

Holland & Knight

2099 Pennsylvania Avenue, N.W., Suite 100 | Washington, DC 20006 | T 202.955.3000 | F 202.955.5564
Holland & Knight LLP | www.hklaw.com

Leila M. Jackson Batties
leila.batties@hklaw.com
202.419.2583

October 25, 2011

Ms. Meredith Moldenhauer
Chairperson
The District of Columbia
Board of Zoning Adjustment
441 4th Street, NW - Suite 210-S
Washington, DC 20001

2011 OCT 25 PM 1:22

RECEIVED
D.C. OFFICE OF ZONING

**Re: Application No. 18257/Appeal of Walter Parrs , et al
Prehearing Statement of Intervenor, Euromarket Designs, Inc. d/b/a CB2
("CB2")**

Dear Chairperson Moldenhauer:

On behalf of CB2, the Intervenor in the above-referenced appeal, enclosed please find one original and 20 copies of CB2's prehearing statement, with exhibits. Also, for your convenience, we have enclosed one unbound copy of the filing. The appeal is scheduled to be heard before the Board of Zoning Adjustment on November 1.

Thank you for your considerate attention to this matter. We remain hopeful that the Board will affirm the Zoning Administrator's approval of the building permit that is the subject of the appeal.

Sincerely,

HOLLAND & KNIGHT, LLP



Leila M. Jackson Batties

Enclosures

Atlanta | Boston | Chicago | Fort Lauderdale | Jacksonville | Lakeland | Los Angeles | Miami | New York
Northern Virginia | Orlando | Portland | San Francisco | Tallahassee | Tampa | Washington, D.C. | West Palm Beach
#10706209_v1

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 18257
EXHIBIT NO. 23

Board of Zoning Adjustment
District of Columbia
CASE NO.18257
EXHIBIT NO.23

Ms. Moldenhauer
October 25, 2011
Page 2

Cc: Advisory Neighborhood Commission 2E
c/o Commissioner Ron Lewis, Chair (via U.S. Mail)
Commissioner Bill Starrels, SMD ANC 2E05 (via U.S. Mail)
Mr. Matthew LeGrant, Zoning Administrator (via Hand Delivery)
Melinda M. Bolling, Esq., General Counsel, DCRA (via Hand Delivery)
Jay A. Surabian, Esq., Assistant Attorney General (via Hand Delivery)
Ruthanne G. Miller, Esq., Counsel for the Appellant (via Hand Delivery)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of October, 2011, a copy of the prehearing statement for the Intervenor, Euromarket Designs, Inc., d/b/a CB2, for **BZA Appeal No 18257**, was sent to the following persons:

Ruthanne G. Miller, Esq.
Sullivan, Styles & Barros, LLP
1990 M Street, NW, Suite 200
Washington, DC 22036
Via Hand Delivery

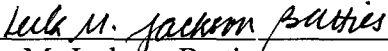
Melinda M. Bolling, Esq.
General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street, SW
5th Floor
Washington, DC 20024
Via Hand Delivery

Jay Surabian, Esquire
Assistant Attorney General
Office of the Attorney General
941 North Capitol Street, NE, Suite 9400
Washington, DC 20002
Via Hand Delivery

Mr. Matthew LeGrant
Zoning Administrator
Department of Consumer and Regulatory Affairs
1100 4th Street, SW -- Room 3100
Washington, DC 20024
Via Hand Delivery

Advisory Neighborhood Commission 2E
c/o Commissioner Ron Lewis, Chair
3400 Reservoir Road, NW
Washington, DC 20007
Via U.S. Mail

Commissioner Bill Starrels, SMD ANC 2E05
1045 31st Street, NW
Washington, DC 20007
Via U.S. Mail



Leila M. Jackson Batties

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

RECEIVED
D.C. OFFICE OF ZONING
2011 OCT 25 PM 1:22

**APPEAL OF
WALTER PARRS, ET AL**

**BOARD APPEAL NO. 18257
HEARING DATE: NOV. 1, 2011
ANC 2E**

STATEMENT OF THE INTERVENOR

**I.
INTRODUCTION**

This statement is submitted to the Board of Zoning Adjustment (the "Board") on behalf of Intervenor, Euromarket Designs, Inc., d/b/a CB2 ("CB2"). This is an appeal from the Zoning Administrator's approval, for zoning purposes, of a building permit for an elevator. CB2 is the owner and operator of the business for which the elevator was approved. The elevator was erected on the rear, lower roof of the building located at 3307 M Street, N.W. (the "Building") and is used for moving furniture and other items into and out of the CB2 store.

