

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

Appeal of 5333 Connecticut Neighborhood Coalition, et al. BZA Appeal No. 18615

PREHEARING STATEMENT OF CMK DEV, LLC, OWNER

On behalf of CMK DEV, LLC, (the "Owner") the owner of the property known as 5333 Connecticut Avenue, NW (Lot 128, Square 1873), this prehearing statement is respectfully submitted in response to the Pre-Hearing Statement of the Appellants, 5333 Connecticut Neighborhood Coalition ("5333 CNC" or the "Coalition") et al.

**I.
INTRODUCTION**

As indicated by Exhibit 31 of the BZA Record, Advisory Neighborhood Commission 3/4G ("ANC") (which represents the entire constituency of the neighborhood) has withdrawn its appeal in this proceeding and has entered into a Memorandum of Understanding with the Owner wherein the ANC concludes that the proposed "design, construction, and operation of the building under the terms of the Memorandum of Understanding will provide significant benefits to the Chevy Chase community and the District of Columbia as a whole." The remaining Appellants comprise a segment of the community in continuing opposition to this matter-of-right project.

Notwithstanding the voluminous 144-page pre-hearing statement of Appellants, a large portion of which contains repetitive, irrelevant, and inaccurate statements and exhibits, the relevant issues before this Board are clear and simple. Aside from the assertion that the proposed apartment building violates Title 12 DCMR (the District of Columbia Construction

Code Supplement of 2008) over which this Board has no jurisdiction, the four issues raised are as follows:

- A. Zoning of the Site.
- B. Height of Building Measurement.
- C. Structures and Uses Above Top of Roof, and
- D. Challenges to FAR and cellar calculations involving traditional approvals of window wells and area ways.

II.

RESPONSES TO POINTS ON APPEAL

On behalf of the Owner, this pleading responds to each of the issues raised in the appeal.

A. Zoning of the Site

1. On March 16, 1965, the Zoning Commission rezoned lots 44, 35, 37, 19, 20 and 21 in Square 1873 to R-5-C, extending the R-5-C zone to the eastern lot line of Lot 37 on Military Road and the eastern lot line of Lot 19 on Kanawha Street, N.W. The Order of the Zoning Commission and the plat of the square showing the pertinent lots are attached as Exhibits A and B. The Zoning Commission has taken no action to change those boundary lines and the lines have remained in place to the present date. The R-5-C zoning category was redesignated R-5-D by the Zoning Commission in 1992.

2. The 1965 action of the Zoning Commission was reflected in the next Official Zoning Map of 1966, attached as Exhibit C.

3. On January 1, 2013, the zoning map (Exhibit D) shows the entirety of Lot 128 being zoned R-5-D, as does the Official Zoning Map currently on the web site of the Office of Zoning (Exhibit E).

4. The conclusive determination for zoning is the Office of Zoning Certification of January 22, 2013, certifying that the entire Lot 128 is zoned R-5-D. (Exhibit F)

5. In Zoning Commission Order No. 656-D of July 1, 1996, page 3, regarding a PUD for this identical Lot 128 and property, the Zoning Commission confirmed that "The site remains in the R-5-D (formerly known as R-5-C) zone district and in the high density residential land use category." The ANC and the "Square 1873 Committee, representing the residents of the neighborhood surrounding the PUD site" supported that PUD with the R-5-D zoning for the entire site of Lot 128. See page 11 of Zoning commission Order No. 656 of March 12, 1990.

B. **Height of Building Measurement**

1. The primary law governing the height of buildings in the District of Columbia is the 1910 Height of Buildings Act codified in § 6-601 of the DC Official Code. The District of Columbia Zoning Regulations essentially follow these provisions.

There are two steps in determining the maximum height of buildings in the District of Columbia. The first step is to determine what the maximum height can be with reference to the width of the widest abutting street. Different provisions are contained for buildings that front on "residence" or "residential" streets from those that front on business or commercial streets. The applicable provision for streets confronting 5333 Connecticut Avenue, NW, is § 6-601.05 (c) which provides that:

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

Since Connecticut Avenue confronting Lot 128 in Square 1873 is 130 feet wide, the height for the apartment building is limited to 90 feet. Additionally, the applicable Zoning District (R-5-D) limits heights to 90 feet. Accordingly, a building on the property may be built to a height of 90 feet.

