

BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

Appeal of 5333 Connecticut Neighborhood Coalition, et al, from)
an April 3, 2013 and May 28, 2013, decision by the D.C.)
Department of Consumer and Regulatory Affairs to issue) BZA Appeal No. 18615
building permits authorizing the construction of an apartment)
building in the R-5-D District at premises 5333 Connecticut)
Avenue, N.W. (Square 1873, Lot 128))
_____)

PRE-HEARING STATEMENT OF APPELLANTS

This prehearing statement is submitted on behalf of Appellants 5333 Connecticut Neighborhood Coalition (“5333CNC”) and the individual appellants who reside within 200 feet of the proposed building. As is outlined in detail in this pre-hearing statement, the building proposed to be constructed by CMK Developer LLC, an affiliate of Cafritz Company (“the Developer”), on the site at 5333 Connecticut Avenue (Lot 128, Square 1873) violates numerous aspects of the Zoning Code and therefore Building Permit No. B1208792, issued on May 28, 2013 (the “Permit”) as well as prior permits must be revoked. The statement of errors are as follows:

1. The building substantially exceeds the allowable Floor Area Ratio (“FAR”) permitted under Title 11 DCMR by improperly characterizing 100% percent of the 17 ground floor apartment/condo units and other area of that floor as cellar, and therefor excluded from the FAR calculation, even though the ceiling of a substantial portion of that floor sits entirely above the adjacent finished grade.

2. The building proposed to be constructed at 5333 Connecticut Avenue, N.W. violates the unambiguous language of the Height of Buildings Act as codified in DC Code § 6-601, by permitting a building far taller than the maximum height permitted under the Act.
3. The proposed building violates the Height of Buildings Act as codified in DC Code § 6-601 in another completely independent way, assuming *arguendo* that Kanawha Street is the proper front from which to measure height, by permitting an unlawful height well over the 90 foot limit as measured from the middle of the building front.
4. The site upon which the proposed building sits is only partially zoned as R-5-D. A portion of the eastern edge of the site is actually zoned R-1-B. The result of this is that a portion of the building and foundation is being constructed on land that does not permit apartment buildings and the Floor Area Ratio incorporates at R-5-D density land that is not lawfully zoned as such.

The proposed building also violates numerous Title 12 DCMR building code provisions that are the subject of an Office of Administrative Hearings Appeal with regard to the same permits. A copy of the initial OAH appeal filing is attached as Exhibit 37.

A list of witnesses is attached hereto as Exhibit 38.

Factual Background

The Developer acquired the ten original lots comprising the site in mid-1973. In March 1990, the Zoning Commission approved a Planned Unit Development (“PUD”) via Zoning Commission Order #656 for the site to authorize the construction of a 189,000 square foot mixed commercial-residential development, which at that time was mostly zoned R-5-C (now equivalent to R-5-D based on classification revisions). However, the PUD expired in 1998 and

was not renewed. According to every Official Zoning Map published since Cafritz's acquisition of the site in mid-1973 until the time of the conversion to an electronic zoning map circa 2006, the R-5-D zone boundary terminated 251 feet from Connecticut Avenue along Military Road.

On April 3, 2013, the D.C Department of Consumer and Regulatory Affairs ("DCRA") issued a foundation permit (#FD 1200052) and a sheeting and shoring permit (#SH 1200128) authorizing the Developer to commence construction of a "Foundation to Grade Permit for an apartment building with 1-2/3 levels of underground parking," and "sheeting and shoring for new building." A full building permit application (#B 1208792) was issued on May 28, 2013.

Discussion of Zoning Errors

I. The Building Exceeds the Permissible Floor Area Ratio By At Least 8-9% by Improperly Classifying All of its 17 Ground Floor Residential Units as a "Cellar" and Thereby Improperly Excluding the Entire Floor From Its Floor Area Ratio.

The building plans call for a 10-story residential building, but only the top 9 stories are included in the proposed building's FAR calculations. The Developer claims the entire ground floor encompassing 17 residential apartment units is a "cellar." Some of the units on this floor have floor to ceiling windows and others have nearly floor to ceiling windows. The residential units in the Military Road wing of the ground floor sit substantially above the sidewalks and adjacent grades of Military Road, Connecticut Avenue, and the Alley. The floors of these "cellar" apartments sit as much as 5-6 feet above the sidewalk and street level along Military Road and the ceilings of these "cellar" apartments are as much as 15-16 feet above Military Road and over 10 feet above portions of Connecticut Avenue. These lower level units that the Developer attempts to exclude from the FAR as a "cellars" look very much down at the homes

along Military Rd and are nearly equivalent to second story units in relation to adjoining properties.

The Zoning Regulations provide that the term “gross floor area,” which is used to calculate FAR, does not include any "cellar" areas but “shall include basements.” 11 DCMR § 199.1 (definition of “gross floor area”). The term "cellar" is defined as –“that portion of a story, the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade.” *Id.* (definition of “cellar”). “Basement” is defined as –“that portion of a story partly below grade, the ceiling of which is four feet (4 ft.) or more above the adjacent finished grade.” *Id.* (definition of “Basement”)

Despite the fact that the lower level ceilings of the proposed building are significantly more than 3 feet 11 ½ inches above the adjacent finished grade, the Developer attempts to designate the lower level of the proposed building as entirely "cellar" in order to exclude this space from FAR and further increase the mass of the building. The perimeter wall method or any appropriate method, if properly applied, would count the entire Military Road wing and a portion of the rest of the ground level as a “basement” or even as entirely above grade and not as a “cellar”. The result would be an FAR of approximately 4.67, which very substantially exceeds the allowed 4.2 FAR limit inclusive of inclusionary zoning.

The Developer’s rationale for characterizing the lower level as a cellar is by reference to the construction of an areaway wall hundreds of feet long at an elevation of exactly 307.54 and a large, steep earth berm abutting it that is hundreds of feet long immediately adjacent to that areaway wall as shown on the “cellar level” site plan in Exhibit 1. This “areaway”, thus formed, serves as an elevated moat around the building perimeter as further shown in the elevation drawings in Exhibit 2 and Exhibit 3. Behind the “moat” are nearly floor to ceiling windows.

The top of the areaway “wall” level is 3 feet 11 ½ inches below the ceiling height of the lower level units for the entire length of the Military Road wing of the building as noted on Exhibit 3. The bottom of the areaway that is “adjacent” to the building, on the other hand, has an elevation of 302.5 feet and is over 9 feet below the ceiling. The only purpose from this earth berm and wall structure is to attempt to create an artificial “adjacent finished grade” for use in measuring the vertical distance to the ceilings of the lower level.