The appellants have not filed any prehearing statement and have not identified any witnesses or documents that they intend to offer at the hearing on November 1, apparently waiving their opportunity to identify witnesses or documents or submit any argument other than what is contained in their appeal notice. Notwithstanding the appellants' failure to come forward with evidence demonstrating that the Zoning Administrator erred in issuing the building permit for the elevator, CB2 wants this Board to appreciate the reasons why the Zoning Administrator correctly issued the building permit for the elevator, including:

- The level of the building upon which the elevator structure sits is obviously a roof and could not reasonably be considered anything else.

- No setback is required along the east or north walls of the Building. The Zoning Administrator applied the Board's ruling in the *Kalorama* case and followed his consistent application of that decision when concluding that the east and north walls were not exterior walls that required a setback. For the Zoning Administrator to determine otherwise would have required him to ignore these precedents.
- Loading is not a new function in this area of the Building. This has been a designated loading area for the Building for 20 years, at least.

CB2 respectfully requests that the Board deny this appeal as unsupported, and thereby affirm the issuance of the building permit. CB2 also requests that the Board act as promptly as its business will allow. In relying upon the District's processes and the Board's precedents, CB2 has already erected and is operating the elevator and does not want its business interrupted, particularly given the economy.

II. **JURISDICTION AND BURDEN OF PROOF**

The Board of Zoning Adjustment (the "Board") has jurisdiction, pursuant to D.C. Code § 6-641.07 and 11 DCMR § 3100.2, to hear an appeal when it is alleged that the decision of any administrative officer or body related to the enforcement or administration of the Zoning Regulations erred or was otherwise incorrect. On appeal, the Board may "reverse or affirm, wholly or partly, or may modify the order, requirement, decision, determination, or refusal appealed from or may make such order as may be necessary to carry out its decision or authorization, and to that end shall have all the powers of the officer or body from whom the appeal is taken." D.C. Code § 6-641.07(g)(4). In order for the Board to modify a determination made by the Zoning Administrator, the appellant must present evidence that refutes the decision. The Zoning Regulations clearly state that "[i]n all appeals and applications, the burden of proof

shall rest with the appellant or applicant. If no evidence is presented in opposition to the case, the appellant or applicant shall not be relieved of this responsibility." 11 DCMR § 3119.2.

III. **EXHIBITS IN SUPPORT OF THE INTERVENOR'S STATEMENT**¹

<u>Exhibit A:</u>	Building Rooftop Plan
<u>Exhibit B:</u>	North-South Building Section
<u>Exhibit C:</u>	1991 Permit Drawings for Building Addition
<u>Exhibit D:</u>	Outline of Testimony and Resume of Steven E. Sher, Director of Zoning and Land Use Services, Holland & Knight LLP

IV. **FACTUAL BACKGROUND**

The Building was built in approximately 1989. The area of the Building where the elevator is located was designated as a loading area in 1991, if not at the time the building was originally constructed. See the 1991 permit drawings attached as **Exhibit C**.

As shown on the roof plan for the Building (**Exhibit A**) the elevator at issue is near the northeast corner of the lower roof of the Building, approximately nine feet from the north edge of the roof and flush to the property line along the east edge of the roof. The vent shaft to the garage below is located in the northeast corner of the roof; and a mechanical penthouse is located along the east edge of the roof, just south of the elevator. The vent shaft and the mechanical penthouse were constructed at least 20 years ago, based on the 1991 permit drawings, if not at the time the Building was originally constructed.

The walls and the lower roof of the Building extend to the north and east property lines, and abut the rear property lines of properties along Prospect Street, N.W., and 33rd Street, N.W.

