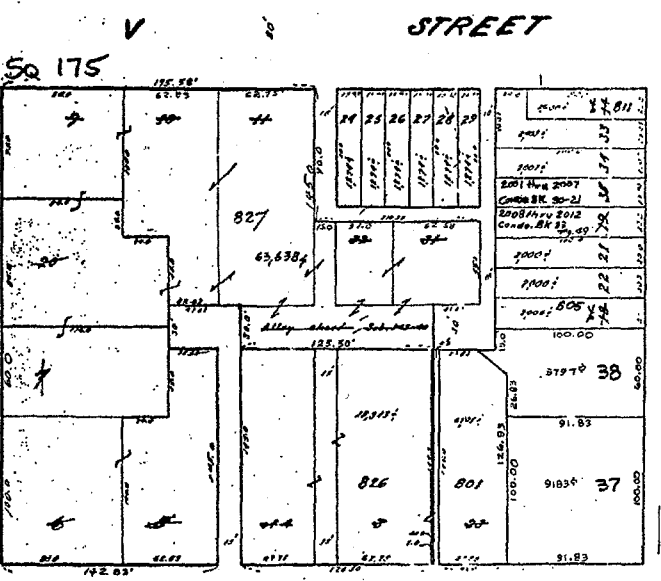
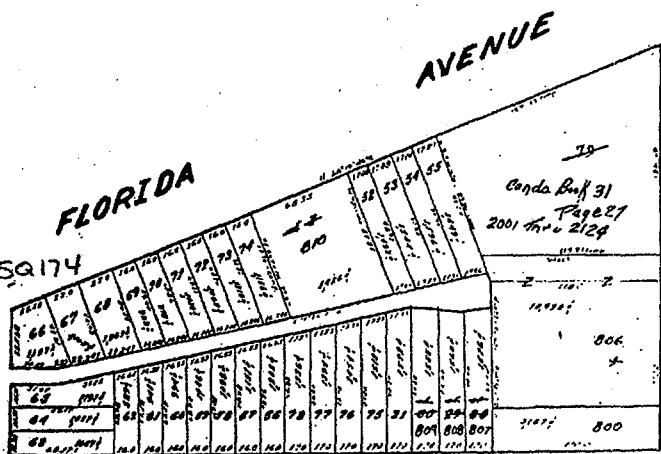
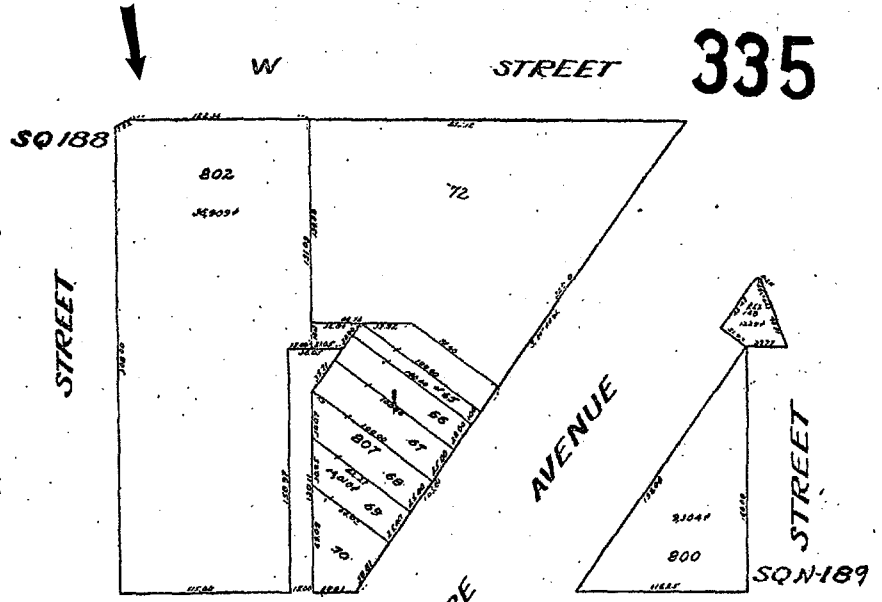
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EXHIBIT D



The Roosevelt
16th & V Streets, N.W.