In fact, the earth berm and areaway wall explicitly retain nothing. Rather, the areaway wall is on the uphill side of the soil it is supposed to retain with the grade falling steeply away from it. The wall and earth berm clearly serve no function other than to add artificial elevation (artificial because there was no soil from the existing grade ever there to retain, only air) and all runoff runs away from the “retaining” wall downhill. The structure of this artificial elevation and steep earth berm is further shown on Exhibit 4. As shown in the Exhibit, the dirt berm and areaway wall even sit on top of another portion of the building and are not even adjacent to the building, but rather on top of it. The P-1 and P-2 levels are located immediately under the areaway wall. The "berm" is just an isolated mound of earth, not connected to any soil coming out of the ground, but rather sits on a concrete slab. The areaway wall is simply a portion of the overall building foundation and the wall is directly attached to the P-1 and P-2 levels that it sits on top of (as shown on Exhibit 4). The building extends another 8 feet or more beyond the areaway. This elevated moat is quite different than a true areaway that is (1) at the natural grade, (2) is designed to retain soil, (3) is required to let light or air into below grade levels, and (4) has footers in the ground. In fact, the berm and wall structure block light and air from the building. The legality of this areaway construct under the building code is in dispute as well.

Moreover, the “adjacent finished grade” used to attempt to justify this level as a “cellar” is neither immediately or nearly “adjacent” to the building, nor does it utilize “grade”. The areaway wall is located not adjacent to, but rather four feet away from the wall of the ground floor units the Developer wants to exclude from FAR (with the earth berm another foot away). The wall is also located four feet beyond the “building restriction line” (see Title 11, Section 199 “line, building” definition) and outside the Developer’s buildable lot.

The Zoning Regulations do not define “adjacent finished grade,” but provide that the meaning of words not defined “shall have the meanings given in Webster’s Unabridged Dictionary. “ 11 DCMR § 199.2(d). “Adjacent” is defined as “bordering.” [cite]. The earth berm, located at least five to six feet away from the building, does not “border” the building.

The term “finished grade” is a term of art used in the field of architecture. As 5333CNC’s expert will testify, the term “finished grade” refers to the surface of a lawn, walkway or driveway after completion of grading operations. This definition should not be construed as including berms or embankments. For example, the definition of building height, which likewise requires that measurement begin at either the “natural grade” or the “finished grade” specifically provides that “[b]erms or other forms of artificial landscaping shall not be included in measuring building height.” Id. § 199.1 (definition of “Building, height of”).

There are several lines shown on Exhibit 5 that show existing grade elevations at various points on and adjacent to the site. These are shown by lines on Exhibit 5:

- A. The existing elevation at the building restriction line (beyond which is regulated as public space).
- B. The existing elevation adjacent to the lot line.

- C. The existing elevation adjacent to the areaway. However, this is five feet beyond the building restriction line and not adjacent to the building.
- D. The elevation at the true northern edge of the building (ie, the end of the P-1 level that extends roughly 13 feet past the building restriction line).
- E. The existing elevation of the adjacent sidewalk grade along Military Road.

When each of these lines is drawn and labeled on Exhibit 5, the primary observation drawn from the exercise is that not in a single linear foot of the 238 foot long Military Road wing along any of these lines does the grade justify the elevation of 307.54 feet required to consider this level a cellar. In fact, most of the existing elevations of these areas outside of the buildable parcel are at least several feet below the 307.54 level. As such, absent the artificial berm and wall, there is no reasonable interpretation of “adjacent finished grade” that justifies more than a small fraction of the lower level as constituting a “cellar” if the perimeter wall method or any appropriate method consistent with the intent of the Zoning Regulations was properly applied. Certainly, the inclusion of a large berm (past the building line), a wall on top of another portion of the building, or a “planter box wall” (in the courtyard) is not reasonable “adjacent finished grade”.

A further examination of the areaway wall solidifies this point. The areaway wall is not adjacent to the building. There is no earth where the areaway wall is proposed to be installed. Rather the areaway wall is, on average, several feet above existing grade and is located in a protected “building restriction area”. Furthermore, the bottom of the areaway is the P-1 slab elevation of 302.5 feet, which renders the ceiling height of this level some 9 feet above the “adjacent finished grade”(ie, the bottom of the wide areaway) at the building restriction line and

the central courtyard. The 302.5 elevation is immediately adjacent to these ground floor units. This would render the entire Military Road wing of that level “basement” or entirely “above grade” versus a “cellar” as well as a portion (but not all) of the Kanawha Street wing.

Further definitive proof is shown in Exhibit 1, which shows that at least 9 of the supposedly buried “cellar” units adjacent to the courtyard have walkout patios, which have the same 302.5 foot elevation as the central courtyard slab, the bottom of the areaways, and the floors of the units. These patio units by definition have floor to ceiling windows and walk out to their adjacent patios at “adjacent finished grade”. There is not a single characteristic about them that would lend these floor-to-ceiling window patio units to being treated as a “cellar” or lawfully excluded from FAR. Yet, the Developer as shown in Exhibit 1 and 4 appears to point to the “Planter Box” wall elevation of 307.54 as adjacent finished grade, which is not reasonable as these are not adjacent, are artificial, and could be removed if desired as could any artificial elevation construct above the courtyard structural slab level of 302.50 feet. For the courtyard, 302.5 is the patio elevation and slab elevation and is “adjacent finished grade”.

If any developer is permitted to simply build a large moat or wall around its building in order to permit “cellar” floors to be improperly excluded from FAR or to inexplicably exclude units with walkout patios at grade from FAR (by looking to a non-adjacent planter box elevation), it could potentially render meaningless the density limitations of the Zoning Regulations. In the case of this building, the manipulation on average is up to 5 feet. However, the Zoning Code is very specific in saying that the ceiling of a “cellar” must be less than 4 feet above the adjacent finished grade. The manipulation of 5 feet (125%) is very, very substantial in the context of a 4 foot limit and defeats the entire intent of the regulation. What if the ground

level was above grade, had 15 foot floor to ceiling windows and an 11.1 foot tall berm and wall? Would that be permitted to be called a “cellar”?

While in the case of 5333 Connecticut Avenue, this improper classification may “only” have added ~8-9% (or 3/4 of one floor) to the building mass improperly. However, in a lower density zone such as R-5-A, a two story apartment building that improperly classified one level as a “cellar” could increase its FAR substantially (50% perhaps?) above its allowable FAR. The Zoning Commission specifically determined that anything more than four feet above “adjacent finished grade” is a cellar. It was certainly not the intent that the Zoning Administrator be permitted to further legislate zoning rules by allowing such broad interpretation of the rules that effectively nullify the regulation.

