

ATTACHMENT 2

**Detailed Statement of Zoning Errors and Statement of How Appellants
Intend to Prove Their Case**

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Factual Background

Square 1873, Lot 128 is owned by an affiliate of Calvin Cafritz Enterprises (“the Developer”), which has owned the ten original lots encompassing the site since mid-1973. In March 1990, the Zoning Commission approved a Planned Unit Development (“PUD”) 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 the 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, making a portion of the former PUD site that extends 291 feet along Military Rd. within the R-1-B zone boundary.

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.” According to DCRA’s website, the full building permit (#B 1208792) was issued on May 28, 2013. *See* Attachment 1.

A list of Appellants and a description of their interests is appended (Attachment 3). Appellants believe that the design of the building exceeds the applicable Floor Area Ratio (“FAR”) and height limitations established by the federal Height of Buildings Act and the zoning regulations. Further, the Developer proposes to develop the entire site, including the R-1-B zoned portion of the parcel, as if it is zoned R-5-D despite the right to build on the last 40 feet of the site terminating with the PUD expiration. Accordingly, Appellants believe that DCRA erred in issuing the permits and that the Building is not matter of right under the Zoning Regulations. Because the building permit was issued only a few days ago, Appellant Advisory Neighborhood Commission (“ANC”) 3/4G has not yet had an opportunity to vote on the building permit and is only appealing the foundation and sheeting and shoring at this juncture until the Commission has an opportunity to meet. The specific provisions of the Zoning Regulations that are exceeded by the Building are described below.

1. Excessive FAR. The building exceeds the maximum Floor Area Ratio (“FAR”) for the R-5-D zone district, which is 4.2 , including the bonus density allowed under the Inclusionary Zoning provisions of the Zoning Regulations 11 DCMR §§ 402.4, 2604.1. The Developer has failed to include 17 habitable units located on the basement level of the building in the calculation of the FAR by erroneously characterizing these 17 units as “cellar” space which is excluded from the gross floor area calculation. *Id.* § 199.1 (definition of gross floor area). However, these 17 units do not meet the zoning definition of a cellar because the ceiling of this story is more than four feet above the adjacent finished grade. *Id.* § 199.1 (definition of cellar).

Appellants will prove this zoning error based on the building plans, photographic evidence, testimony from an architect concerning the plans, testimony from an expert in interpreting DC zoning regulations, and related legal arguments.

2. Excessive height. The building exceeds the matter-of-right height under the zoning regulations and the Height of Buildings Act, DC Code §6-601.01 *et seq.*, which requires that the limit of height shall be measured from the middle of the building façade from “the sidewalk opposite the middle of the front (of the building) that will permit of the greater height.” *Id.* § 6-601.07. DCRA’s interpretation of the Act to permit the Developer to use the width of Kanawha Street and a measuring point that is not in the middle of the front of the building to measure the height of the building conflicts with the plain language of the Height of Buildings Act, which must govern. *See* 11 DMCR §§ 101.3 and 101.4 and D.C. Code 6-641.11, requiring that the more stringent requirement shall govern whenever they require larger yards, lower height or bulk of buildings, a lower percentage of a lot to be utilized, or other more stringent development standards. The height of the building is also not in compliance with the zoning regulations for the same reasons. *Id.* § 199.1 (definition of height of building) and *Id.* § 400.

Appellants will prove this zoning error based on the building plans, photographic evidence, testimony from an architect concerning the plans, testimony from an expert in interpreting DC zoning regulations, and related legal arguments.

3. Variance needed for portion of lot that is within the R-1-B zone. A portion of Lot 128, Square 1873 consisting of 40 feet from the lot line along a portion of Military Road is within the R-1-B zone district, while the remainder of the lot is within the R-5-D zone district. However, the building depicted on the building permit applications does not conform to the zoning requirements of the R-1-B zone district for that portion of the site and violates the restrictions on split lot zoned sites per 11 DCMR § 2514. In case of disagreement or uncertainty as to the exact location of a zone district boundary line, this Board, on appeal, shall determine the exact location of the boundary. 11 DCMR § 107.7. An apartment building is not permitted as a matter of right in the R-1-B zone. *Id.* § 201. Therefore, the Developer must obtain a variance in order to construct within that portion of the lot or ask the Zoning Commission to re-zone the lot after a public hearing. D.C. Code § 6-641.03; 11 DCMR § 3101.

Appellants will prove this zoning error based on the building plans, historical and current zoning maps, exhibits from the 1990 PUD proceedings, other written exhibits, photographic evidence, testimony from an architect, testimony from an expert in interpreting DC zoning regulations, and related legal arguments.

4. Projections extend beyond the building line.

The Zoning Regulations defined a “building line” as “a line beyond which property owners *have no legal or vested right to extend a building or any part of the building* without special permission and approval of the proper authorities; ordinarily a line of demarcation between public and private property, but also applied to *building restriction lines*, when recorded on the records of the Surveyor of the District of Columbia.” 11 DCMR § 199.1 (emphasis added).

Here, the proposed building includes numerous projections beyond the building restriction line that are not permitted by DCRA regulations violates 12 DCMR § 3202.7.1, which prohibits all projections on any street less than 60 feet wide. The projections also would violate all conditions of 12 DCMR § 3202.4.1 regarding general public interest as well as 12 DCMR § 3202.10.3.1 regarding allowable projection width (much wider than allowed) as summarized in the “Projection Schedule.” The projection also would violate all conditions of 12 DCMR § 3202.4.1 regarding general public interest as well as 12 DCMR § 3202.10.3.1 regarding allowable projection width (much wider than allowed) as summarized in the “Projection Schedule.”

Appellants will prove this zoning error based on the building plans, photographic evidence, testimony from an architect concerning the plans, testimony from an expert in interpreting DC regulations governing projections, and related legal arguments.

5. ANC3/4G Did Not Receive the Required Notification

ANC3/4G was not given notice of the foundation permit and the sheeting and shoring permit issued on April 3, 2013 or requisite notice of the initial permit applications for these permits. ANC notification is required by the DC Code. Section 1-309.10(a) allows ANCs to advise District Government bodies “with respect to all proposed matters of District government policy.” To make that possible, section 1-309.10(c) requires that an ANC be given notice of “requested or proposed zoning changes, variances, public improvements, licenses, or permits affecting said Commission area....” Notice must be given 30 days in advance of the proposed action. DC Code § 1-309.10(b).

This lack of notification made it impossible for ANC3/4G or neighbors of the property who would be adversely affected by the application to explain to DCRA why the project did not comport with the zoning regulations. It also deprived the agency of the benefit of the recommendations of ANC3/4G, to which he would have been required to give great weight.

Appellants will prove this error through testimony from the ANC.