The second step, namely, determining the point of measurement, is governed by an entirely separate section of the Act, in §6-601.07, which provides for how and from where the height is actually measured. This section provides that:

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 one 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. (Emphasis added.) No parapet walls shall extend above the limit of height

The proposed building at 5333 Connecticut Avenue on Lot 128, Square 1873, fronts on three streets: Connecticut Avenue, Military Road, and Kanawha Street. Kanawha Street has the highest elevation and will permit the greater height. Accordingly, the point of measurement for determining maximum height of this building "shall" be Kanawha Street. The point of measurement for the building is the level of the curb opposite the middle of the front of the building on Kanawha Street (Elevation 316.83). This is approximately the same point of measurement and with the same height as the existing Chevy Chase Towers building, on the south side of Kanawha Street, immediately across from the subject site.

2. These provisions have been applied consistently in the same manner by the DC Office of Corporation Counsel (now the Office of Attorney General), the Board of Zoning Adjustment, the Zoning Commission, and the Zoning Administrator. The

application and interpretation of the governing law on the subject was established or reconfirmed over 60 years ago by the Office of Corporation Counsel, on May 11, 1950, in an Official Opinion to the Commissioners of the District of Columbia. After analyzing the Congressional Act and its legislative history, the Corporation Counsel, Vernon E. West, confirmed the two step process as now applicable here. A copy of that opinion is attached as Exhibit N as part of Appellants' Statement at Exhibit 20.¹

The pertinent language of the 1910 Height Act providing for the separate point of measurement has been cited and furnished. The 1950 Opinion of Corporation Counsel confirming the mandated method of measurement has also been cited and furnished. Virtually hundreds of buildings have followed the same methodology. The following are precedents, most in fairly recent rulings, which continue to follow that interpretation.

a. Projects approved by the BZA:

- 655 New York Avenue, NW: property fronts on four streets (6th, 7th and L Streets and New York Avenue); width of New York Avenue used for the maximum permitted height, curb opposite middle of front of building on L Street used as point of measurement (BZA Case No. 18502, Order dated February 6, 2013)
- 1201 Vermont Avenue, NW: property fronts on both M Street and Vermont Avenue; Vermont Avenue width permitted the maximum height and M Street used for point of measurement of height (BZA Appeal 6186 - Public hearing January 25, 1961)
- 2660 Woodley Road, NW (Washington Sheraton Hotel): property fronts on Calvert Street and Woodley Road; permitted height taken from Calvert Street and point of measurement taken from Woodley Road (See finding of fact 86 a. of BZA Appeal 13112, October 21, 1983.) This decision was challenged in the District of Columbia Court of Appeals but affirmed

¹ Appellants have included the very detailed statement submitted by the Owner to the Director of DCRA, the Chief Building Official and Matthew Le Grant, Zoning Administrator, dated May 6, 2013, essentially responding to all of the issues then raised and raised now. To reduce the amount of paper, the Owner will reference that Exhibit instead of reproducing it. See Exhibit 20 to Appellant's Pre-Hearing Statement.

on other grounds. Woodley Park Community Association v. BZA, Washington Sheraton Corp., Intervenor, 490 A.2d 628 (DCCA 1985).