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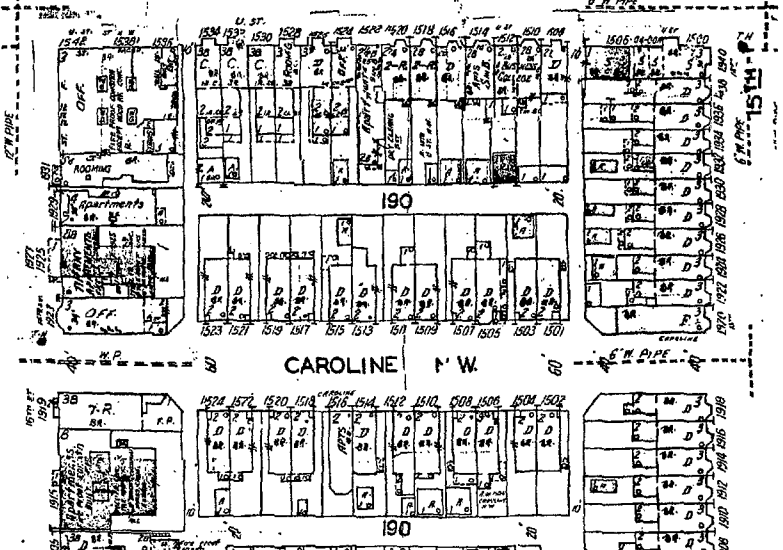
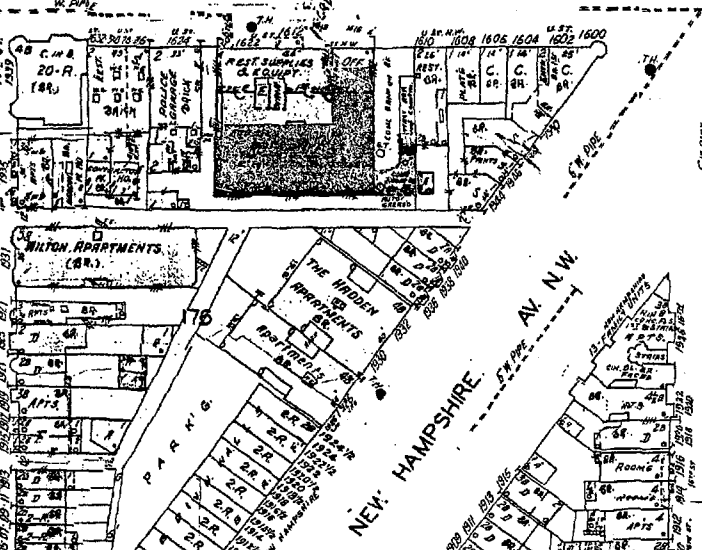