¹ In identifying these documents and witnesses, CB2 is not waiving any argument that the Board proceed to decision in the face of the Appellants' failure to list any exhibits or witnesses in its case-in-chief. CB2 is also not waiving any right to supplement its exhibits and witnesses in response to other filings.

The east wall of the Building also abuts an adjacent building that has frontage on 33rd and M Streets, N W.

When CB2 was considering opening a store at this Georgetown location, it contacted the appropriate neighborhood groups, including Advisory Neighborhood Commission 2E (the "ANC") and the Old Georgetown Board (the "OGB"), to review the plans. On August 30, 2010, the ANC unanimously approved the plans for the then proposed store, commenting mostly on the signage. The OGB had no objection to the issuance of a permit for the store, and approved CB2's application as a consent calendar item at its meeting on October 7, 2010. CB2 applied for a building permit and, on April 26, 2011, the Department of Consumer and Regulatory Affairs for the District of Columbia issued Building Permit No. B1104635 (the "Building Permit") for the installation of the elevator on the rear, lower roof of the Building. As designed and constructed, the elevator is necessary to move furniture and other items into and out of the CB2 store. Trucks and other vehicles access the elevator from a loading driveway that extends from Bank Street, N.W., east to the loading area.

On June 5, 2011, Walter Parrs, who resides at 3308 Prospect Street, N.W.; Dorina G. Kanopka, who resides at 1216 33rd Street, N.W.; and Zdenek D. Nikoden, who resides at 1218 33rd Street, N.W. (collectively, the "Appellants"), filed an appeal to the Board challenging the issuance of the Building Permit. The Appellants contend that the elevator is not situated on the roof of the Building and that, instead, the elevator should be treated as an accessory structure that does not meet the required rear-yard setback. They also argue that if the elevator is a roof structure, it must be set back from all exterior walls at a distance at least equal to its height above the roof, which it does not now. Finally, the Appellants' claim that loading is not permitted at this level of the Building.

Notice of the hearing was sent to all parties and to the ANC. As of the time of the Intervenor's filing, the Appellants had not submitted materials for the hearing on the case, apparently waiving their opportunity to identify witnesses or documents or submit any argument other than what is contained in their appeal notice.

V.

**THE ZONING ADMINISTRATOR CORRECTLY DETERMINED THAT THERE IS NO
SETBACK REQUIRED FOR THE ELEVATOR**

The Zoning Administrator determined that the elevator does not have to be set back from the north and east walls of the Building. This determination is consistent with (i) the plain language of the Zoning Regulations, and the reasonable interpretation of terms used in the Zoning Regulations; (ii) the Board's conclusions in *Appeal No. 17109 of Kalorama Citizens Association* ("*Kalorama*"); and (iii) the Zoning Administrator's subsequent application of *Kalorama*. The Court of Appeals has stated that while the Board is not bound by past decisions, it must consider in its deliberations long-standing interpretations of the Zoning Regulations that have had precedential effect. *Smith v. District of Columbia Board of Zoning Adjustment*, 342 A.2d 356 (1975). Certainly the Board expects the Zoning Administrator to follow its decisions.

A. The Elevator Is Situated on the Roof of the Building

The elevator is located on the lower roof of the Building. (See the building section attached as **Exhibit B.**) As the term "roof" is not defined in the Zoning Regulations, §199.2(g) of the Zoning Regulations provides that "words not defined in this section shall have the meaning given in Webster's Unabridged Dictionary." A roof is therein defined as "the outside cover of a building or structure including the roofing and all the materials and construction necessary to

maintain the cover upon its walls or other support." In this case, the patio open to the sky at the rear of the lot constitutes a roof or cover over the first floor below.²

Roof structures also are not defined in the Zoning regulations, but §411 of the Zoning Regulations, entitled "Roof Structures," regulates housing for mechanical equipment, stairway and elevator penthouses and other structures not in question in this appeal. In the case of the Building, all of the structures on the lower roof are connected to form a single enclosure and include all three types of functions; *i.e.*, mechanical equipment, a stairway, an elevator penthouse (the elevator) and a vent shaft. The mechanical equipment enclosure, stairway and the vent shaft were constructed pursuant to plans approved twenty years ago, if not an earlier set of plans for the Building. The other portions of the roof structure, including the elevator and elevator canopy, were constructed pursuant to the Building Permit.