- 1401 Pennsylvania Avenue, NW (Willard Hotel Addition): property fronts on Pennsylvania Avenue and 14th and F Streets, NW; permitted height of building taken from Pennsylvania Avenue, NW and point of measurement as approved by the BZA taken from 14th Street, NW (BZA Application 13276 of October 6, 1980) Note: The Office of Corporation Counsel by Memorandum dated July 29, 1980, once again confirmed the consistent application of the Height Act in ruling that Pennsylvania Avenue could be used for determining maximum height and 14th Street could be used for point of measurement for the Willard Hotel Addition.

b. Zoning Commission decisions:

- PUD for the South Block over the Center Leg Freeway (a/k/a Capitol Crossing): property fronts on four streets (2nd, 3rd, E and F, NW); width of 3rd Street used for the maximum permitted height, curb opposite middle of front of building on F Street used as point of measurement (ZC Case No. 08-34A, Order dated January 28, 2013, see Finding of Fact No. 30)
- PUD for the project known as View 14: property fronts on 3 streets (14th and Belmont Streets and Florida Avenue, NW); width of 14th Street used for the maximum permitted height, curb opposite middle of front of building on Belmont Street used as point of measurement (ZC Case No. 05-22, Order dated January 9, 2006)
- PUD for 2400 14th Street: property fronts on 3 streets (14th, Belmont and Chapin Streets, NW); width of 14th Street used for the maximum permitted height, curb opposite middle of front of building on Chapin Street used as point of measurement (ZC Case No. 06-24, Order dated April 9, 2007)
- PUD for 200/250 K Street, NE: property fronts on four streets (2nd, 3rd, K and L); width of K Street used for the maximum permitted height, curb opposite middle of front of building on 3rd Street used as point of measurement (ZC Case No. 05-36, Order dated April 20, 2006)
- PUD for Marriott Marquis convention center hotel: property fronts on 3 streets (9th and L Streets and Massachusetts Avenue, NW); width of Massachusetts Avenue used for the maximum permitted height, curb opposite middle of front of building on L Street used as point of measurement (ZC Case No. 08-13, Order dated February 23, 2009)
- Review under the Capitol Gateway Overlay for 1111 New Jersey Avenue, SE: property fronts on 3 streets (L and M Streets and New Jersey Avenue); width of New Jersey Avenue used for the maximum permitted

height, curb opposite middle of front of building on L Street used as point of measurement (ZC Case No. 12-09, order dated February 11, 2013, see sheet A-5 of plans marked as Exhibit 22)

c. Rulings of the Zoning Administrator:

- Constitution Square: property fronts on three streets (1st, M and N Streets, NE); width of 1st Street used for the maximum permitted height, curb opposite middle of front of building on N Street used as point of measurement (ZA letter dated April 23, 2007)
- 1200 1st Street, NE: property fronts on three streets (1st, M and Patterson Streets); width of 1st Street used for the maximum permitted height, curb opposite middle of front of building on Patterson Street used as point of measurement (ZA letter dated March 24, 2009)
- 2030 M Street, NW; property fronts on three streets (21st and M Streets and New Hampshire Avenue); width of New Hampshire Avenue used for the maximum permitted height, curb opposite middle of front of building on 21st or M Street used as point of measurement (ZA letter dated April 18, 2011)
- 601 Massachusetts Avenue, NW: property fronts on four streets (6th, 7th and K Streets and Massachusetts Avenue); width of either K Street or Massachusetts Avenue used for the maximum permitted height, curb opposite middle of front of building on 7th Street used as point of measurement (ZA letter dated April 18, 2011)

In determining the actual point of measurement for applying height limitations and calculating the maximum height for 5333 Connecticut Avenue, the Zoning Administrator followed the same method used for many years. As it relates to the height of a particular building, once the street is selected for measuring the height, two points are critical: 1) the point for starting the vertical measurement, i.e., the base, and 2) the point for ending the vertical measurement at the top of the building.

As the starting point, the Zoning Administrator consistently over the years has used the full length of the building on a lot to determine the middle of the building -- drawing lines out perpendicular to the street on which the building fronts from both ends

but not beyond the end of the street on either end. The mid-point from those projected lines fix the location on the top of the curb to begin the measurement vertically. (For the subject building, this point of measurement is elevation 316.83'.) In this manner, a building, no matter the shape, (for example a building that squarely fronts on the street, or has a portion a few feet back or many feet back, or is designed with an angle back) would always have the same consistent point of measurement. Otherwise, a developer could take a gerrymandering approach and could simply design a building so that only a small portion of the building's façade were on the front property line and thereby achieve a higher point of measurement without respect to the rest of the building.