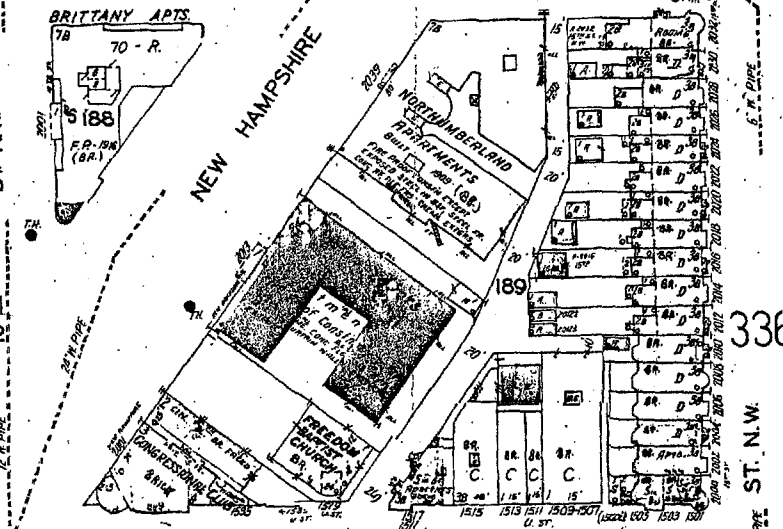
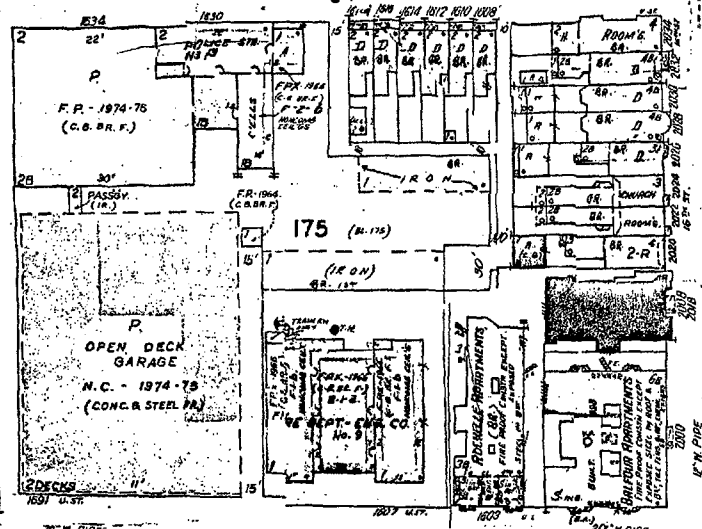
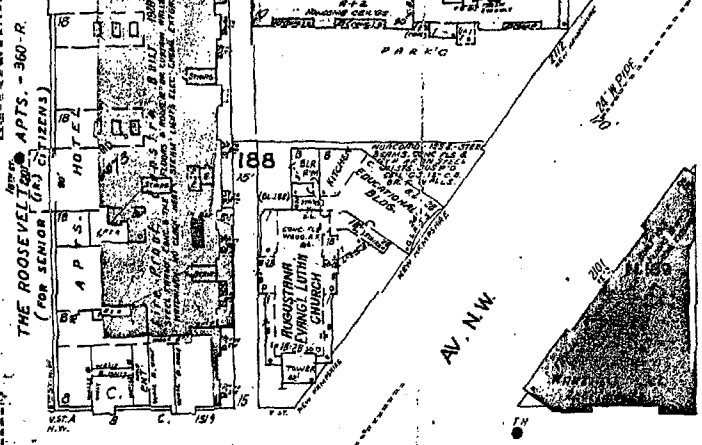
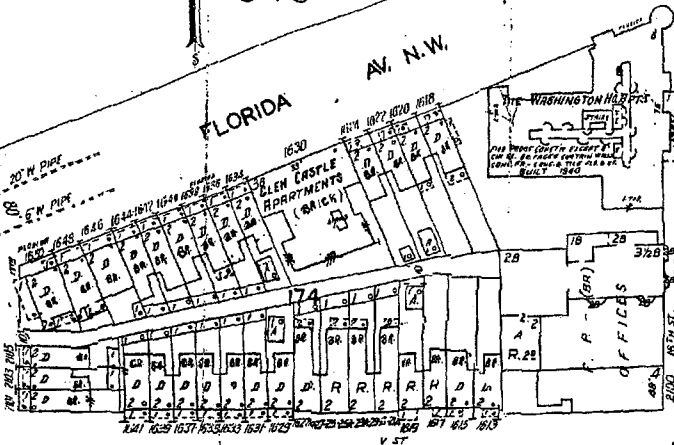