In interpretive matters related to Zoning and Construction, the interpretive intent of the DC Council is also clear (DC Code § 6-641.11) that the more conservative interpretation is required:

“Wherever the regulations made under the authority of this subchapter require a greater width or size of yards, courts, or other open spaces, or require a lower height of buildings or smaller number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in or under any other statute or municipal regulations, the regulations made under authority of said sections shall govern. Wherever the provisions of any other statute or municipal regulations require a greater width or size of yards, courts, or other open spaces or require a lower height of buildings or smaller number of stories or require a greater percentage of lot to be left unoccupied or impose other higher standards than are required by the regulations made under authority of said sections, the provisions of such other statute or municipal regulation shall govern.”

The allowable FAR on the site of the proposed 10-story building is 4.2. The other 9 stories of the building add up to an FAR of over 4.18. If just two of the building’s cellar units (no less the entire Military Road wing and a significant portion of the Kanawha Street wing) are deemed not to be cellar space, the allowable FAR for the site is exceeded. If all the ground floor space was determined not to be “cellar” space, the proposed building’s FAR would become 4.67, well beyond what is permissible by law and very overwhelming for the neighborhood.

This proposed building, when an appropriate method is correctly and consistently applied, substantially exceeds the allowable FAR. The building permit for this proposed building was issued in error by the Zoning Administrator.

II. The Proposed Building Violates the Height of Buildings Act.

The building proposed to be constructed at 5333 Connecticut Avenue, N.W. violates the unambiguous language of a federal statute, the Height of Buildings Act adopted by Congress in 1910. Under this law, the maximum permissible height of a building on this lot is 90 feet, as measured from the sidewalk opposite the middle of the Connecticut Avenue front of the structure. The Zoning Administrator violated this statute in authorizing the proposed building that substantially exceeds the maximum permissible height.

1. The Governing Statute – the Height of Buildings Act

The maximum height of the proposed building is governed by the Height of Buildings Act, enacted by Congress in 1910 and codified at D.C. Code § 6-601.01 et seq. Section 6-601.05 provides:

(a) No building shall be erected, altered, or raised in the District of Columbia in any manner so as to exceed in height above the sidewalk the width of the street, avenue, or highway in its front, increased by 20 feet

(c) On a residence street, avenue, or highway no building shall be erected, altered, or raised in any manner so as to be over **90 feet in height at the highest part of the roof or parapet, nor shall the highest part of the roof or parapet exceed in height the width of the street, avenue, or highway upon which it abuts**, diminished by 10 feet, except on the street, avenue, or highway 60 to 65 feet wide, where a height of 60 feet may be allowed; **and on a street, avenue or highway 60 feet wide or less, where a height equal to the width of the street may be allowed**

(d) The height of a building on a corner lot will be determined by the width of the wider street.

Section 6-601.07 further provides:

For the purposes of this subchapter the height of buildings shall be measured from the level of the sidewalk opposite **the middle of the front of the building** to the highest point of the roof. If the building has more than 1 front, the height shall be measured from the elevation of the sidewalk **opposite the middle of the front** that will permit of the greater height.

2. The Proposed Structure Violates the Height of Buildings Act

The proposed structure at 5333 Connecticut Avenue is on a corner lot bounded by Kanawha Street on the south, Connecticut Avenue on the west, and Military Road on the north. Kanawha Street is 50 feet wide. Connecticut Avenue is 130 feet wide. Military Road is 90 feet wide.

In the permit application, the Developer has designated Kanawha Street as the “front” of the building. Section 601.05(a) thus would permit a maximum building height of only 70 feet if this were not a corner lot. Because it is a corner lot, Section 601.05(c) and (d) and the limits applicable to lots zoned R-5-D would permit a building height of 90 feet from Connecticut Avenue. Under the literal language of Section 601.07, Connecticut Avenue is the front of the building that permits of the greater height of the building (90 feet versus 70 feet). Pursuant to Section 601.07, the height of a structure on this lot must be measured from a measuring point defined by “the elevation of the sidewalk opposite the middle of” the Connecticut Avenue front. By our calculations, the maximum 90-foot building height that would result from measuring from this statutorily mandated measuring point is 23.5 feet lower than the building approved by the Zoning Administrator.

However, the Developer asserts that the Zoning Administrator may authorize construction of a structure that is 90 feet high, measured from the middle of the Kanawha Street front, by “mixing and matching” – that is, by taking the maximum height determined by the front of the building that permits the greatest height -- the Connecticut Avenue front – and applying that 90 foot measurement from the Kanawha Street front. The Developer seeks to use this “mix

and match” strategy to take advantage of the greater natural elevation of Kanawha Street as the baseline for the building, rather than utilizing the middle of the Connecticut Avenue front which is at a substantially lower elevation. The permit issued by the Zoning Administrator is illegal because the “mix and match” approach violates the plain language of the Height of Buildings Act.

The U.S. Supreme Court has held that federal statutes must be interpreted under the familiar two-step process established by *Chevron U.S.A., Inc. v. Natural Resources Development Council, Inc.*, 467 U.S.837 (1984). Under Step One of *Chevron*, the decision maker must determine “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter”; a reviewing court “must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43. If a court, employing traditional tools of statutory construction, ascertains that the language of the statute is unambiguous and that “Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *Id.* at 843 n.9.

If and only if the reviewing court determines that “Congress has not directly addressed the precise question at issue” may the analysis proceed to Step Two of *Chevron*. *Id.* at 843. In applying Step Two, “if the statute is silent or ambiguous with respect to the specific issue,” the court may then consider whether the agency charged with implementation of the statute has adopted a permissible interpretation of the statute and applied it reasonably in the specific case. *Id.*

Here, the interpretation of the statute is governed by Step One of *Chevron*. The statute expresses the unambiguous intent of Congress.

The Zoning Administrator violated the plain language of the Height of Buildings Act by issuing a permit that allowed the height to be measured 90 feet from the Kanawha Street front rather than 90 feet from Connecticut Avenue.

Under the Height of Buildings Act, the maximum permissible height is to be determined exclusively by the width of the streets surrounding a corner lot. The plain language of the Act Section 601.07 provides that the height of the building must be measured from the middle of the Connecticut Avenue front of the building -- “the middle of the front that will permit of the greater height.” D.C. Code § 601.07. Section 601.05(d) provides an unambiguous principle for determining what front permits of greater height for a building on a corner lot – the front on “the wider street.” The statute thus unambiguously provides that the height of 5333 Connecticut Avenue must be measured from the middle of the Connecticut Street front.

The Zoning Administrator misinterpreted the Height of Buildings Act because he introduced into the determination of maximum building height a factor that is not to be found anywhere in either Section 601.05 or Section 601.07 – the relative elevation above sea level of the various fronts of this corner lot. The factor set forth by Congress in Sections 601.05 and 601.07 as the exclusive criterion on which the determination of the maximum permissible height may be made is limited to width of street in front of the building. Accordingly, the Zoning Administrator violated the statute by ignoring its literal language and determining the permissible height by a factor other than the one Congress expressly established as the benchmark for making that calculation.