B. The Elevator Does Not Need to be Set Back from the Eastern and Northern Walls of the Building Because Those are Not Exterior Walls

The Zoning Regulations require that mechanical equipment, stairways, and elevator penthouses on the roof of a building be set back from all *exterior walls* a distance at least equal to its height above the roof upon which it is located. 11 DCMR § 770.6. While the term "exterior wall" is not defined in the Zoning Regulations, in *Kalorama*, the Board interpreted the term to *exclude* walls that are built to a property line and abut adjacent properties. Specifically, in *Kalorama* the Board wrote:

While the term "exterior walls" has been interpreted more broadly under the Zoning Regulations to include a wall setback from the property line that abuts a yard or Court, as opposed to a street or alley, *it has not been interpreted to apply to a side wall constructed to the lot line of an abutting property...* Accordingly, what distinguishes an exterior wall for zoning purposes is not whether it is exposed to the elements, *but whether it is setback from a property line.*

² This unusual condition results from the slope of the site up from M Street to the north. Because of the change in grade, the first floor of the building is entirely out of grade at M Street, but is in the grade at the north end of the site.

Kalorama, at 13. (emphasis supplied).

In the subject case, the Elevator is setback approximately nine feet from the northern wall of the Building, and is flush along the eastern wall of the Building. Neither wall abuts a street or alley or a yard or court on the subject property. Instead, they are constructed to the lot line of the abutting property. Therefore, based on the language in *Kalorama*, neither wall constitutes an exterior wall for zoning purposes, so the Elevator does not have to comply with the 1:1 setback requirement for roof structures. This conclusion is logical given that the other structures on this roof — the vent shaft and the mechanical penthouse are also erected at the edge of the roof and abut the property line of the adjacent properties, including the residences of some of the Appellants. In fact, as contemplated in *Kalorama*, the Building shares a common wall with the building at the corner of 33rd and M Streets, N.W. It would be illogical for the Zoning Administrator or the Board to impose a setback requirement for the elevator that is different than the other mechanical equipment on this roof of the Building.

C. The Zoning Regulations Do Not Prohibit Loading on this Portion of the Building

Nothing in Section 2203 of the Zoning Regulations prohibits loading on the lower roof of the Building. In fact, this area of the Building has been designated as a loading area for 20 years, at least, based on the 1991 Permit Drawings, attached as **Exhibit C**. Any objection to the use of the roof for loading is thus untimely and barred from consideration by the Board.

**VI.
WITNESSES**

A. Steven E. Sher, Director of Zoning and Land Use Services

B. Anthony J. Garippo, Senior Managing Director of Architecture and Construction, Crate
and Barrel

V.
CONCLUSION

For the reasons stated above, the building permit was lawfully issued by the Zoning Administrator, based on the reasonable interpretation on the Zoning Regulations, the Board's conclusions in *Kalorama*, and the Zoning Administrator's subsequent application of *Kalorama*. Accordingly, CB2 respectfully requests that the Board affirm the issuance of Building Permit No. B1104635.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: *Leila M. Jackson Batties*
Leila M. Jackson Batties, Esq.
Paul J. Kiernan, Esq.

