

Arent Fox

April 29, 2010

VIA ELECTRONIC MAIL ONLY

Meredith Moldenhauer, Chair
Board of Zoning Adjustment
441 Fourth Street NW, Suite 210 S
Washington DC 20001

Kinley R. Bray

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Reference Number
031342.00001

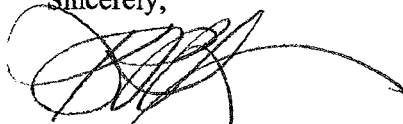
Re: Appeal of Steuart Investment Companies
BZA Case No. 18041
Appellant's Post-Hearing Submission No. 1

Dear Chairwoman Moldenhauer and Members of the Board:

At the conclusion of the public hearing on the above-referenced matter, the Board requested certain additional information from the Appellant.

Attached, pursuant to the Board's request, is an excerpt from District of Columbia Instrument No. 2003001108, a combined lot development covenant referenced in Ms. McCarthy's testimony on the record. The full document is accessible through the Recorder of Deeds office.

Sincerely,



Kinley R. Bray

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing, with attachments, was sent via electronic mail on April 29, 2010 to the following individuals:

Jay A. Surabian
Assistant Attorney General, Department of Consumer and Regulatory Affairs
Office of the General Counsel
Jay.surabian@dc.gov

Advisory Neighborhood Commission 6C
6C02@anc.dc.gov



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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18041

EXHIBIT NO. 24

Board of Zoning Adjustment
District of Columbia
CASE NO. 18041
EXHIBIT NO. 24

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REC'D
D.C. OFFICE OF ZONING

COMBINED LOT DEVELOPMENT COVENANT

THIS COMBINED LOT DEVELOPMENT COVENANT ("Covenant") is made as of the 17th day of November 2002, by and among U.S. PROPERTY DEVELOPMENT CORPORATION, a Delaware corporation ("USP"), METROPOLIS DEVELOPMENT COMPANY, LLC, a District of Columbia limited liability company ("Metropolis"); METRO MARKET LLC, a District of Columbia limited liability company and METRO MARKET II, LLC, a District of Columbia limited liability company (collectively referred to as "Metro Market"); and the DISTRICT OF COLUMBIA, a municipal corporation acting in its own name, or by and through its agencies, departments or instrumentalities, whether or not such agencies, departments or instrumentalities are specifically identified herein ("District" or "District and its agencies, departments or instrumentalities"). USP, Metropolis, Metro Market, and the District hereby ratify, affirm and agree to the following terms, conditions, covenants, warranties and obligations, including but not limited to, all recitals.

RECITALS

A. USP is the record owner of fee simple title to "Parcel A". USP has provided to the Office of Planning an up-to-date title report evidencing that USP owns fee simple title to Parcel A.

B. Metro Market is the record owner of fee simple title to "Parcel B". Metro Market has provided to the Office of Planning an up-to-date title report evidencing that Metro Market owns fee simple title to Parcel B.

C. The Zoning Commission, pursuant to its authority under the Zoning Act, D.C. Code Sections 6-641.01 to 6-641.15 (2001), on February 23, 1990, enacted amendments to the Zoning Regulations in Zoning Commission Order No. 632 (as amended by Zoning Commission Order Nos. 632-A through 632-C) establishing and mapping the Arts District, which amendments constitute the "Arts Regulations".

D. The purposes of the Arts District are, among other things, (i) to expand the housing supply in the Arts District; (ii) to encourage development of residential and commercial buildings; (iii) to encourage uses that increase pedestrian activity; and (iv) to encourage the adaptive reuse of older buildings in the area, all consistent with the Comprehensive Plan of the District of Columbia relating to this specific area of Washington, D.C., which purpose is further elaborated in Section 1900.2 of the Arts Regulations.

E. As an incentive for creating and maintaining preferred uses in the "Arts District", the Arts Regulations permit combined lot development in accordance with Section 1905 of the Arts Regulations, pursuant to which bonus density, in the form of "Gross Floor Area", and the permitted mixture of uses among development sites may be allocated from one lot to one or more

other lots. Section 1905.1(c) of the Arts Regulations provides the maximum floor area for all uses is to be calculated as if the lots were one lot.

