

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

STATEMENT OF REASONS IN SUPPORT OF AN APPEAL FROM THE OCTOBER 20, 2009
DETERMINATION OF THE ZONING ADMINISTRATOR FOR THE DISTRICT OF COLUMBIA DENYING A
PROPOSED COMBINED LOT DEVELOPMENT BETWEEN LOT 9 IN SQUARE 483 AND LOT 62 IN SQUARE
515N (THE "PROPOSED COMBINED LOT DEVELOPMENT") AS VIOLATIVE OF CHAPTER 17 OF THE
DISTRICT OF COLUMBIA ZONING REGULATIONS

This Statement of Reasons is submitted on behalf of the appellant Steuart Investment Company (the "Appellant" or "Steuart"), the owner of Lot 9 in Square 483 ("Square 483") and Lot 62 in Square 515N ("Lot 62"). Appellant hereby challenges the October 20, 2009 decision of the Zoning Administrator, Matthew LeGrant, (attached hereto as Exhibit A) that the Proposed Combined Lot Development does not comply with the requirements of Chapter 17.

Procedural Background

The Appellant, Steuart Investment Company (and Steuart Square N515/A Company, a subsidiary of Steuart Investment Company) is the owner of Square 483 and Lot 62. Square 483 is bounded by Fifth Street, Sixth Street, K Street, and New York Avenue, N.W., and is zoned DD/C-3-C. Square 483 contains 56,339 square feet of land area, and the Appellant proposes to develop the entire property for commercial use. Square 483 is located within Housing Priority Area A.

Lot 62 is located in the western portion of Square 515N, which is triangular in shape and formed by L, Fourth, and Fifth Streets, N.W. and New York Avenue, N.W. Lot 62 is zoned DD/C-2-C. Lot 62 contains 42,824 square feet of land area. The Appellant intends to develop Lot 62 as entirely residential. Lot 62 is located within Housing Priority Area A.

Pursuant to 11 DCMR §1706.3, each lot in the Housing Priority Area must provide a certain amount of residential development on site, or account for such residential uses off site by combined lot development as required by § 1706. Each lot in the DD/C-3-C zone must provide on site, or account for off site through combined lot development, no less than 3.5 FAR of residential use. Each lot in the DD/C-2-C zone must provide no less than 4.5 FAR of residential uses, again, either on site or off site through a combined lot development. 11 DCMR §§ 1706.5(b), 1706.4(b).

The Appellant owns both Square 483 and Lot 62, and proposes to transfer the residential use requirement from Square 483 to Lot 62 through a combined lot development. In the same transaction, the Appellant proposes to transfer all of the commercial development to which Lot 62 is entitled to Square 483. See Exhibit B. Thus, Square 483 would be developed as an entirely commercial building, and Lot 62 would be developed as entirely residential. The Appellant sought approval of the Combined Lot Development by submitting for the Office of Planning's review and approval a covenant describing the proposed transfer, and was told by the Office of

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Planning that the proposed transfer did not comply with the requirements of Chapter 17 of the Zoning Regulations.

On May 22, 2009, the Appellant met with the Zoning Administrator to discuss the Proposed Combined Lot Development. The Zoning Administrator asked the Appellant to provide a written summary of how the Combined Lot Development met the requirements of Chapter 17. On August 12, 2009, the Zoning Administrator and the Appellant met for a second time, and discussed the requirements of Chapter 17, specifically the language found in 11 DCMR § 1706.7(b). The Appellant provided such information in writing. The Zoning Administrator again asked the Appellant to provide written documentation showing that the Proposed Combined Lot Development did not violate Chapter 17 and the specific limitations of transfers of residential FAR found in 11 DCMR § 1706.7(b)(2). The Appellant once again complied.

On October 20, 2009, the Zoning Administrator issued a written determination letter finding that the proposed Combined Lot Development did not comply with Chapter 17, and in fact violated 11 DCMR § 1706.7(b)(2). It is from this written determination that we appeal.

Jurisdiction

The Board of Zoning Adjustment is authorized to hear this appeal pursuant to 11 DCMR § 3100.2.