The Developer attempted, in advocacy before the agency, to justify ignoring the literal language of the term “front that will permit of the greater height” by relying on a legal opinion

issued by the District of Columbia Corporation Counsel on May 11, 1950. (Exhibit 6).

However, the reasoning of that 1950 opinion is defective on its face, as a matter of law.

The opinion addresses the proper method of interpreting the current statute, Section 601.05 and 601.07, by considering the method of calculating the maximum height in Section 6 of the 1899 Height Act as originally passed, 30 Stat. 922, and as amended in 1903, 32 Stat. 1022.

The opinion concludes:

[1] The Act of 1899, both as originally enacted and as amended, clearly shows the intent of the Congress that the measurement of the actual height of the building was to be made without regard to the street the width of which permitted the greater theoretical height, and [2] there is nothing in the 1910 Act which indicates that Congress intended to change this principle.

May 11, 1950 Op. at 3.

The first clause in this sentence is correct, “The Act of 1899, both as originally enacted and as amended, clearly shows the intent of the Congress”. The second clause is plainly incorrect and untenable under *Chevron* because it ignores the literal language of the statute. In 1910, Congress explicitly eliminated provisions that had appeared in the prior statutes that based determination of the maximum height on factors dealing with the grade of the street or the median elevation of the front of the building. Congress replaced them in 1910 with the current provision, which explicitly requires that the maximum height be determined by reference to one objective and unambiguous factor – the width of the widest street measured from the middle of the front of the building on the widest street bounding a corner lot.

As the 1950 Opinion notes, Section 6 of the 1899 law provided:

That the height of all buildings shall be measured from the level of the sidewalk opposite the middle of the front of the building to the highest point of the roof; if the building has more than one front the measurement shall be made upon the front facing the steepest gradient.

May 11, 1950 Op. at 3 (emphasis added). This provision explicitly created a rule that the

measurement of the height of the building depended upon the gradient of the streets bordering

the lot. Were this provision in effect today, the height of the structure at 5333 Connecticut would be measured from the Connecticut Avenue front, the “front facing the street of steepest grade.”

Similarly, the 1903 amendment of Section 6 provided:

That the height of all buildings shall be measured from the level of the sidewalk opposite the middle of the front of the building to the highest point of the roof. If the building has more than one front, the height should be measured from the mean elevation of the sidewalk at the street corners.

Id. (emphasis added)

This provision also created an express rule that the measurement of the height of the building depends upon the gradient of the land on which it is built and provided that the baseline for the building would be determined by the average (mean) elevation of the front of the building between the two street corners. Were this provision in effect today, the height of this building also would be measured from the Connecticut Avenue front, and the baseline for the building would be “the mean elevation of the sidewalk at the street corners,” or approximately 305.75 feet. This would have been substantially lower than the baseline approved by the Zoning Administrator based on the height of Kanawha Street.

However, neither of these two provisions relied on by the 1950 Corporation Counsel opinion is in effect today, nor were they in 1950. Dissatisfied with its prior actions in 1899 and 1903, Congress in 1910 again amended Section 6 of the Height of Buildings Act and adopted a substantial change in the factors that would govern measurement of the maximum height of a building. This law eliminated all factors that would provide for determination of the maximum height of a structure depending upon the slope or the gradient of the land on which it was located. Instead, Congress imposed an explicit and unambiguous standard upon which the

calculation would be made, namely determining the measuring post based exclusively on the width of the widest street.

Thus, examination of the plain language of the statutes demonstrates that the May 11, 1950 opinion is wrong in its assertion that “there is nothing in the 1910 Act which indicates that Congress intended to change [the] principle” that the measurement of the actual height of the building was to be made without regard to the width of the street that would permit the greater theoretical height. To the contrary, Congress eliminated prior statutory provisions that based this measurement on factors related to gradient or slope and simplified the operation of the statutory mechanism by eliminating every other factor except the width of the streets involved. The Zoning Administrator therefore erred as a matter of law in following a mix-and-match approach and determining the maximum height by permitting the height “determined by the width of the wider street” to be transferred from that front (Connecticut Avenue) to a different front on a different street (Kanawha Street).

The Developer also attempted to justify the permit based on the fact that many buildings in the District have been constructed under the “mix-and-match” approach to determining the maximum permissible height. However, the fact that DCRA and the Zoning Administrator may have misinterpreted the law and misapplied the Height of Buildings Act in the past provides no justification for its continuing to violate the plain language of a Congressional statute. Neither the Zoning Regulations nor prior applications of those rules may, as a matter of law, override the statute passed by Congress. The Zoning Regulations cannot lawfully be applied to permit a building that exceeds the maximum height allowable by the unambiguous statutory directive that “[t]he height of a building on a corner lot will be determined by the width of the wider street”,

which in this case is Connecticut Avenue, and will be measured from “the middle of the front that will permit of the greater height.” D.C. Code §§ 601.05(d), 601.07.

Furthermore, for the same reasons, the building also violates the height limits and “height of building” definition codified in the D.C. Zoning Code (D.C.M.R Title 11). A similarly flawed interpretation of the plain language of the Height of Buildings Act has been used as the rationale to ignore the clear prohibition against the same “mixing and matching” under Title 11. The “building, height of” definition in Title 11, Sec. 199 is consistent with the Height of

Buildings Act, plainly stating:

“the vertical distance measured from the level of the curb opposite the middle of the front of the building to the highest point of the roof or parapet.... If a building fronts on more than one (1) street, any front may be used to determine the maximum height of the building; **but the basis for the height of the building shall be determined by the width of the street selected as the front of the building....**”

The prohibition against “mixing and matching” was specifically included in the 1958 Zoning Code. Yet, an April 11, 1977 DC Corporation Counsel (Attorney General) Opinion justified ignoring the plain language of the Zoning Code prohibited “mixing and matching” and did so using the same faulty reasoning of the 1950 Opinion. The 1977 Opinion is contained as Exhibit 7. The intent of Congress, via the 1910 Act is very clear that “mixing and matching” of street widths and measuring point locations is prohibited by the statute’s plain, unambiguous language. In each case, the methodology was plainly implemented such that average height of a structure along its wider street could not exceed the height limits imposed by the statute. By way of example, on a perfectly flat parcel, the 5333 Connecticut Building would be able to be 90 feet at all points along Connecticut. However, on a steeply graded Connecticut Avenue, the height at the middle of the building façade would still be 90 feet, however, with one corner lower than 90 feet and one corner higher than 90 feet.