2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, DC 20006

Exhibit A

BANK STREET NW

33RD STREET NW

RECEIVED
D.C. OFFICE OF ZONING
2011 OCT 25 PM 1:28

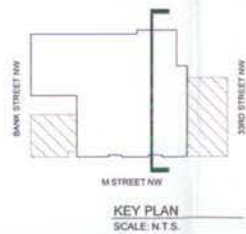
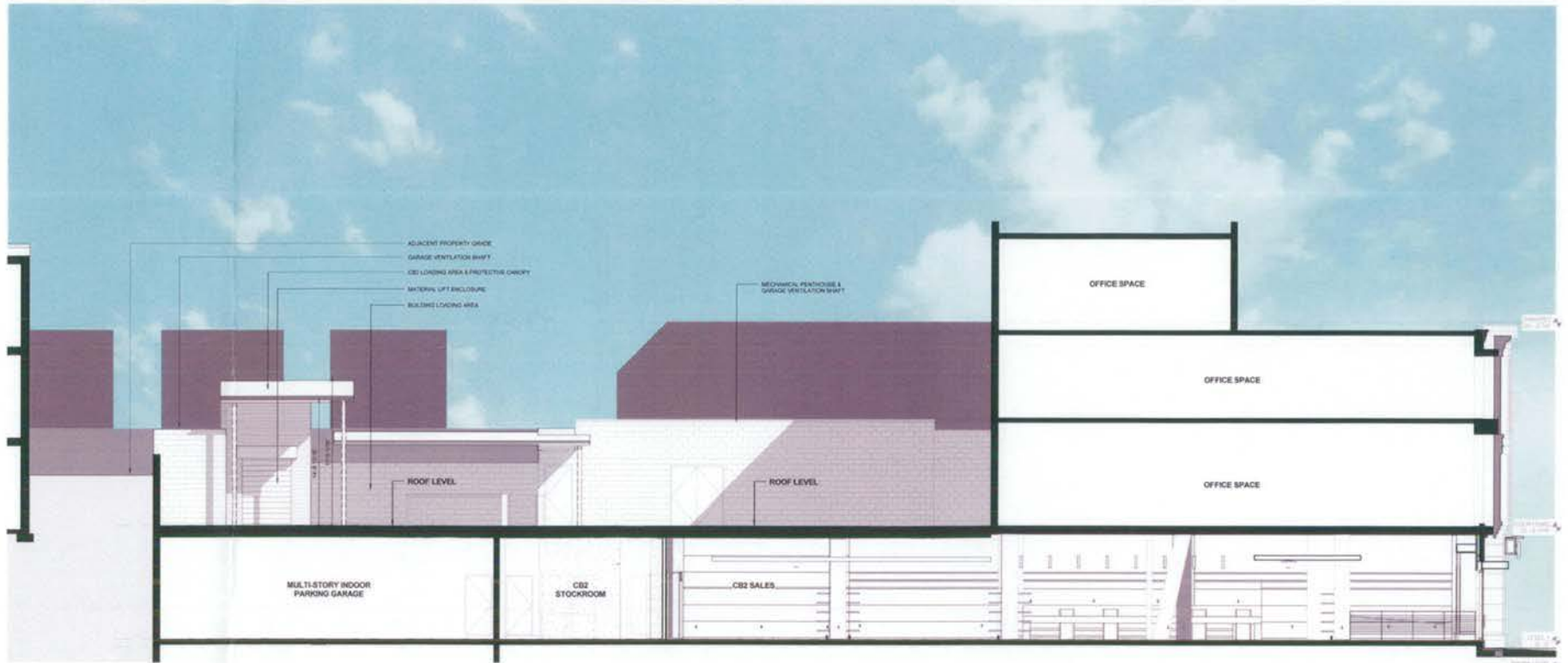