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MERIDIAN HILL PARK

W ST. N.W.

FLORIDA AV. N.W.



336

ST. N.W.

15TH ST. N.W.

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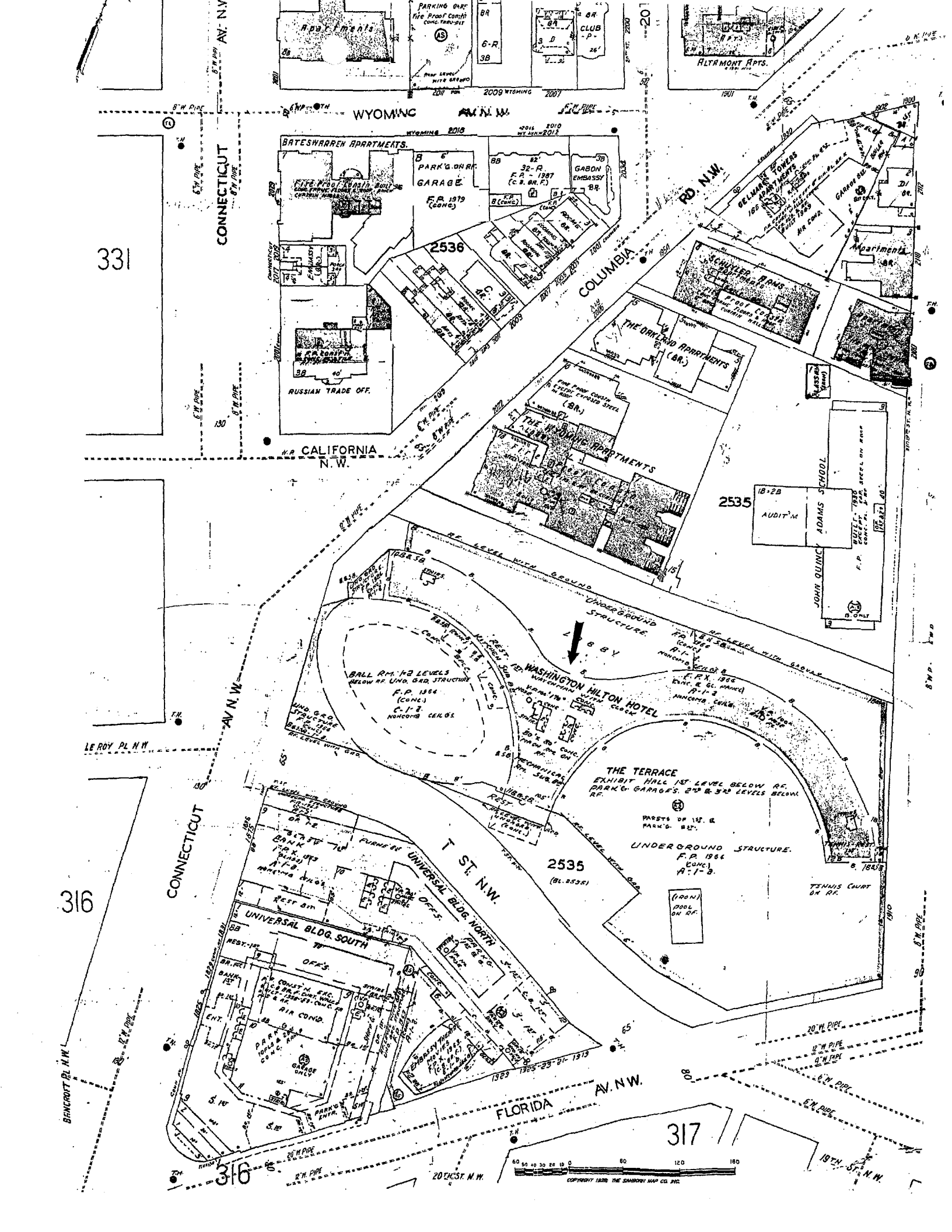
17TH ST. N.W.

17TH ST. N.W.

17TH ST. N.W.