Jennifer Steingasser of the Office of Planning acknowledges this in a September 25th, 2008 report to the Zoning Commission (ZC #8-06-01 Report excerpted as Exhibit 8, page 18). She notes: “Clearly, the Act anticipates that a building on a corner or through lot with two frontages could result in a building that is higher on one of those frontages that would otherwise be allowed. However, **separating height determination and measuring point allows, in some cases, a building to be higher on both frontages than would otherwise be allowed on either one**” and further notes, “Option 1 (no mixing and matching) would require both the maximum permitted height and the measuring point to be taken from the same street ensuring that at height on at least one frontage is based on the street width.” Option 1 noted in the report is the only interpretation consistent with the unambiguous language of the Height of Buildings Act and is therefore the only lawful interpretation. Again, any other interpretation is plainly contrary to the rule of interpretation mandated by the D.C. Council, requiring that the Zoning Regulations be construed to apply a lower height wherever there is a choice. DC Code § 6-641.11. The Building permit clearly violates the Height of Buildings Act and the Title 11 “height of building” definition and height limits.

III. The Building Approved by the Zoning Administrator Is Illegal Because It Exceeds 90 Feet High, Properly Measured from Kanawha Street and Violates the Height of Buildings Act

1. The Building Height Exceeds the Maximum Height Permitted by the Height of Buildings Act by at Least 1.67 feet.

There is a second and independent reason why the proposed structure violates the Height of Buildings Act. Even if the Board elected to follow the 1950 Opinion of the Corporation Counsel, the building the Zoning Administrator approved is illegal because it exceeds the maximum permissible height of 90 feet from the middle of the building along Kanawha Street.

As detailed below, the Developer has played a shell game with respect to both (1) the base height measuring point for determining the height of the building and (2) the top elevation measuring point for determining the height of the building and utilized points not permitted by the Height of Buildings Act. Every time the Appellant has demonstrated that the Developer's own plans show that the proposed building is illegal under the Height of Buildings Act because it exceeds the 90 foot maximum height, the Developer has proffered a new and more contrived rationale to justify the "middle" measuring point, top measuring point and height of the proposed building. Despite the obvious flaws with the Developer's proffered justifications for the building, the Zoning Administrator has approved a building that not only exceeds 90 feet in height from the middle of the building façade on Kanawha Street, but also the building exceeds 90 feet relative to the elevation of the curb directly in front of it at all points on all adjacent streets. In other words, at no single point does the proposed building abut a curb height from which the lawful top elevation point is 90 feet or less.

The common sense and legal way to measure the height of the building would be to determine the base elevation at the middle of the 134 foot long physical structure that runs along Kanawha Street (shown in Exhibit 9 and Exhibit 10) and measure the elevation of the sidewalk (or top of the curb under Title 11) at that point. By a process of interpolation of the elevation lines shown on the Developer's own plans as marked on Exhibit 10, the elevation of the sidewalk opposite the middle of the Kanawha Street tower is approximately 315.33 feet and a curb elevation that is approximately 315.10 feet. According to the Developer's original "elevation drawing" shown as Exhibits 11 and 12, the "highest point of the roof or parapet" was 407.00 feet. The 407.00 elevation reflected the pool deck, which is the minimum relevant measuring point for the limit of height under the Height of Buildings Act. The difference

between the two elevations was an illegal 91.67 feet. Regardless of the exact top elevation (the final permit plans obtained from DCRA by request indicated 407.00 feet versus more recent dated plans that show 407.33 feet), the key observation is that any top measuring point in excess of 405.33 feet violates the Height of Buildings Act (and any building exceeding 405.10 violates 11 DCMR as marked in Exhibits 11 and 12) and cannot be approved by law.

Therefore, even under the “mix and match” theory upon which the Zoning Administrator authorized the building, the height of the proposed building exceeds the maximum permitted by the Height of Buildings Act by at least 1.67 feet.

2. The Developer’s Ever Changing Justification for Determining the Measuring Point Is a Shell Game that Circumvents the Plain Language of the Height of Buildings Act.

As noted above, plans the Developer submitted for approval for the proposed building stated that the height of the highest point of the roof of the building was 407.33 feet. The plans also indicated the height of the “top of curb @ center of Kanawha St” that was used as the base measuring point on Kanawha Street was 317.33 feet, producing a building that was exactly 90.00 feet high. However, the base height measuring point was entirely free –floating and fictitious. This fictitious point is noted in the Kanawha Street elevation drawing in Exhibit 16. The Developer’s plans never indicated where along the Kanawha Street side of the building the purported measuring point actually was located and the Developer did not file a plat that indicated a base height location or measurement. When the Appellant notified the Developer and the Zoning Administrator that no point with a physical height of 317.33 existed on the Kanawha Street front of the proposed building, the Developer abandoned this rationale and fictitious measuring point.

Instead, seven months after applying for the Building Permit was applied for, the Developer proffered a revised plat shown as Exhibit 9 indicating the curb top measuring point along Kanawha Street was at an elevation of 316.83 feet at a specified measuring point. However, the measuring point indicated on the plat (the “illegal middle”) is located substantially to the east of the point opposite the true middle of the Kanawha Street façade (the “legal middle”). The difference in these two points is noted on Exhibit 13. The “illegal middle” on the plat claims a 316.83 elevation at the curb and is approximately 1.73 feet higher than the “legal middle” curb height because the natural contour of the land rises to the east of the true center point of the Kanawha Street tower.

The Developer attempted to justify the use of its wildly off-center “middle” measuring point for the base elevation by determining the purported “middle” of the front on Kanawha Street by utilizing segments C, D, and E noted in Exhibit 14. It does not include segments A or B in its calculation, yet inexplicably includes D and E. Rather, the true “legal middle” of the Kanawha Street façade would include only segments B and C. Using the “illegal middle” for its base elevation simply uses a completely contrived methodology to attempt to justify a higher measuring point further east of the “true middle” after it had been caught inventing a 317.33 elevation that didn’t exist and was inflated by roughly 2 feet in an attempt to add a 10th resident floor under the 90 foot height limit. Had the higher elevation point been located further west near the “legal middle” indicated on Exhibit 13, clearly such an absurdly contrived methodology, inconsistent with any reasonable enforcement of the Height of Buildings Act, would not have been utilized.

The following points further demonstrate the absurdity of this “illegal middle”:

- The tower on the Military Road side runs approximately 238 feet along that street. Segments D and E that the Developer considers part of the Kanawha St. façade lie as much as 120 feet from Kanawha Street and only 60 feet from Military Road.
- Segments D and E are part of the wing that sits directly on top of the Military Road building restriction line.
- Segments D and E are entirely behind the central courtyard, entirely behind the back of the Kanawha Street wing, entirely behind the middle connector of the building, and Segment E that is behind a portion of the rear wing of the building and can best be described in common sense terms as the “back of the building”.