M STREET NW

1 LEVEL 2 FLOOR & ROOF PLAN
SCALE: 3/32" = 1'-0"



Exhibit B



1 BUILDING SECTION
SCALE: 3/16" = 1'-0"



RECEIVED
P.L.C. OFFICE OF ZONING
2011 OCT 25 PM 4:28

Exhibit C

2011 OCT 25 PM 1:28

ZONING

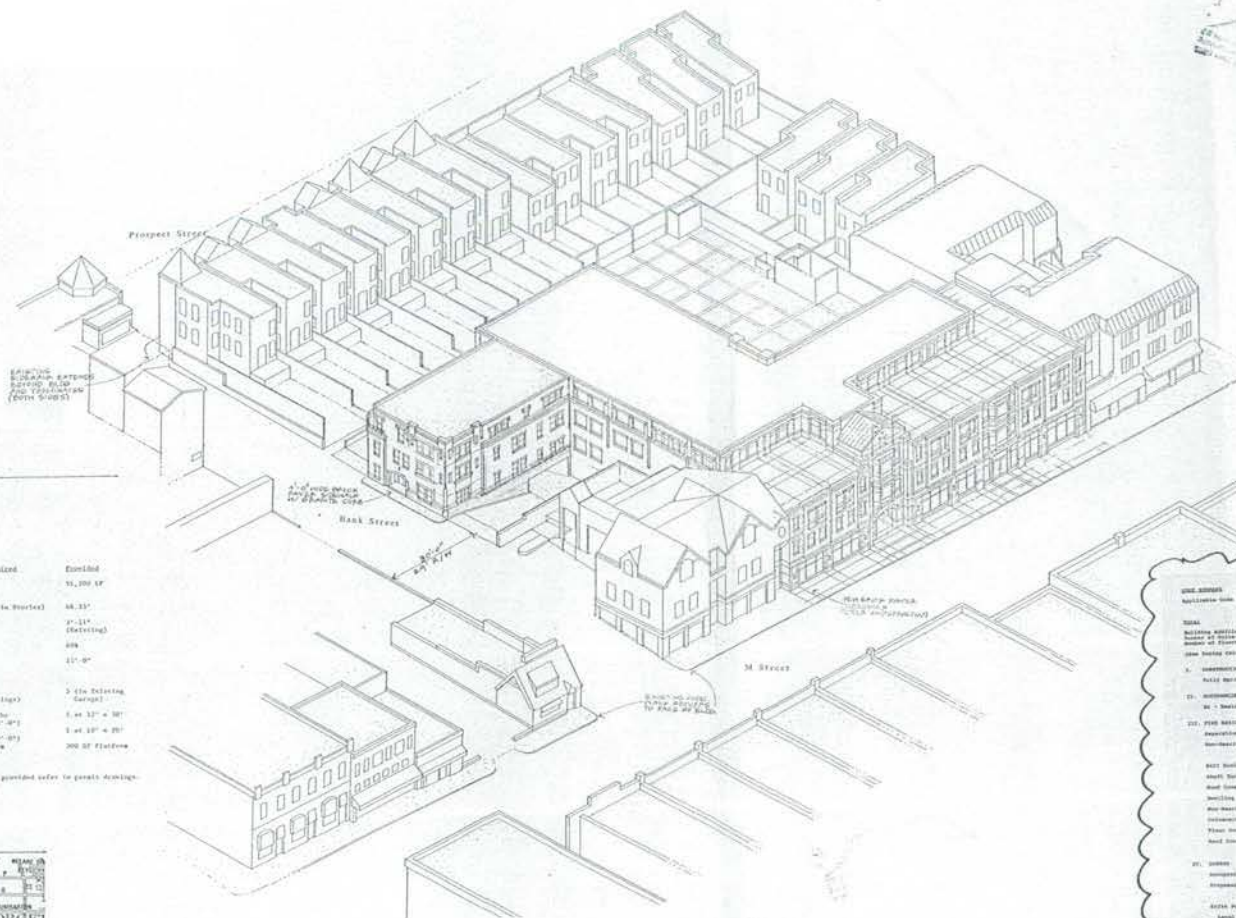
ZONING CALCULATIONS

Lot: 79
 Block: 1201
 File No: 224
 File Area: 27,993 SF
 FAR: 1.2 Commercial
 1.2 Residential

	Permitted/Calculated	Existed
Total Allowable Area (FAR)	68,887 SF	10,200 SF
Building Height	30' (to the top of the roof)	44.33'
Frontage Ratio	2'-11" (Setback)	2'-11" (Setback)
Site Coverage	N/A	20%
Front Yard	15'-0"	15'-0"
Side Yard	Not Required	Not Required
Parking*	3 (3 per 2 dwellings)	3 (in the existing garage)
Loading	2 Loading Berths (22' x 30' x 30' x 30')	2 at 32' x 30'
	2 Service (15' x 30' x 30' x 30')	2 at 32' x 30'
	200 SF Platform	200 SF Platform

* 115 total spaces required, 115 spaces are provided under the garage structure.

LOCATION MAP



DEVELOPER
 HARBOR GROUP - GEORGETOWN, INC.