F. Both Parcel A and Parcel B are located in the ARTS/C-3-A zone district. The C-3-A zone district generally provides for a maximum Floor Area Ratio of 4.0, with no more than 2.5 of such Floor Area Ratio devoted to non-residential uses, and a maximum height of 65 feet. The ARTS/C-3-A zone district provides that, with bonus densities for residential and other preferred uses, the maximum Floor Area Ratio shall be 4.5, and the maximum height of buildings, excluding roof structures, shall be seventy-five feet.

G. Parcel A has a land area of 30,870 square feet, for a total maximum permitted development, inclusive of bonuses provided in the Arts Regulations, of 138,915 (30,870 x 4.5) square feet of Gross Floor Area of commercial and/or residential use. Parcel B has a land area of 23,130 square feet, for a total maximum permitted development, inclusive of bonuses provided for in the Arts Regulations, of 104,085 (23,130 x 4.5) square feet of Gross Floor Area of commercial and/or residential use. The combined lot, with the inclusion of allowable bonus densities, provides for a maximum permitted development of 243,000 (54,000 x 4.5) square feet of Gross Floor Area of which no more than 135,000 (54,000 x 2.5) may be nonresidential.

H. Metro Market intends to construct a mixed-use building containing 107,881 square feet of residential space and 7,118 square feet of ground floor "Retail and Service Uses" or "Arts and Arts Related Uses" on Parcel B, for a total Gross Floor Area of 114,999 square feet (the "Parcel B Improvements"). The Parcel B Improvements will have a total FAR of 4.97 (114,999/23,130), a residential FAR of 4.66 (107,881/23,130), and a commercial FAR of .31 (7,118/23,130). Because the development includes more than 3.0 FAR of residential use, it is entitled to a bonus density of 0.5 FAR, or 11,565 square feet of Gross Floor Area (23,130 x .5).

I. On June 7, 2002, Metro Market filed an application (BZA Application No. 16914) with the Board of Zoning Adjustment seeking a variance from the residential recreation space requirement of Section 773 of the Zoning Regulations, a variance from the maximum permitted height of a roof structure under Section 1902.1 of the Arts Regulations, and a special exception for a roof structure pursuant to Section 411 of the Zoning Regulations. All terms and provisions herein are subject to the decision of the Board of Zoning Adjustment in BZA Application No. 16914.

J. USP, in a joint venture with Metropolis, intends to develop a mixed-use building containing 98,875 square feet of residential space, 1,158 square feet of indoor residential recreational space, and 12,182 square feet of ground floor retail "Retail and Service Uses" or "Arts and Arts Related Uses" on Parcel A, for a total Gross Floor Area of 112,215 square feet (the "Parcel A Improvements"). The Parcel A Improvements will have a total FAR of 3.67, a residential FAR of 3.20 (98,875/30,870), and a commercial FAR of .40 (12,182/30,870). Because the development includes more than 3.0 FAR of residential use, it is entitled to a bonus density of 0.5 FAR, or 15,435 square feet of Gross Floor Area (30,870 x .5).

K. On May 20, 2002, USP filed an application (BZA Application No. 16907) with the Board of Zoning Adjustment seeking a special exception from the ground floor retail

requirements under section 1901 of the Arts Regulations, and variances from the lot occupancy requirements and the residential recreation space requirements of Sections 772 and 773 of the Zoning Regulations, respectively. On July 23 and August 6, 2002, the Board of Zoning Adjustment granted the relief requested in BZA Application No. 16907.

L. The combined lot will have a total lot area of 54,000 square feet. The proposed combined lot development will have 206,756 square feet of residential space, 1,158 square feet of indoor residential recreational space and 19,300 of ground floor retail, for a total Gross Floor Area of 227,214 square feet. The total FAR for the combined lot development will be 4.21 (227,214/54,000), of which 3.83 FAR (206,756/54,000) will be residential and .36 FAR (19,300/54,000) will be retail, service, arts or arts related uses to be provided at the ground floor of each Parcel.

M. USP and Metropolis have entered into an agreement concerning Parcel A, whereby Metropolis has been granted an option by USP to purchase up to 12,000 square feet of unused bonus density on Parcel A, which option Metropolis intends to exercise, upon execution of this Agreement. Pursuant to Section 1905 of the Arts Regulations, Metropolis desires to allocate to Parcel B a total of 10,914 square feet of USP's bonus density to the Parcel B Improvements.