It would make a mockery of the Height of the Buildings Act and the Zoning Regulations to suggest that the “front” of the building along Kanawha Street should be calculated by disregarding the actual 134 foot long tower façade and using a contrived methodology whose sole goal is an attempt to unreasonably sidestep the Height of Buildings Act maximum height limits.

The Certified Plat dated December 21, 2012 submitted by the Developer in support of its permit application (Exhibit 9) contains a legend, which states that the “top of pool deck and stair wells below 90’ height limit.” The inclusion of this legend cannot change the physical fact that the proposed measuring point is unreasonable and defective and the building well exceeds the height limit imposed by the Height of Buildings Act and by Title 11 DCMR from the “legal middle” measuring point. Exhibit 17 is a copy of document submitted by the Developer to DCRA that contradicts its own contrived “middle of the front” and more reasonably shows and notes the “Width of the Kanawha St. Frontage”.

3. The Height of Building Act Prohibits the Developer’s Shell Game with Regard to Top Measuring Point,

The Developer ultimately recognized the absurdity of its argument and attempted to make the case that the relevant top measuring point is NOT “the highest part of the roof or parapet”, but the “top of the roof” or the “top of the parapet”. This assertion is plainly false based on the plain language of the Height of Buildings Act, which articulates “On a residence street, avenue, or highway no building shall be erected, altered, or raised in any manner so as to be over **90 feet in height at the highest part of the roof or parapet**”. D.C. Code § 6-601.05 (emphasis added). Furthermore, nothing is excluded from the height of a building under the Act unless specifically excluded in 6.601.05(h) or 6.601.07. In both cases, the statute makes clear that the only exclusions that can extend above the 90 foot limit are (1) utilitarian structural features related to building function and (2) architectural embellishments. Specifically, DC Code § 601.05(h) provides:

(h) Spires, towers, domes, minarets, pinnacles, penthouses over elevator shafts, ventilation shafts, chimneys, smokestacks, and fire sprinkler tanks may be erected to a greater height than any limit prescribed in this subchapter when and as the same may be approved by the Mayor of the District of Columbia; provided, however, that such structures when above such limit of height shall be fireproof, and no floor or compartment thereof shall be constructed or used for human occupancy above the top story of the building upon which such structures are placed; and provided, that penthouses, ventilation shafts, and tanks shall be set back from the exterior walls distances equal to their respective heights above the adjacent roof; and provided further, that a building

58 to 62. Environment §§ 51 to 56,

§ 6-601.07. Measurement of building height; parapet walls.

For the purposes of this subchapter the height of buildings shall be measured from the level of the sidewalk opposite the middle of the front of the building to the highest point of the roof. If the building has more than 1 front, the height shall be measured from the elevation of the sidewalk opposite the middle of the front that will permit of the greater height. No parapet walls shall extend above the limit of height, except on nonfireproof dwellings where a parapet wall or balustrade of a height not exceeding 4 feet will be permitted above the limit of height of building permitted under this subchapter.

(June 1, 1910, 36 Stat. 454, ch. 263, § 7; May 20, 1912, 37 Stat. 114, ch. 124.)

In this case, the limit of height is first, the top of the pool deck elevation of 407.00 (or 407.33 depending on the plan set), and second (2) the top of the parapet/façade at 406.83, which is not excluded from height because (a) it exceeds 4 feet (if considered a parapet) and/or (b) it is physically an extension of the façade and not a parapet or embellishment. While the top portion of the parapet is not a traditional parapet, it is considered as an extension of the façade, a parapet, or balustrade because it is not set back 1:1 from the edge of the roof. This is a long-established interpretation in DC as supported by the Zoning Commission Case No. 08-06-01 Report excerpted as Exhibit 8 (see report Figure 9). In fact, the Height Act is forward thinking and works by exception. Any portion of a building not specifically excluded from the height limit is included.

Furthermore, Appellants' assertions are supported by Whayne Quin, Esq. of Holland and Knight who correctly states in Exhibit 18, "Above the maximum height of a building itself, the law also provided for essentially two types of structures, namely architectural elements such as spires, towers, domes, minarets which has evolved into what generally has become known as "architectural embellishments"; and utilitarian elements such as penthouses over elevator shafts, ventilation shafts, chimneys, smokestacks and fire sprinkler tanks. Congress set no limit for these roof structure elements but required them to be constructed with a setback from public street frontages on a 1:1 basis and prohibited them from being used for "human occupancy"."

A pool deck is not an architectural embellishment such as a spire, or utilitarian structural element such as a penthouse for an elevator or mechanical equipment, and may not extend above the limit set by the Height of Buildings Act. All of the architect's plans indicated the pool deck as the top measuring point for getting to 90.00 feet until they were caught using a fictitious base elevation measuring point and that no longer worked.

ANC 3/4G sent a letter to DCRA questioning some of the discrepancies of the proposed building attached as Exhibit 19. As shown in the response to DCRA attached as Exhibit 20, the Developer argues that the top of the guard rail is “not the top measuring point for height”. This ornamental guard rail is not set back 1:1 from the edge of the building and is considered an extension of the building or façade. As such, it certainly counts toward the height limit. Furthermore, portions of the glass façade of the building extend to the same height of 406.83 feet. Moreover, the pool deck extends further above this height and unequivocally should the relevant top measuring point at an elevation of 407.00 (or 407.33) feet. Architectural plans submitted by the Developer support this assertion.

Both of these top measurement points are in excess of 90 feet from even the “illegal middle” plat elevation of 316.83 and certainly from the “legal middle” elevation of approximately 315.10. By any measure, the proposed building unequivocally violates the Height of Buildings Act and was approved in error. These discrepancies in the architectural plans were a blatant manipulation designed to include 10 residential floors and pool deck in a 90 foot height limit and to connect to an existing higher elevation public alley that that would be difficult to connect to if the building sat lower.

4. Rooftop Enclosed Recreation and Storage Space Extend Even Further Above the Height Limit Imposed by the Height of Buildings Act and Further Block Neighborhood Light and Air

While the prior analysis was limited to the elevation between the “legal middle” measuring point and the pool deck elevation and the resulting height limit violation, there is an even more egregious Height Act violation described below. There is substantial enclosed recreation space and storage space (shown in Exhibit 21) that extends much further still above the maximum height limit to an elevation in excess of 420 feet, or 15 feet above the limits on

height imposed by the Height of Buildings Act based on the Kanawha Street elevation and 23.5 feet based on the Connecticut Avenue elevation. The result is a tall, massive 158-foot long “penthouse” and recreation space that goes well beyond building structural elements or architectural embellishment and extends above the Height of Buildings Act limits. This massive structure that looms 125 feet tall over Military Road will cast wintertime shadows that ensure no direct light during winter months to some homes.