After the full building permit was issued on May 28, 2013, the Zoning Commission, effective June 14, 2013, in Order No. 12-11, made a change to the definition of "Building, Height of" to provide that in residential districts, the measuring point would be at the midpoint of the "building façade of the principal building that is closest to the street lot line." Under the former measurement, the building height would be 87.83 feet and under the revised definition, although not applicable, the height of the building would be 89.07 feet -- still below 90 feet. See attached plat as Exhibit G.

Under the Zoning Regulations, the height of a ninety foot building in the R-5-D zoning district is measured to the top of the roof from the point of measurement at street level. However, under the 1910 Height Act, the height is measured to the top of the parapet which is normally slightly above the height of the roof. Roof structures, railings, guards, architectural embellishments, and certain other roof-top uses permitted by the Zoning Regulations, may extend above the maximum height of buildings.

Taking a conservative approach, the architects for 5333 Connecticut Avenue designed the building to be lower than the permitted 90 foot height. Based on the method of measurement used for height, the building at 5333 Connecticut is not a 90 foot high building. The building is 90 feet to the top of the guardrail, which is not the top measuring point required for height under either the Zoning Regulations or the 1910 Height Act. When measured pursuant to the "highest point of the roof or parapet" (in compliance with both the Height Act and the Zoning Regulations), the building is actually 87.83 feet in height. This could accommodate higher ceilings and an increase in height, with up to a 2.17 foot increase in height, if desired.

Attached as Exhibit O in Appellants' Exhibit 20 is a plat that shows, not only the point of measurement based upon the consistent rulings of the Zoning Administrator, but also two other points of measurement suggested by those who are in opposition. Under all of these points, the building is within the 90 foot limitation. Under the point of measurement applied pursuant to the consistent application of the Zoning Regulations and 1910 Height Act (using the entire building) at the time of the zoning approval, the height will be 87.83 feet. Using only that portion of the building closest to Kanawha Street, the measuring point would shift to the west and the height would be 89.07 feet. Using the maximum width of the entire building (including the portion closest to Military Road) projected through Connecticut Avenue to the curb extended on Kanawha Street, the height would be 88.9 feet.

Attached as Exhibit P to Appellants' Exhibit 20, is an elevation drawing (A-3.4) that shows the respective heights (elevations) to the top of the roof (403.33'), top of the parapet (404.66'), and top of the safety railings and guardrail 406.83'). Attached as

Exhibit Q, also in Appellants' Exhibit 20, is a detailed elevation drawing (A-5.2) that shows heights of the roof, the parapet, and the railings and guards for 5333 Connecticut Avenue.

3. To make it abundantly clear, attached as Exhibit H is a detailed and enlarged area plat that shows the point of measurement as approved by the Zoning Administrator and the relationship to the top of roof, top of parapet, top of guardrail (at 90 feet), as well as top of swimming pool deck (90.5 feet). In all cases, the top of roof, top of parapet are below 90 feet permitted under the applicable residential zoning classification of R-5-D. The top of guardrail is 90 feet in height and the top of the swimming pool deck is less than four feet above the parapet as permitted under Section 411.17 of the Zoning Regulations

C. **Structures Above Top of Roof**

Exhibit I shows the roof plan with the designation of uses as permitted under the Zoning Regulations. Regarding the pool deck, the top of the deck is less than four feet above the top of parapet as provided in Section 411.17 of the Zoning Regulations, providing that roof structures less than four feet (4 ft.) in height above a roof or parapet wall shall not be subject to the requirements of this section. Pursuant to Section 411.1 of the Zoning Regulations, "penthouses for storage, showers and lavatories incidental and accessory to roof swimming pools or communal recreation space located on that roof; and (b) other enclosed areas, within the area permitted as roof structure used for recreational uses accessory to communal rooftop recreational space, shall be subject to conditions in variable floor area ratio credit specified in this section." The balance of the challenged uses all fall within this section.