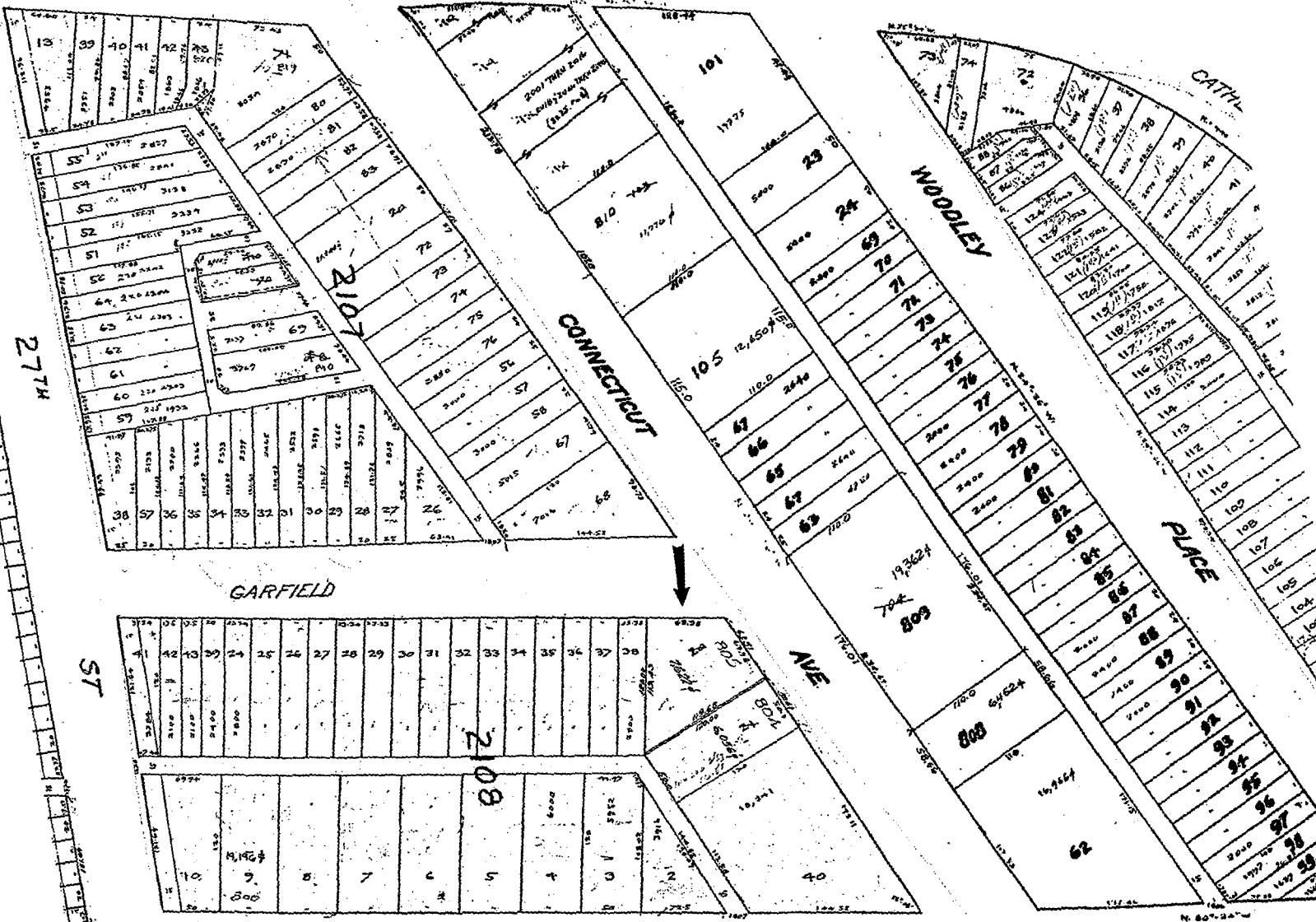
The Washington Hilton
Connecticut Ave. and T Street, N.W.





Apartment Building
Connecticut Avenue and Garfield St., N.W.

CATHEDRAL AVE



27TH

ST

GARFIELD

2108

CONNECTICUT

AVE

WOODLEY

PLACE

WOODLEY ROAD

N. 80° 34' W

540

Highway N.W.

CATHEDRAL

AV. N. W.