Factual Background

Residential Requirements

Together, Square 483 and Lot 62 comprise 99,163 square feet of land area. Pursuant to 11 DCMR § 1706.5(b), each lot in the DD/C-3-C zone shall provide on site, or account for off site in a combined lot development, no less than 3.5 FAR of residential use. Thus, any development on Square 483, which is located within the DD/C-3-C zone, must provide 3.5 FAR or 197,187 (3.5 x 56,339 sf) square feet of residential uses, either on site or off site through a combined lot development.

Pursuant to 11 DCMR § 1706.4(b), each lot in the DD/C-2-C zone shall provide on site, or account for off site in a combined lot development, no less than 4.5 FAR of residential use. Thus, any development on Lot 62 must provide 4.5 FAR or 192,708 (4.5 x 42,824 sf) square feet of residential uses, either on site or off site through a combined lot development. Combined, Square 483 and Lot 62 are required to develop a minimum of 389,895 square feet of residential uses (197,187 + 192,708).

Commercial Entitlements

Square 483, located in the DD/C-3-C zone district, is entitled to a permitted commercial density of 6.0 FAR as a matter of right, which equates to 338,0334 square feet of floor area, based on the land area in the square (56,339 square feet). Lot 62 is entitled to a permitted

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commercial density of 3.5 FAR as a matter of right, which equates to 149,884 square feet of floor area, based on the land area of the lot (42,824 square feet). Combined, the two properties are entitled to develop a maximum of 487,918 square feet of commercial uses, without consideration of any applicable transferable development rights (“TDRs”) or any available bonus density.

Combined, Square 483 and Lot 62 yield 877,813 square feet of required residential floor area *and* maximum permitted commercial area.

The Proposed Combined Lot Development shifts all residential uses to Lot 62 and all commercial uses to Square 483. Thus, 3.5 FAR of commercial density from Lot 62 in Square 515N is shifted to Square 483, and conversely, 4.5 FAR of residential density is shifted from Square 483 to Lot 62. This proposed transfer ensures that the minimum required residential density for both lots is constructed, while the maximum commercial density for both lots is not exceeded. Prior to application of any applicable bonus density, the shift of the minimum residential requirement and maximum commercial entitlement creates an overall FAR of the Proposed Combined Lot Development of 8.85 FAR. This is calculated by adding the required residential uses (389,895) and the maximum commercial entitlement (487,918) and dividing by the combined lot area (99,163).

TDRs

Pursuant to 11 DCMR § 1706.7(a)(1), an additional .5 FAR of density is available to each lot through the receipt of TDRs. The Appellant proposes to transfer the .5 FAR available to Lot 62 pursuant to 11 DCMR § 1706.7(a)(1) to Square 483 as part of the Proposed Combined Lot Development. Thus, the Appellant is using a total of 49,582 square feet of TDRs.

The Proposed Combined Lot Development Meets the Requirements of Chapter 17

Combined lot developments in the Downtown Development District are governed by 11 DCMR § 1708, which provides that two (2) or more lots, located either in the same square or in different squares, may be combined for the purposes of achieving the required FAR equivalent for preferred uses. § 1708.1(a). In addition to transfers of required minimum residential density pursuant to 11 DCMR § 1706.4, 11 DCMR § 1708.1(a) clearly states that combined lot developments shall be eligible for the density and area allowances permitted in 11 DCMR § 1703, 1704, 1705, and 1706. Thus, the use of a combined lot development does not preclude the application of additional density generated through TDRs once initial residential requirements have been met.