N. USP intends that Parcel A shall be held, sold, transferred, conveyed, used or occupied subject to the covenants and obligations contained in this Covenant, which covenants and obligations shall run with Parcel A and shall be binding upon USP, its successors, mortgagees, transferees and assigns; and

O. Metro Market intends that Parcel B shall be held, sold, transferred, conveyed, used or occupied subject to the covenants and obligations contained in this Covenant, which covenants and obligations shall run with Parcel B and shall be binding upon Metro Market, its successors, mortgagees, transferees and assigns; and

P. USP has obtained and delivered to the Office of Planning, to the satisfaction of the Office of Planning, evidence that there is no person or entity with an interest in Parcel A, which interest was recorded prior to the Effective Date of this Covenant, whose consent is required in order for this Covenant to be fully effective other than those signatures which are a part of this Covenant.

Q. Metro Market has obtained and delivered to the Office of Planning, to the satisfaction of the Office of Planning, evidence that there is no person or entity with an interest in Parcel B, which interest was recorded prior to the Effective Date of this Covenant, whose consent is required in order for this Covenant to be fully effective other than those signatures which are a part of this Covenant.

R. Metro Market covenants and represents to the District that 22,479 square feet of Gross Floor Area, constituting bonus density provided for in the Arts Regulations (11,565 square feet generated by Parcel B and 10,914 square feet generated by Parcel A) will be constructed on

Parcel B in accordance with the Arts Regulations, which bonus density shall be devoted to and maintained for residential use.

S. Metro Market, USP, Metropolis and the District ratify and affirm that all of the terms and conditions of this Covenant shall be solely applicable to and restricted to this transaction and shall in no way whatsoever alter, modify or amend now or in the future the requirements of the Arts Regulations for preferred uses as applied to other combined lot transactions not related to the allocations effectuated by this Covenant (including, without limitation, any standard form of combined lot covenant that may be approved by the District).

COVENANTS

NOW, THEREFORE, in consideration of the foregoing Recitals, which are a material part of this Covenant, and the mutual terms, conditions and covenants set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the District, USP, Metropolis and Metro Market agree to and do hereby covenant as follows:

1. **Definitions.** When used in this Covenant, the following capitalized terms shall have the meanings indicated:

"Arts District" -- the zone district known as the Uptown Arts-Mixed Use (ARTS) Overlay District. The regulations governing use and development of land in the Arts District are set forth in Chapter 19 of the District of Columbia Zoning Regulations.

"Arts Regulations" -- the Zoning Regulations applicable to the Arts District, codified at Chapter 19 of the Zoning Regulations, enacted by the Zoning Commission in Order No. 632 (Case No. 87-7), published at 37 DCR 1450 (February 23, 1990), as amended by the Commission on October 19, 1992, published at 37 DCR 8323 (November 13, 1992). References in this Covenant to the Arts Regulations shall be to those in effect as of the Effective Date (defined in Paragraph 3 below) of this Covenant.

"Arts and Arts Related Uses" -- those uses set forth in Section 1908.1 of the Arts Regulations.

"Floor Area Ratio" or "FAR" -- as defined in the Zoning Regulations.

"Gross Floor Area" -- as defined in the Zoning Regulations.

"Land Records" -- the Land Records of the Office of the Recorder of Deeds of the District of Columbia.

"Parcel A" -- Lot 98 in Square 209 of the District of Columbia (or any successor tax lot or record lot), containing approximately 30,870 square feet, as the same is more particularly described on Exhibit A and shown on the plat which is attached as Exhibit B.

"Parcel A Improvements" -- a mixed-use building containing 98,875 square feet of residential space, 1,158 square feet of indoor residential recreational space, and 12,182 square feet of ground floor retail **"Retail and Service Uses"** or **"Arts and Arts Related Uses"** on Parcel A, for a total Gross Floor Area of 112,215 square feet.

"Parcel B" -- collectively, Lot 104 in Square 209 of the District of Columbia (or any record lot comprised of all of the foregoing), containing approximately 23,130 square feet, as the same are more particularly described on Exhibit C and shown on the plat which is attached as Exhibit D.