While these penthouse level features would be allowed under the Zoning Code in cases where the Height of Buildings Act is not limiting (for example, a 60 foot tall structure), these features are explicitly not allowed to extend above the maximum height limits imposed under the Height of Buildings Act. The substantially larger penthouse level enclosure with enclosed recreation and storage space blocks substantial light and air from the surrounding neighborhood. If rooftop, enclosed recreational space is desired by the Developer, it is required by law to be built below the limit on height imposed by the Height of Buildings Act. If the Developer was forced to eliminate the rooftop enclosed recreation and storage space to bring it in compliance with the Height Act, it would bring the building closer to compliance with the Height of Buildings Act. Yet, the proposed building would still exceed the height act by at least 1.67 feet because the pool deck also extends above the limit of height.

By any reasonable measure, the proposed building violates the Height of Buildings Act and the Zoning Administrator was in error in approving the Permit.

IV. The Proposed Building Violates Multiple Aspects of 11 DCMR By Incorporating Land Into the Site That Is Not Lawfully Zoned R-5-D Resulting in a Violation of Floor Area Ratio Restrictions and Permitted Use Restrictions.

Only a portion of the site is legally zoned for R-5-D use as an apartment building and the proposed building as approved is not in compliance with the Official Zoning Map. The

Developer has planned a portion of the building on land that is not zoned for an apartment building.

The Sheeting and Shoring, Foundation, and Building Permits approved by DCRA allow a high-rise condo building on land extending 291.31 feet from Connecticut Avenue. This building is unlawful by extending onto land not lawfully zoned as R-5-D, but rather is R-1-B and does not permit apartment buildings.

The Zoning Commission, by Order dated March 16, 1965 in Case No 65-13, extended the R-5-C zone district to include Lots 44, 35, 37, 19, 20 and 21 in Square 1873. This new zone boundary was reflected on Zoning Maps for at least 7 years thereafter. Sometime between the publishing of the 1973 Official Zoning Map and the 1975 Official Zoning Map, the zone boundary was amended by the Zoning Commission to be limited to 251 feet from the line of Connecticut Avenue along Military Road.

The “zone boundary,” as reflected on all paper Official Zoning Maps published since the Developer’s purchase of the lots in mid-1973, allowed R-5-D zoning to extend eastward only 251 feet along Military Road from the Connecticut Avenue lot line because the “zone boundary” was set at 251 feet, meaning that no portion of a large apartment building may extend beyond that point onto land zoned as R-1-B.

- A photograph the 1975 official Zoning Map is shown in Exhibit 22.
- A photograph the 1982 official Zoning Map is shown in Exhibit 23.
- A photograph the 1983 official Zoning Map is shown in Exhibit 24.
- A photograph the 1987 official Zoning Map is shown in Exhibit 25.
- A photograph the 1989 official Zoning Map is shown in Exhibit 26. This Exhibit is a photograph of the actual zoning map from the Developer’s May 23rd, 1989 testimony before the Zoning Commission.
- A photograph the 1996 official Zoning Map is shown in Exhibit 27.
- A photograph the 2003 official Zoning Map is shown in Exhibit 28.
- All original Zoning Maps published after the Developer’s purchase show the same 251 foot Zone Boundary.

The approval of the three permits violates various governing statutes including the below:

DCMR, Title 11, Sec. 106 provides:

106.1 The official Zoning Map of the District of Columbia shall be the zoning map that is drawn and maintained on the Geographic Information System, also known as “GIS,” located in the Office of Zoning effective on April 13, 2012.

106.2 The official Zoning Map shall be published for public access on the Office of Zoning’s website.

However, DC Code Section 6-641.05 states:

“No zoning regulation or map, or any amendment thereto, may be adopted by the Zoning Commission until the Zoning Commission: (A) Has held a public hearing, after notice, on such proposed regulation, map, or amendment.”

Every Official Zoning Map published on paper since the Developer’s acquisition of the site in 1973 shows the same 251 foot zone boundary. The Office of Zoning and Advisory Neighborhood Commission 3/4G have no records of actions with respect to zoning of the parcel have taken place since the last paper Zoning Map was published, which appears to be the 2003 Zoning Map. There has been no amendment since the 2003 map. Therefore, no lawful zone boundary change has taken place by law with respect to the parcel and the lawful zone boundary remains at 251 feet as it has **for four decades** during which multiple development attempts took place including a Planned Unit Development approved in 1990 via Zoning Commission Order #656.

Without explanation or legal authority, the current electronically maintained Zoning Map shown in Exhibit 31, now shows a different zone boundary of approximately 281 feet along Military Rd (extending to the center point of the public alley). It appears that the zone boundary reflected on the 2013 electronic map mistakenly incorporates the entire PUD parcel (the 10 original lots that were consolidated into one parcel via a land “subdivision” in 1997 during the term of the PUD) excluding ½ of the 20 foot alley on at the eastern portion of the site. The PUD parcel was permitted to extend eastward from Connecticut 291.31 feet along Military Road. However, the PUD expired in 1998, and all benefits of the PUD lapsed. Therefore, as a matter of law (D.C.M.R, Title 11, Sec. 2400.7), the zone boundary reverted to its pre-PUD limit of 251 feet:

2400.7 Failure of an applicant to complete a proposed development as directed within the time limits set by the Commission or the Zoning Regulations shall result in the termination of the benefits granted under the application, and reversion of the zoning controls to the pre-existing regulations and map.

Therefore, the Developer is not entitled to incorporate the easternmost 40 feet of the proposed structure into the project because that portion is not zoned for R-5-D development. The use of this land was only permitted under the expired PUD agreement. While the Developer is hoping the PUD, the conversion to an electronic Zoning Map, the passage of time, lack of institutional memory, missing records, or calling the 40 year old official zone boundary a “mistake” has “re-zoned” the parcel in their favor without their having to seek appropriate approvals, it cannot by law.

The current development plans, as approved by DCRA, violate the lawful 251 foot zone boundary. The plans also don’t comply with the current Zoning Map maintained on the GIS, by extending 291.31 feet along Military Rd versus the 281 foot GIS zone boundary denoting the zone boundary extending to the mid-point of the 20 foot alley.

In January 2013, the Office of Zoning certified zoning for the parcel and, in doing so, far exceeded the authority provided to it under DC law. In its response to Appellant’s inquiry about the improper zone boundary, the Office of Zoning asserted in a letter attached as Exhibit 32: “The 1975 Official Zoning Map showed a dimension of 291 feet along Military Road and no dimension along Kanawha Street. The dimension could be read as 251 feet, but the top of the "9" in the number is partly obscured by the dashed line denoting the building restriction line.”