The concept of combined lot development was included in the Downtown Development District Overlay (the “DD Overlay”) in Zoning Commission Case No. 89-25 to assist in accomplishing a “balanced mixture of uses comprising a ‘Living Downtown’”, which had been called for in the Comprehensive Plan. The DD Overlay put into place requirements for “preferred uses”, particularly housing, retail and arts, while acknowledging that most property in the Downtown area already had a base amount of matter-of-right commercial density; therefore,

the combined lot would permit owners of property that had both a commercial entitlement and a new residential (or other preferred use) requirement to combine those requirements among two or more lots so as to avoid the difficulties in vertically integrating mixed uses. The proposal was explicit about wishing to provide the greatest flexibility to the private sector to work out how much density would be transferred among lots, for what use, and for what price. In its Final Report to the Zoning Commission on Case No. 89-25, dated February 16, 1990 (logged as Exhibit 184), the Office of Planning explained:

Two or more lots are permitted to combine their development rights and obligations to:

- *Provide locational flexibility regarding the preferred uses...*
- *Permit a horizontal mix of uses (especially offices and apartments), that often is more efficient and more marketable than a vertical mix*
- *Create the legal framework for two or more sites to be linked for purposes of sharing or transferring bonus density*

Pursuant to 11 DCMR § 1708.1(g), the maximum permitted gross floor area for all uses, the minimum required gross floor area for preferred uses, and bonus density, if applicable, **shall each be calculated as if the combined lots were one lot**, and the **total project** shall conform with the maximum and minimum gross floor area requirements (emphasis added). Thus, in computing the minimum required gross floor area, maximum permitted gross floor area, and any bonus density, if applicable, the total combined land area of the two parcels is the basis for the calculation.

11 DCMR § 1708.1(i) states that “no allocation of gross floor area for required uses shall be effective unless an instrument, legally sufficient to effect such a transfer, is filed with the Zoning Administrator and recorded in the land records of the District of Columbia against all lots included in the combined lot development.” The recordation of this instrument permanently binds together the two lots and ensures that the lots are never again looked at independently, because they have been developed as if they were a single lot. The instrument runs with the land in perpetuity, burdens all lots involved in the allocation of gross floor area for required preferred uses, and “binds the present and future owners of the lot receiving the FAR to reserve, design, construct, cause to be occupied, and maintain in perpetuity an area on-site equal to the gross floor area of required preferred uses received.” 11 DCMR § 1708.1(j)(2)-(4).

11 DCMR § 1708.1(j) states further that the covenant must include “the maximum permitted gross floor areas for all uses on **all lots**, the minimum required gross floor areas for preferred uses on **all lots**, and the gross floor area allocated. The covenant shall further state that, after the transfer, the **combined lots** conform to the maximum and minimum gross floor area requirements on the lots” (emphasis added). The recorded instrument requires a calculation or

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accounting of all floor area required, permitted, and allocated among the parcels included in the combined lot development on the basis of the entire development, not on each individual parcel.

The Zoning Administrator Erred in Determining that the Proposed Combined Lot Development violates 11 DCMR § 1706.7(b)(2).

The Zoning Administrator's October 20, 2009 determination letter includes an erroneous interpretation of 11 DCMR § 1706.7(b)(2). Moreover, the Zoning Administrator has read that section in isolation and does not analyze whether the Proposed Combined Lot Development meets the other requirements of the DD Overlay. 11 DCMR § 1706.7(b)(2) reads:

(b) Except for historic landmarks and properties listed in § 1707.4 in the Downtown Historic District, the maximum FAR limitations in §§ 1706.4, 1706.5, and 1706.6 shall not apply to any lot that devotes the increase in gross floor area entirely to residential use on-site; provided:

(1) The increase in gross floor area shall not be used to meet the minimum residential requirements of §§ 1706.4, 1706.5, or 1706.6; and

(2) The maximum residential FAR that may be accepted through combined lot development is listed in the following table:

ZONE DISTRICT OF THE LOT RECEIVING HOUSING	MAXIMUM ALLOWABLE COMBINED LOT TRANSFER (FAR)
DD/C-2-C	3.5
DD/C-3-C	6.0
DD/C-4	8.0

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The Zoning Administrator simply concludes, without analyzing the Proposed Combined Lot Development against the minimum requirements and maximum permitted densities for each use, that because more than 3.5 FAR is being received by Lot 62—regardless of whether that FAR represents underlying density or bonus density—that the proposed transfer violates 11 DCMR § 1706.7(b)(2) and no further analysis is required. This is in clear error, and provides an absurd result.