Appellants also attack the pool deck, guardrail, accessory recreation and storage space as being violative of the 1910 Height Act. These types of structures and uses have been approved for many years under long-standing applications of the Height Act as well as the Zoning Regulations. To be specific, the pool deck (which is 6 inches above the 90-foot measuring point), only amounts to approximately 6 percent of the total roof area. The guardrail at the edge of the building, at 42 inches high, is required by the Building Code. The accessory recreation area is to accommodate and support occasional roof top activities, and the storage area is for the use of tenants when they use the roof top swimming pool and roof top areas.

Appellants misread Section 5 of the Height Act. Other than "spires, towers, domes, minarets, pinnacles, penthouses over elevator shafts, chimneys, smokestacks and fire sprinkler tanks," the Act does not preclude or regulate, in any way, miscellaneous structures or uses above the roof such as guardrails, flagpoles, window washer davits, skylights, swimming pools, or even mechanical equipment (less than 4 feet in height) not contained in a penthouse.² The regulation of such uses and structures has always been handled by the Zoning Commission or Building Code Officials. These have been regulated by the Zoning Commission, for the most part, under Section 411 of the Zoning Regulations and its predecessor Section 3308.

The Height Act is over 100 years old and does not address virtually hundreds of low density and height structures and uses that are required in today's world. Accordingly, as indicated in the Corporation Counsel Opinion of July 27, 1953 (Attached as Exhibit J), officials of the District of Columbia have interpreted the Height Act to allow other reasonable structures

² As should be obvious, the Zoning commission and not the Act or Congress has determined how high miscellaneous roof structures may be, and even the penthouse height, now at 18'-6", with the ability to adjust under Section 411.11 with BZA approval. This also includes the contents of the penthouse and other attributes. See Section 411.1.

than those specifically enumerated in the Act, including the shelters for air conditioning equipment, evaporation condensers, and fans. That opinion also concluded that the term "human occupancy," prohibited in the enumerated structures, "was intended by the Congress to prevent the use of enclosed space above the height limit for residential, office or business purposes . . . and was not intended to preclude the use of space in connection with the maintenance of such building and operation of its utilities." Deck top swimming pools have been permitted under the Zoning Regulations and Height Act for generations, and in 1963, in Case No. 63-3, the Zoning Commission permitted "floor area [in roof structures] erected by curtain walls to be used for incidental storage and for toilets accessory to roof swimming pools."³

The structures and uses now challenged by Appellants are based on many years of long-standing application of the Act and Zoning Regulations. Regarding the pool deck, similar decks (although higher) were approved for 1111 New Jersey Avenue, SE (Zoning Commission Case No. 12-09) see Exhibit L. In 2010, the pool and pool deck were approved by the zoning Administrator and the Zoning Commission for the Waterfront Station PUD at 4th and M Streets, S.W. See Exhibit M which includes the plans for the building and the Zoning Administrator's ruling. (See paragraph 3 on page 3). For other examples, see Exhibit N.

The storage areas provided within the penthouse structure are not devoted to "human occupancy" for residential, office or business purposes; but rather are available for the occasional use by tenants and their guests who use the roof area for recreational purposes as permitted by Section 411.1 of the Zoning Regulations. Such incidental uses which are occasional do not constitute "human habitation," as outlined in the Corporation Counsel Opinion of 1953.

³ The file in Case No. 63-3 has not been located but this language is set forth in the 1973 Reprint of Section 3308.21 of the 1958 Regulations, attached as Exhibit K.

Important and applicable here is the D.C. Court of Appeals ruling in Smith v. District of Columbia Board of Zoning Adjustment, 342 A.2d 356, 359 and fn. 9 (1975) which held that this Board must consider the long-standing interpretation of the Zoning Regulations under principles of administrative stare decisis. Even if the Board should decide to the contrary and desired to change the interpretation, such new interpretation could only apply prospectively and not to this case. See Excerpt from the opinion set forth as Exhibit O.

D. FAR and Cellar Calculations

1. Appellants and the Owner agree that the permitted density for this site is 4.2 FAR (3.5 FAR under R-5-D and an additional .7 FAR under IZ provisions). Since the site has a record area of 47,284.44 square feet (47,370 measured), the permitted gross floor area is 198,954 square feet. Under either record or measured calculations, the gross floor area provided is less, namely, 198,338 square feet.

