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VIA HAND DELIVERY

Zoning Commission for the
District of Columbia
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

Re: ZC Case No. 07-13 – Randall School PUD and Map Amendment
65 I Street, S.W. (Square 643-S, Lot 801)

Dear Members of the Commission:

Introduction

Pursuant to sections 3024.1 and 3024.3 of the Zoning Commission's regulations, the Trustees of the Corcoran Gallery of Art and MR Randall Capital LLC (the "Applicants"), respectfully request the Zoning Commission to reopen the record and accept the following response to the report of the National Capital Planning Commission ("NCPC") dated January 3, 2008, which was filed after the close of the record.

NCPC advises the Zoning Commission that the proposed PUD adversely affects the federal interest due to a penthouse element that purportedly exceeds the permitted height under the Height of Buildings Act of 1910 ("Height Act"), and recommends that the penthouse be modified. In making its recommendation, NCPC departs from more than 97 years of consistent application of the Height Act by the District of Columbia government and the Zoning Commission, including NCPC's own previous interpretations. As set forth below, the project fully complies with the Height Act and with the penthouse setback requirements of the federal law. Accordingly, there is no basis for redesigning the penthouse or denying the PUD based on the 1910 Height Act.

Background on Penthouse Setback Issue

The Applicants propose to set back the penthouse at the north elevation a distance equal to the portion of the penthouse that exceeds the 110-foot limit under the Height

ZONING COMMISSION
District of Columbia
CASE NO. 07-13
EXHIBIT NO. 73

ZONING COMMISSION
District of Columbia
CASE NO.07-13
EXHIBIT NO.73

Act. Here, the building is only being constructed to a height of 100 feet (ten feet under the Height Act limit), and the penthouse is 16.5 feet tall. Thus, only 6.5 feet of the penthouse exceed the 110-foot building height limit and is therefore set back 6.5 feet from the roof edge, as recommended by Commissioner May at the December 10, 2007, meeting where the Zoning Commission took preliminary action to approve the subject application.

NCPC, however, claims that the penthouse setback requirement is not controlled in any way by the building height. In its view, the Height Act requires penthouses to be set back from the roof edge both above *and below* the height limits prescribed by the Height Act. The District has never adopted this position and it is at odds with the intent and purposes of the Height Act.

Legislative History of Height Act Supports Applicants' 6.5-foot Setback

NCPC's reading of the Height Act flatly contradicts the rules of statutory construction and long-standing administrative interpretation of the federal law. By focusing on one dependent clause of the Height Act in isolation, without the preceding language of the subsection on which the clause is based, NCPC has created a new interpretation of the setback requirements never before advanced by NCPC, Congress, the Zoning Commission or any other federal or local agency. As discussed below, the legislative history of the Height Act supports the Applicants' proposed 6.5-foot setback.

The entire relevant subsection of the Height Act provides as follows:

> (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;...

D.C. Code § 6-601.05(h) (2001 ed.).

The express purpose and structure of section (h) of the Height Act is to establish a general rule for features *above the height limit* and then provide conditions on that rule. Subsection (h) *does not address* anything *below* the height limit, which is purely a subject of the District's zoning regulations. The general rule allows "spires, towers, domes, minarets, pinnacles, penthouses over elevator shafts, ventilation shafts, chimneys,

smokestacks, and fire sprinkler tanks" to be constructed to an unlimited height *above the limits prescribed for buildings*, but only under the following conditions: (i) the enumerated features must be fireproof; (ii) they cannot be used for human occupancy; and (iii) penthouses, ventilation shafts and tanks (but not spires, towers, domes, minarets, pinnacles, chimneys, or smokestacks) must be set back a distance equal to their height from the roof edge. The conditions are premised upon, and have no meaning without, the general rule of features allowed above the height limit.

This interpretation is reinforced by several legislative and legal analyses of this provision over the past nine decades. First, the legislative history of section 5(h) of the Height Act indicates that Congress intended the setback conditions to apply only to portions of roof structures erected above the maximum allowable building height. Prior to 1910, roof structures were allowed above the height limit *without setbacks*, and the new Height Act would ensure that future penthouses *above the height limit* would now include setbacks.

> The proposed act permits spires, towers, *penthouses*, ventilation shafts, etc., *to be erected to a greater height than any limit prescribed in this act* when approved by the Commissioners of the District of Columbia, provided, however, that such structures shall be fireproof, not used for human occupancy, and they shall be set back from the exterior walls a distance equal to their respective heights above the adjacent roof. The present act permits the erection of these structures to a height greater than the permissible roof height of the building, but does not require them to be fireproof nor set back from the exterior walls.