BANK STREET RESIDENCES

ARCHITECT

SHALOM BARAN'S ASSOCIATES

USE: RESIDENTIAL
 Maximum Area: 68,887 SF
 Maximum Height: 30' (to the top of the roof)
 Maximum Frontage Ratio: 2'-11" (Setback)
 Maximum Side Coverage: 20%
 Maximum Front Yard: 15'-0"
 Maximum Side Yard: Not Required
 Maximum Parking: 3 (3 per 2 dwellings)
 Maximum Loading: 2 Loading Berths (22' x 30' x 30' x 30')
 Maximum Service: 2 Service (15' x 30' x 30' x 30')
 Maximum Platform: 200 SF Platform

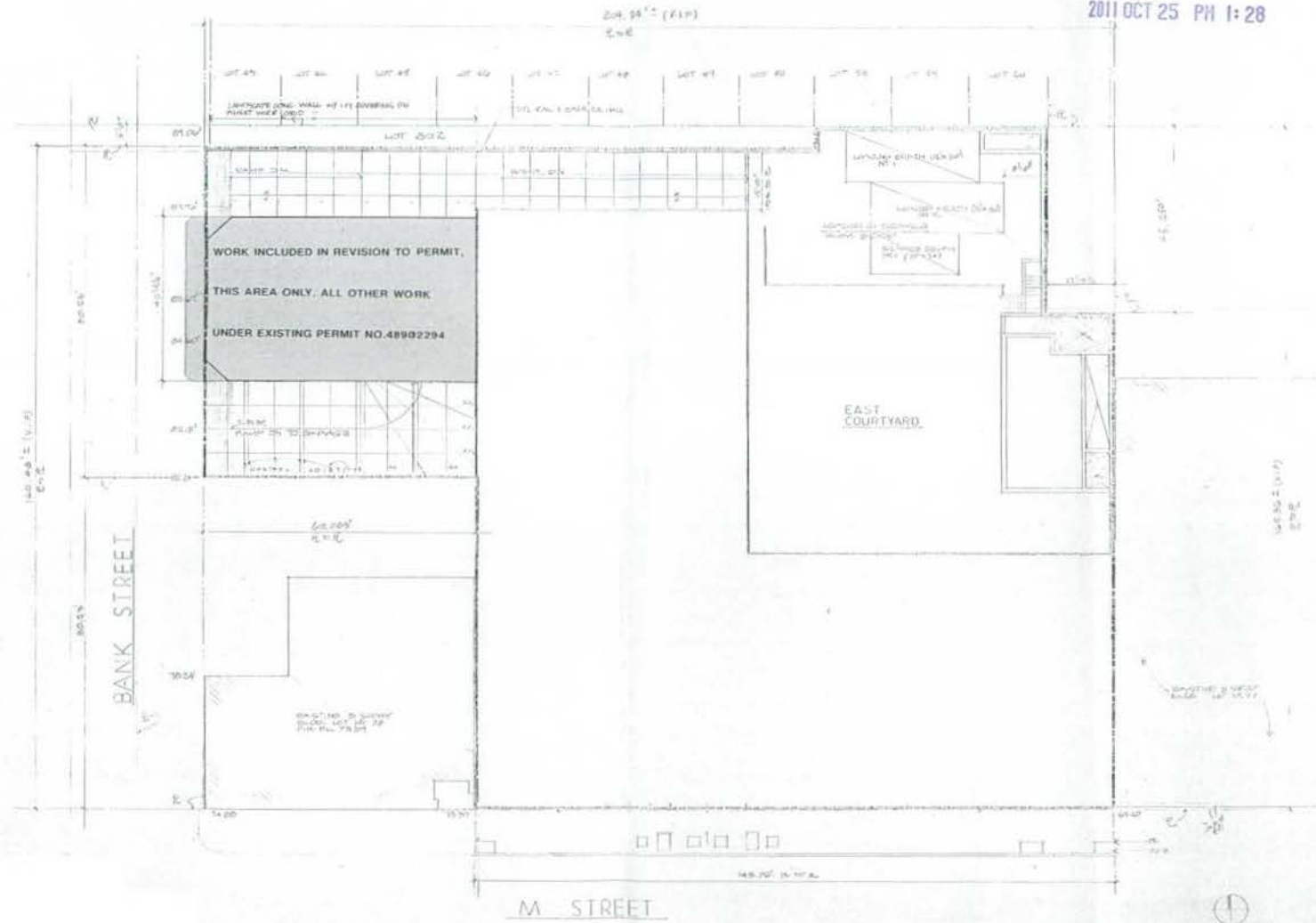
per permit
 Comments
 1-3-91

1-17-91

THAT THE BUILDING HAS BEEN CONSIDERED IN ACCORDANCE WITH THE BUILDING CODE OF THE DISTRICT OF COLUMBIA BUILDING REGULATIONS.