"Parcel B Improvements" -- a mixed-use building containing 107,881 square feet of residential space and 7,118 square feet of ground floor **"Retail and Service Uses"** or **"Arts and Arts Related Uses"** on Parcel B, for a total Gross Floor Area of 114,999 square feet.

"Retail and Services Uses" -- those uses set forth in Section 1907.1 of the Arts Regulations.

"Zoning Commission" -- the Zoning Commission for the District of Columbia.

"Zoning Regulations" -- the Zoning Regulations of the District of Columbia, codified at Title 11, D.C.M.R., July 1995, as amended by subsequent orders of the Zoning Commission. References in this Covenant to the Zoning Regulations shall be to those in effect as of the Effective Date of this Covenant.

2. **Purpose.** This Covenant constitutes: (1) a declaration of covenants running in perpetuity with Parcel A and Parcel B, as required by Section 1905.1 of the Arts Regulations, which shall be binding upon USP, as to Parcel A, and Metro Market, as to Parcel B, and all respective successors in interest, mortgagees and assigns of any interest in Parcel A or Parcel B, respectively, and upon the District; (2) an instrument confirming that a minimum of 3.0 FAR will be developed, constructed and maintained for residential use on Parcel A and a minimum of 3.0 FAR will be developed, constructed and maintained for residential use on Parcel B; (3) an instrument confirming that Metropolis has allocated 10,914 square feet of residential Gross Floor Area from Parcel A to Parcel B; (4) an instrument accomplishing the transfer of 10,914 square feet of Gross Floor Area from Parcel A to Parcel B and confirming the vesting of 10,914 square feet of Gross Floor Area in Parcel B; and (5) an instrument confirming that the transfer of 10,914 square feet of Gross Floor Area from Parcel A to Parcel B reduces the bonus density remaining on Parcel A by 10,914 square feet of Gross Floor Area, leaving Parcel A with 4,521 square feet of Gross Floor Area available for residential development on Parcel A or transfer for residential development to another parcel within the Arts District.

3. **Recitals.** The Recitals hereinabove stated are incorporated by reference into the body of this Covenant as if fully set forth herein.

4. **Effective Date.** This Covenant shall become effective upon the date of its recordation among the Land Records (**"Effective Date"**).

IN WITNESS WHEREOF, the Mayor of the District of Columbia, having first considered and approved the foregoing Combined Lot Development Covenant, has directed the execution thereof in the name of the District of Columbia, by the Secretary of the District of Columbia, who has hereunto set her hand and affixed the seal of the District of Columbia hereto under authority of the Act of Congress entitled "An Act to Relieve the Commissioners of the District of Columbia of Certain Ministerial Duties" approved February 11, 1932.

WITNESS:

DISTRICT OF COLUMBIA
(a municipal corporation)

Tabatha Bryant

By:

Beverly D. Rivers
Beverly D. Rivers
Secretary of the District of Columbia

[CORPORATE SEAL]

DISTRICT OF COLUMBIA, SS:

I, Tabatha Bryant, a Notary Public in and for the District of Columbia, do hereby certify that Beverly D. Rivers, who is personally known to me as the person named as Secretary of the District of Columbia in the foregoing Combined Lot Development Covenant bearing date as of Jan. 24, 2002, and hereunto annexed, personally appeared before me in said District and, as Secretary as aforesaid, and by virtue of the authority in her vested, acknowledged the same to be the act and deed of the Mayor of the District of Columbia and that she delivered the same as such.

GIVEN under my hand and seal this 2 day of January, 2002.

Tabatha Bryant
Notary Public, D.C.

My commission expires: April 14, 2007.

APPROVED AS TO LEGAL SUFFICIENCY:

Alan Bergstein
Alan H. Bergstein
Land Use and Public Works Section

CERTIFICATION BY
DISTRICT OF COLUMBIA OFFICE OF PLANNING
IN CONNECTION WITH THE COMBINED LOT DEVELOPMENT COVENANT
BETWEEN
THE OWNER OF SQUARE 209, LOT 98
AND
THE OWNER OF SQUARE 209, LOT 104

This certification is identified as Exhibit E to the Combined Lot Development Covenant ("Covenant") between (i) U.S. Property Development Corporation, a Delaware corporation (USP), (ii) Metropolis Development Company, LLC, a District of Columbia limited liability company ("Metropolis"), (iii) Metro Market, LLC, a District of Columbia limited liability company and Metro Market II, LLC, a District of Columbia limited liability company (collectively referred to as "Metro Market"), and (iv) the District of Columbia, a municipal corporation acting in its own name. USP is the record owner of fee simple title to Lot 98, Square 209, Washington, D.C. ("Parcel A"). Metro Market is the Record Owner of fee simple title to Lot 104, Square 209, Washington, D.C. ("Parcel B").