As seen in Exhibits 22 to 28, this is not a plausible explanation when looking at the official Zoning Maps. The fuzzy Zoning Map reproductions contained in the Office of Zoning’s Letter and Exhibits shown as Exhibit 32 appear to not be taken directly from official Zoning Maps at all, but rather from second hand sources, such as scans of low grade scans or documents provided by the Developer’s representatives. By contrast, the original Zoning Maps show very

crisp, clear lines and the writing style used on Zoning Maps make it impossible to mistake “5s” with bubble style “9s” utilized as a matter of course on Zoning Maps.

The contrast between Exhibit 22 and Exhibit 30 is quite striking because enlarging, copying, scanning, and other techniques cannot easily take an original document (the original Zoning Map) that has crisp lines and distort them into fuzzy lines as shown in Exhibit 30. Furthermore, to show how implausible the explanation is that the unambiguous “251” could be read as “291”, Exhibit 33 shows a series of Zone Boundaries showing “5”s and “9”s from photos of actual Zoning Maps to show that entirely different special styles are used for “5”s and “9”s so that there can be no credible claim that a “5” is actually a “9”. Furthermore, the bottom half of a 5 is always “rounded” in shape, while the bottom portion of a 9 is more angular. No handwriting expert would mistake the two.

The Office of Zoning declares 40 prior years of consistent Zoning Maps a “mistake”, saying: “The 2003 Official Zoning Map was produced in a different format and shows the boundary on the Military Road as 251 feet from Connecticut Avenue. The Map also shows the location of the PUD which was approved in 1990 but which approval expired in 1998 without the PUD having been constructed. The Map shows the entire PUD site as zoned R-5-D. The location of the line as depicted remains unchanged from the lines shown on all the previous maps. The 251 foot dimension was a mistake based on an erroneous reading of the partially obscured “9” on the prior maps, as described above.”

Not only is the explanation entirely without merit after reviewing original, non-distorted maps, the Office of Zoning is granted no power to move a zone boundary and no interpretive power with regard to Zoning Maps. The Office of Zoning’s power is limited by law to administrative duties, such as certifying zone boundaries when the discrepancies in question are

less than 1 foot from the lot line (ie, only to correct rounding errors) or making administrative corrections of maps when supported by unambiguous evidence. The 2003 Zoning Map and all prior maps published since the Developer's mid-1973 purchase require no interpretation at all. They all show a zone boundary of 251 feet.

A further examination of the Office of Zoning's position declaring all prior Zoning Maps a mistake is warranted. The Office of Zoning has been unable to explain when the Zoning Map was changed, by whose authority, and what evidence warranted the change. It appears that there is no affirmative evidence. Errors on Zoning Maps have occurred before and have been appropriately corrected by the Office of Zoning and predecessor agencies. However, when they are corrected "administratively" by the Office of Zoning, it is because there was indisputable documentation (contemporaneous with the improper boundary change or lack of boundary change) that definitively shows a mistake was made. Here there is absolutely no evidence supporting an administrative correction. The documentation provided is a 1965 Zoning Commission order shown in Exhibit 32. But the Zoning Map clearly changed between 1973 and 1975 as shown on Exhibits 29 and 22. Paper Zoning Maps did not change by accident, but by deliberate action. Yet, the Developer points to a document from 1965 (8 years before the Zoning Map change and the Developer's purchase of the site and nearly 50 years ago now) as justification for declaring 40 years of consistent Zoning Maps a mistake. Here, there is no evidence of a "mistake", or a "5" being a "9", and the timeline is entirely backwards.

Furthermore, meaningful changes occurred to the parcel between 1965 and 1973. As shown in the history of the site outlined below, enormous changes took place with regard to the development potential and deed restrictions on the lots between 1965 and 1973 that completely

changed the original intent of the 1965 rezoning and may have led to the 1973 change to the zone boundary from 290 to 251 for further protection of the neighborhood.

The following events occurred after the Zoning Commission Order dated March 16, 1965 in Case No 65-13 that meaningfully changed the development potential of the site versus the original zoning intent:

1. **1965 Rezoning:** The original site developer, George Bayer, made substantial promises with regard to use of the property in its 1965 submissions, including compliance with the Lewis Plan, to the Zoning Commission. A copy of his letter is attached as Exhibit 34.
2. **Alley Closure Changes Development Potential For the Site:** Approximately 8 months after the rezoning, the alley system that bisected the site was closed and moved. The “paper” closure of the alley system made more questionable the compliance with the Lewis Plan buffers that had been promised by the developer in Exhibit 34 that were ensured by the prior alley system.
3. **Developer Financial Distress and Lots Placed Under Contract by Cafritz:** The site was repossessed by the bank, American Security Corporation, after financial distress of the original developer. The site was then placed under contract by the current Developer.
4. **The Developer Sued the Entire Chevy Chase Terrace Subdivision in 1972:** The site contained “deed restrictions” that forever prohibited the development of an apartment building on much of the site. A copy of one such deed restriction is shown in Exhibit 35. In an effort to remove the deed restrictions from the land, the Developer sued every land owner in the subdivision. A copy of the 1972 lawsuit is contained as Exhibit 36. In January 1973, a default summary judgment was granted after no residents responded and the deed restrictions were deemed unenforceable on a portion of (but not all of) the site.

Many of the defendant addresses in the 1972 lawsuit for purposes of proper service appear to be incorrect. This outcome substantially changed the development potential for the site and brought a potential building much further east toward adjacent homes.

5. Zoning Map Changes Circa 1973: Right around the time of the Developer's purchase of the site and lawsuit, the Zoning Map zone boundary was changed from 290 feet to 251 feet as indicated in Exhibits 29 and 22. It is unclear why.

6. Zoning Maps Presented by the Developer to the Zoning Commission on Two Occasions in 1989: The developer presented PUD plans for the site to the Zoning Commission on both May 23, 1989 and November 16, 1989. Each time the pre-hearing statement included Zoning Maps indicating the 251 foot zone boundary, as shown in Exhibit 26.

Substantial changes occurred after the 1965 Zoning Commission Order 65-13 that meaningfully increased the development potential of the parcel. This may have led to the Zoning Commission to further restrict the zone boundary on the eastern part of the site to ensure a buffer. It is unclear exactly what occurred, but the paper maps between 1973 and 1975 did not change on their own. Furthermore, the Developer testified on two occasions before the Zoning Commission in 1989 and never asserted a mistake in the zone boundary. The 251 foot zone boundary is the lawful zone boundary.

The proposed building substantially exceeds the allowable FAR because it incorporates approximately 3,600 square feet of land area into its FAR calculations that is not zoned R-5-D.

Conclusion

For the foregoing reasons, the permits were issued in error and must be revoked.

Respectfully submitted,



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Certificate of Service

I hereby certify that, on September 10, 2013, I served the foregoing appeal by depositing the same in the U.S. Mail, 1st Class Postage pre-paid, on the following responsible persons:

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