CONNECTICUT

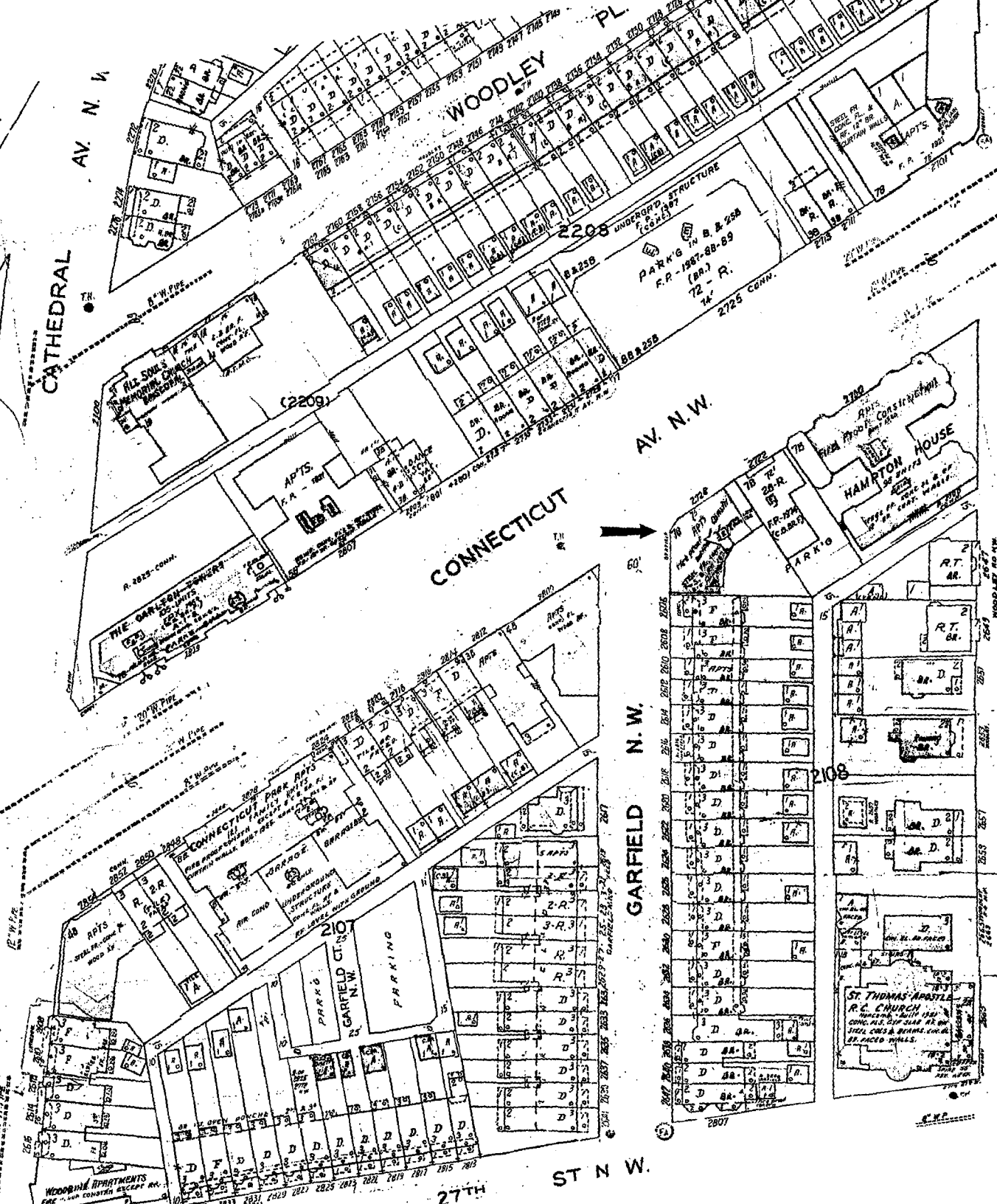
WOODLEY

AV. N.W.

GARFIELD N.W.

WOODLEY RD N.W.

530



ST N W.