H.R. Rep. No. 19070, 61st Cong., 2nd Sess. (1910), reprinted in *Congressional Record*, April 11, 1910, at 4536 (emphasis added). See copy attached at Tab A.

In 1953, the Office of Corporation Counsel (now the Office of Attorney General) provided the same interpretation of subsection (h), noting that the setback provisions under the Height Act are only triggered for those elements that exceed the height limits:

> [I]t would appear that the 61st Congress, insofar as penthouses were involved, was not concerned so much with the use to which such penthouses would be put as with the fireproofing of such penthouses, *and it would seem there was no objection on the part of Congress to the construction of fireproof penthouses above the height limit, just so such penthouses were (1) set back from the exterior walls* apparently for reasons of light and ventilation, and (2) were not constructed or used for human occupancy.

Opinion of the Corporation Counsel to the Zoning Commission re penthouses, July 27, 1953 (emphasis added). See copy attached at Tab B.

In 1958, when the Zoning Regulations were being rewritten, the Zoning Advisory Committee issued the same conclusion when reporting on the proposed provisions for elevator and stairway penthouses:

> Set back provisions of such appurtenances are contained in the Act of June 1, 1910 (36 Stat. 452), regulating the height of buildings in the District of Columbia. The Act provides that *when above the limit of height*, a penthouse, etc., shall be set back from the exterior walls of the building on which it is located a distance equal to its height above the adjacent roof."

Report of the Zoning Advisory Council on Proposed Amendments to the Zoning Regulations, July 16, 1958, at 1 (emphasis added). See copy attached at Tab C.

Likewise, in connection with contemplated roof structures for the Sheraton Park Hotel at Connecticut Avenue and Calvert Street, N.W., the Office of Corporation Counsel, in 1955, specifically opined that the penthouse setback provision of Subsection (h) of the Height Act is dependent in its application on the preceding paragraphs of Section 5, which prescribes the maximum building heights in various parts of the District of Columbia. Opinion of the Corporation Counsel to the D.C. Commissioners re roof structures, May 26, 1955. See copy attached at Tab D.

NCPC legal counsel offered the same interpretation in 1994 regarding the penthouse setbacks for the proposed PUD for WETA at 21st and H Streets, N.W., ZC Case No. 93-9C. There, the issue was whether the Height Act interpreted "exterior walls" to mean only walls fronting a street. NCPC concluded, notwithstanding the staff recommendation, that setbacks above the height limit were only required for portions of the building fronting on streets.

> The Height Act ... allows "penthouses over elevator shafts" to be erected *above the otherwise applicable height limits* "provided, that penthouses ... shall be set back from the exterior walls distances equal to their respective heights above the adjacent roof."

Note from Sandy Shapiro, NCPC General Counsel, to George Oberlander, NCPC staff, February 17, 1994 (emphasis added). See copy attached at Tab E.

These administrative rulings and opinions issued over the last nine decades from a variety of federal and local government agencies have consistently held that, under the Height Act, the penthouse setback restrictions only apply where they would otherwise exceed the building height limits. To conclude otherwise would result in an absurd consequence and intrude upon the application of those zoning regulations, which are independent of the Height Act and the responsibility of the Zoning Commission.

Rules of statutory construction dictate that such long-standing interpretation should be accorded great deference. As noted in the 1953 OCC Opinion, "'the long-continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration***** constitutes an invaluable aid in determining the meaning of a doubtful statute.' Sutherland, Statutory Construction, sec. 5103." See also Shapiro Note, *supra,* (a "court of law, in interpreting a statute, will give great deference to long standing administrative interpretations of that law by the body which has responsibility for administering that law"). The Height Act grants the Mayor authority to approve roof structures above the height limit and thus the city's interpretation of these provisions is particularly persuasive. D.C. Code § 6-601.05(h) (2001 ed.) (penthouses "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*") (emphasis added).

Based on this long-standing administrative interpretation, there is no support for NCPC's position that the setback requirements operate independently of the underlying premise of subsection (h) and should somehow apply to penthouses constructed *below* the allowable building height. Instead, the only conclusion to be drawn is that the penthouse setback requirements are only triggered for that portion of the penthouse that exceeds the permissible building height.

Conclusion

Based on the foregoing, the Applicants respectfully request the Commission to find, consistent with past precedent, that the setback provisions of the 1910 Height Act apply only to those portions of the roof structure that exceed the height limits established for buildings; that the roof structure as now proposed meets those setback requirements; and therefore, that the proposed building complies with the Height Act and does not adversely affect the federal interest. The Applicants further request the Commission to take final action to approve the proposed PUD and map amendment.

Respectfully submitted,

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