The proposed Combined Lot Development does not violate 11 DCMR § 1706.7(b)(2), which limits the amount of *bonus* residential density. The underlying densities in the Combined Lot Development have been calculated using the base densities of each lot, and adhering to the maximum permitted gross floor area for all uses on each lot as enumerated in 11 DCMR § 1706.4(a) and 11 DCMR § 1706.5(a). 11 DCMR § 1706.7(b) eliminated the matter of right density caps as long as the resulting increased (bonus) density was used for housing. That bonus density was permitted “provided” that it could not be used to reduce the minimum residential requirements and it was subject to the maximum FAR limitations in 1706.7(b)(2). It is clear, since the limitation in 1706.7(b)(2) is part of the provisions that govern 1706.7(b), coming after

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the restrictive term “provided”, and since the proposed combined lot is not using **any** of the density bonuses provided in 1706.7(b), that the limitations in subsection (b)(2) do not apply.

An additional .5 FAR of density devoted to any permitted use is available on each lot through application of transferable development rights pursuant to 11 DCMR § 1706.7(a)(1),:

To assist in the development of residential and preferred uses, the following density bonuses may be used:

- (a) *The maximum gross floor area permitted under §§ 1706.4, 1706.5, and 1706.6 may be increased by 0.5 FAR...provided the increase in gross floor area is achieved by:*
 - (1) *Receiving transferable development rights as provided in § 1709, which gross floor area may be devoted to any permitted use on the receiving lot;*

In this instance, the TDRs have been purchased from other projects in the area.

The Zoning Commission, at the time of adoption, regarded this additional .5 FAR of density in effect as matter of right, through compliance with the housing requirements or purchase of TDRs, rather than “bonus density” per se. Once an additional .5 FAR was applied using TDRs or other prescribed methods, additional “bonus” density for housing could then be available, pursuant to 1706.7(b), subject to the limitations in that subsection, a provision which was added more than a decade after the original .5 entitlement was established. At the Zoning Commission hearing on September 17, 1990, Chairman Boasberg, referring to proposed section 1706.7, stated:

*Going on to 1706.7, this was the section which allowed the TDRs, and basically what it said was that we will allow this **extra** FAR, but you have to use it first for these transferable development rights which came from the historic, and the idea was to make those valuable, since they were limited in FAR, the transfer would become valuable, and so we gave them, in effect, the matter of right to use that.*

Zoning Commission Transcript, Case No. 89-25, September 17, 1990, at pp. 141-142 (emphasis added).

The transfer of required residential FAR from Square 483 to Lot 62 in Square 515N includes only the 3.5 FAR of residential use required to be provided on Square 483; none of it is “bonus density” restricted by 11 DCMR § 1706.7(b)(2). Moreover, the Combined Lot Development complies with both the maximum and minimum gross floor area requirements as calculated together as one lot and balances these required minimums and permitted maximums among the lots as if they were a single lot.

Witnesses

Appellant will call the following witnesses at the hearing:

Guy T. Steuart, III
Ellen McCarthy

Property Owner
Expert in Planning and Zoning

Appellant estimates it will need one (1) hour to present its case.

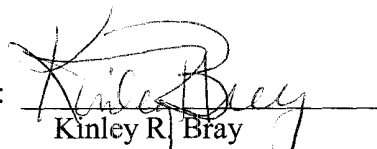
Conclusion

For the foregoing reasons, the Appellant respectfully appeals the Zoning Administrator's October 20, 2009 determination, and requests a hearing before the Board. We reserve the right to present additional testimony and evidence in advance of and at the hearing.

Respectfully submitted,

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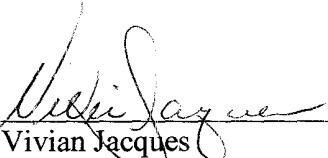
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed, first-class, postage pre-paid on this 21st day of December, 2009 to the following:

Matthew LeGrant
Zoning Administrator for the District of Columbia
Department of Consumer and Regulatory Affairs
941 N. Capitol Street
Washington DC 20002

Advisory Neighborhood Commission 6C
P.O. Box 77876
Washington, DC 20013-7787


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