27TH

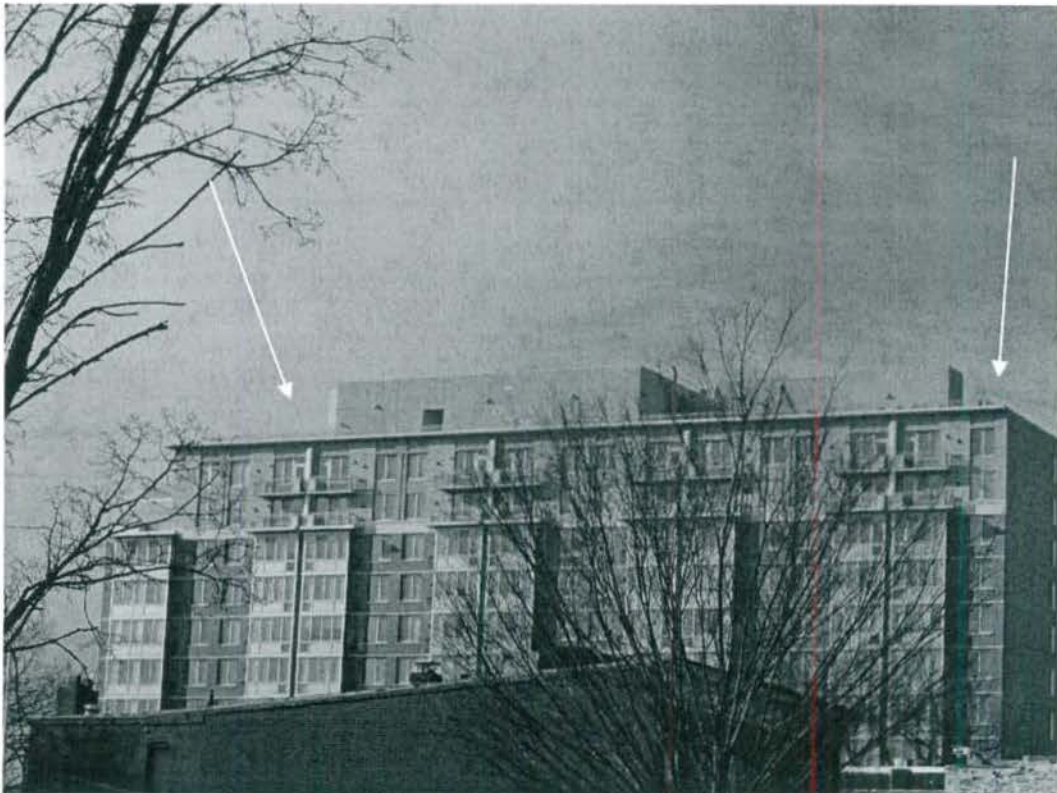
EXHIBIT E



Residential Building at 400 Massachusetts Ave., N.W.

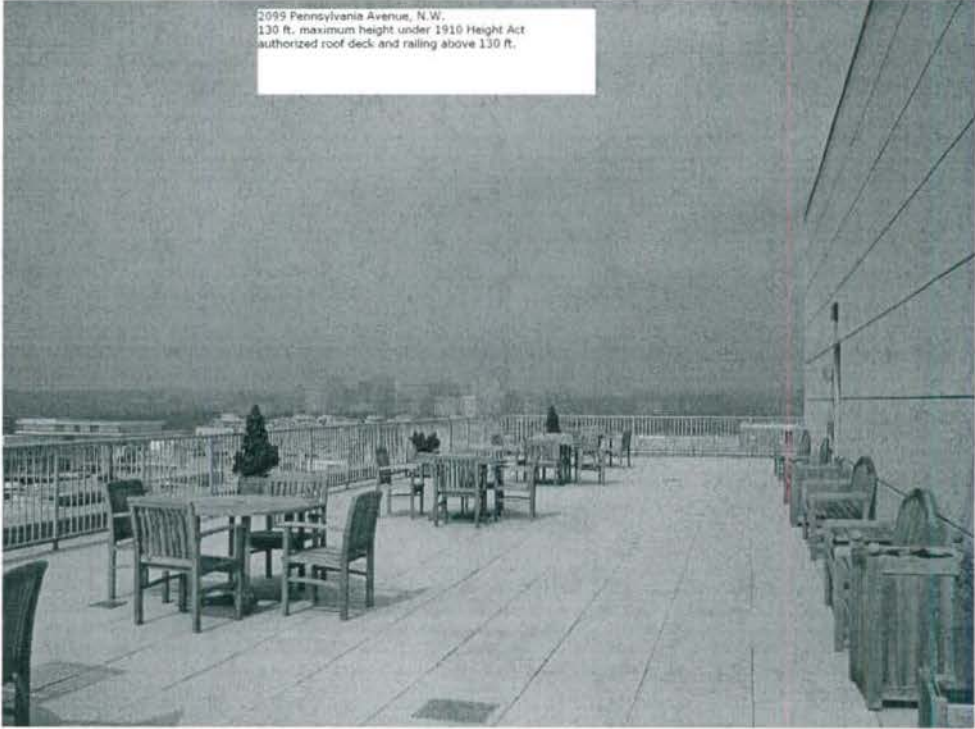


The Avalon at Gallery Place, 770 5th St., N.W. (roof deck and railing)