The purpose of this certification is to certify the allocation of bonus residential gross floor area between Parcel A and Parcel B, pursuant to certain provisions of the Uptown Arts-Mixed Use Overlay District ("Arts District") set forth in 11 D.C.M.R. Chapter 19, ("Arts Regulations"). Section 1905 of the Arts Regulations authorizes the combination of two or more lots within the Arts District for purposes of transferring bonus density authorized for one or more of the approved developments on the lots to one or more of the other lots, and for allocating the permitted mixture of uses among the different development sites.

Both Parcel A and Parcel B are zoned ARTS/C-3-A, pursuant to Zoning Commission Order No. 632, February 23, 1990 (as amended by Zoning Commission Order Nos. 632-A through 632-C, November 13, 1992), which established and mapped the Arts District. Pursuant to Section 1904.3 of the Arts Regulations, the Arts District allows a maximum density, without bonuses, of 4.0 FAR. Pursuant to Section 1904.3 of the Arts Regulations, an additional 0.5 FAR of bonus development rights is allowed if at least 3.0 FAR of new development are devoted to residential use.

The land area of Parcel A is 30,870 square feet, resulting in a maximum of 138,915 square feet of Gross Floor Area (at 4.5 FAR). The land area of Parcel B is 23,130 square feet, resulting in a maximum of 104,085 square feet of Gross Floor Area (at 4.5 FAR). The combined lot, with the inclusion of allowable bonus densities, provides for a maximum permitted

development of 243,000 (54,000 x 4.5) square feet of Gross Floor Area of which no more than 135,000 (54,000 x 2.5) may be nonresidential.

The development that USP proposes to construct on Parcel A, pursuant to a joint venture with Metropolis, 98,875 square feet of residential space, 1,158 square feet of indoor residential recreational space, and 12,182 square feet of commercial space, for a total FAR of 3.67 on Parcel A. Pursuant to Section 1904.3 of the Arts Regulations, because USP's development includes more than 3.0 FAR of residential use, it is entitled to a bonus residential density of 15,435 square feet of Gross Floor Area (30,870 x .5). The development that Metro Market intends to construct on Parcel B contains approximately 107,881 square feet of residential space and 7,118 square feet of commercial space, for a total FAR of 4.97 on Parcel B (114,999/23,130). Because the development on Parcel B includes more than 3.0 FAR of residential use, Metro Market is entitled to a bonus density of 0.5 FAR, or 11,565 square feet of Gross Floor Area (23,130 x .5).

The combined lot will have a total lot area of 54,000 square feet. The proposed combined lot development will have 206,756 square feet of residential space, 1,158 square feet of indoor residential recreational space and 19,300 of ground floor retail, for a total Gross Floor Area of 227,214 square feet. The total FAR for the combined lot development will be 4.21 (227,214/54,000), of which 3.83 FAR (206,756/54,000) will be residential and .36 FAR (19,300/54,000) will be retail, service, arts or arts related uses to be provided at the ground floor of each Parcel.

Metropolis, pursuant to an agreement with USP, intends, pursuant to the Combined Lot Development provisions contained in Section 1905 of the Arts Regulations and the Covenant, to transfer unused bonus residential development rights on Parcel A, consisting of 10,914 square feet of Gross Floor Area, to Parcel B. This reduces the bonus density remaining on Parcel A by 10,914 square feet of Gross Floor Area, leaving Parcel A with 4,521 square feet of Gross Floor Area available for residential development on Parcel A or transfer for residential development to another parcel within the Arts District.

The Office of Planning hereby certifies that Parcel A and Parcel B comply in all respects with the applicable Arts Regulations pertaining to combined lot developments involving the quantities of residential and commercial development as indicated in this memorandum and as set forth in the Covenant to which this Exhibit B is attached.

Certified:


Andrew Altman, Director
Office of Planning

Date: 12-18-02