2. In calculating the floor of a building where a portion of the floor is classified as a cellar (being a story the ceiling of which is less than four feet above adjacent finished grade) and a basement (that portion of a story below grade where the ceiling is four feet or more above adjacent finished grade), a "perimeter wall" method of calculation has been utilized for decades through the Office of the Zoning Administrator to determine what portion of the floor is to be included in the permitted gross floor area. Attached as Exhibit R in Appellants' Exhibit 20 is the methodology required as set forth in the Memorandum of James J. Fahey dated September 11, 1990. Accordingly, the perimeter of the lowest habitable floor is 982 linear feet with 121.6 feet being above adjacent grade or 12.38% of the perimeter. This calculates to 2,689 square feet to be counted in gross floor area at this level (12.38% times 21,718 square feet). Thus, the total square footage

of all floors for the building including the basement/cellar story is 198,338 -- below the permitted density with an FAR of 4.2 (198,954 square feet). See Exhibit P "Cellar Plan."

3. What Appellants seem to be questioning is the right to have window wells or areaways outside cellar windows which permit additional light and air through a narrow area between the exterior building wall and adjacent finished grade. That narrow area has been interpreted to be in the general range of a maximum of five (5) feet. As the Board is aware, throughout the District of Columbia, window wells and areaways including access points from the exterior are permitted to give such additional light and air. The Zoning Administrator and his predecessors have consistently approved hundreds of buildings with similar areaways and window wells.

4. As required by the District of Columbia Court of Appeals, this Board must consider this long-standing interpretation of the Zoning Regulations under principles of administrative stare decisis. See Smith v District of Columbia Board of Zoning Adjustment, supra.

5. Unfortunately, in making their arguments, Appellants failed to utilize the final building plans showing the building walls adjacent to finished grade either on the Military Road side or at the center court level of the building. Compare Appellant's Exhibit 4 with the Exhibit attached hereto as Exhibit Q to show the difference. On the Military Road side, the areaway is approximately four feet in width, with absolutely no access from the units, but only the ability to gain light and air. As previously noted, this type of construction has been approved for decades to improve the light and air circulation to buildings. Adjacent to the interior courtyard of the building, between the wall of the unit, and the courtyard, the areaways (five feet) are accessible only to each

individual unit but separately divided from other units at the same level. This provides light and air into the units. Again, this is standard in developing apartment buildings in the District of Columbia. Adjacent finished grade is that area immediately outside the areaways or window wells. That adjacent finished grade defines the cellar.

6. Much is made by Appellants of the difference in grade from Military Road to the adjacent finished grade adjacent to the building from Military Road. The actual changes in grade are minor from what exists today. There is an 18-foot drop in grade from Kanawha to Military Road. The benefit of this actually flows to the neighborhood. The area will be heavily landscaped and will assist in providing a privacy buffer between the existing houses on the north side of Military Road and the new building. Along Connecticut Avenue, the grade of the building will be about two feet lower than existing. Along Kanawha, it will be about 6 inches to a foot lower than existing grade. The total change of finished grade on the Military Road side is approximately two feet higher than the existing condition over a distance of approximately 30 feet. See Exhibit R. When the whole site street frontages are considered, the grading will be close to the existing average grade.

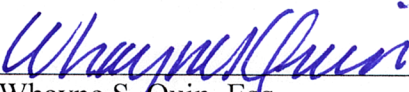
III. **CONCLUSION**

As a party to these proceedings, the Owner, through counsel, intends to participate in this appeal. Owner believes all issues are clear and that the Zoning Administrator's rulings and approvals can and should be affirmed on the basis of pleadings and documents submitted for the

record. However, Owner may call as witnesses Steven E. Sher, urban planner and expert in zoning, and/or Eric Colbert, architect for the project as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2013, I served a copy of the foregoing PREHEARING STATEMENT OF CMK DEV, LLC, by hand-delivery, on the following:

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