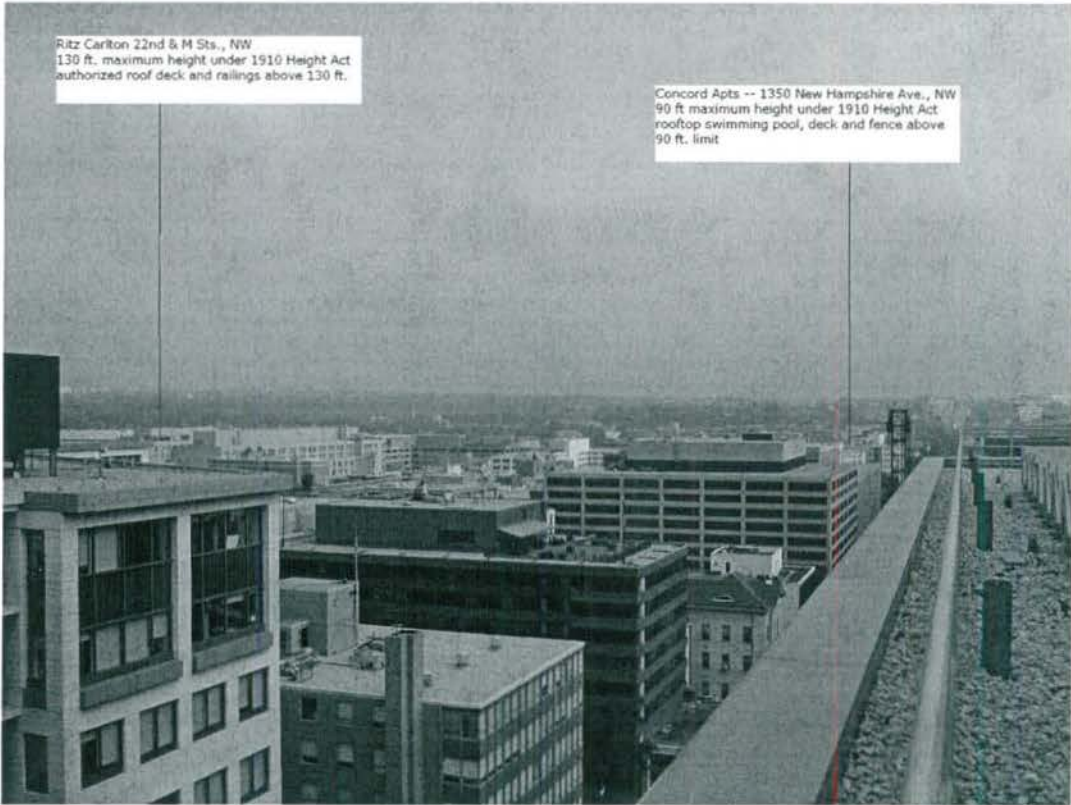
Apartment Building, 5th St and Massachusetts Ave., N.W.
(roof deck and railing)

2099 Pennsylvania Avenue, N.W.
130 ft. maximum height under 1910 Height Act
authorized roof deck and railing above 130 ft.



Ritz Carlton 22nd & M Sts., NW
130 ft. maximum height under 1910 Height Act
authorized roof deck and railings above 130 ft.

Concord Apts -- 1350 New Hampshire Ave., NW
90 ft maximum height under 1910 Height Act
rooftop swimming pool, deck and fence above
90 ft. limit





2500 K Street, N.W.
90 ft. maximum height under 1910
Height Act
rooftop pool and fence above 90 ft.
limit



2414 K Street, N.W.
90 ft. maximum height under 1910 Height Act
authorized rooftop pool and deck exceeding 90 ft.
height