2/1/91

RECEIVED
D.C. OFFICE OF ZONING
2011 OCT 25 PH 1:28



RECEIVED D.C. OFFICE OF ZONING 2011 OCT 25 PH 1:28	
3307 M STREET, NW	
SITE PLAN	
A0.01	

Exhibit D

Outline of Testimony
Steven E. Sher
Director of Zoning and Land Use Services
Holland & Knight LLP

RECEIVED
U.S. OFFICE OF ZONING
2011 OCT 25 PM 1:29

- I. Introduction
- II. Description of subject property and improvements
- III. Review of pertinent portions of the Zoning Regulations
- IV. Review of decision of the BZA in Appeal No. 17109
- V. Review of the decision of the Court of Appeals
- VI. Conclusion as to compliance with the Zoning Regulations



Steven E. Sher, Director of Zoning and Land Use Services, has more than 30 years' experience as the leading consultant in the Zoning Regulations and development processes in the District of Columbia. For more than 18 years, he has advised developers and property owners on the interpretation and application of development regulations and approval processes in the city. He has appeared as an expert witness in zoning and planning before the District of Columbia Zoning Commission, Board of Zoning Adjustment, Historic Preservation Review Board and the Mayor's Agent for the historic preservation act, before the Zoning Hearing Examiner and the Planning Board in Montgomery County, Maryland, and in local and federal courts. Recent major cases in which he has played a leading role include the MCI Center, the new Washington Convention Center, the residential/retail/hotel complex at 2200 M Street for the Ritz Carlton, and the planned redevelopment of the old Hecht's block at 7th and F Streets, the Station Place office development adjacent to Union Station, to be the new headquarters for the SEC, the International Monetary Fund's Headquarters II office building at 1900 Pennsylvania Avenue, the new headquarters for the U.S. Department of Transportation at the Southeast Federal Center and the redevelopment of the Capper/Carrollburg public housing projects in Southeast using a HOPE VI grant.

For more than 14 years, Mr. Sher was employed in the various zoning and planning offices of the District of Columbia. As one of the chief technical staff persons for the Zoning Commission, he played a significant role in drafting major portions of the present Zoning Regulations, including the waterfront and mixed use (CR) districts, the regulations concerning community based residential facilities, the planned unit development regulations and the regulations governing parking and loading.

For eight years, Mr. Sher served as the Executive Director of the Zoning Secretariat. As such, he was the chief executive/operating/administrative officer for the Zoning Commission and the Board of Zoning Adjustment of the District of Columbia. Mr. Sher supervised the handling of over 1,600 cases before the Board of Zoning Adjustment and numerous rezoning, planned unit development and text amendment cases before the Zoning Commission. Matters which he assisted the Zoning Commission in resolving included the rezoning of the Dupont Circle area, the Hotel-Residential Incentive District, implementation of the Foreign Missions Act and major development cases such as McLean Gardens, Techworld, Lafayette Center and the Sumner-Magruder schools redevelopment. Mr. Sher represented the Zoning Commission and the BZA before Congress, the Council of the District of Columbia, the Mayor and other public agencies.

Mr. Sher is a member of Lambda Alpha, the honorary land economics society, and the American Planning Association. He also served on the Mayor's Commission on Downtown Housing, various task forces of the Greater Washington Board of Trade and the D.C. Building Industry Association and the Metropolitan Washington Council of Government Metropolitan Development Community Advisory Committee. He has also served as guest lecturer at various universities on planning and zoning issues.

Mr. Sher received a Bachelor of Arts in Urban Studies from Brooklyn College of the City University of New York and a Master of Regional Planning from Cornell University.

RECEIVED
OFFICE OF ZONING
OCT 25 PM 1:29