NATIONAL CAPITAL PLANNING COMMISSION
801 PENNSYLVANIA AVENUE, N.W., SUITE 301
WASHINGTON, D.C. 20576

February 17, 1994

Note to George Oberlander

Re: George Washington University/WETA Zoning Commission Case No. 93-9C

You asked me to look into an issue raised in the above case regarding the setback requirements of a roof structure. Specifically, in pleadings filed on behalf of Advisory Neighborhood Commission 2A (ANC 2A) by the law firm of Driscoll & Draude, it is stated that "the elevator penthouse and the 'studio mechanical penthouse' on the proposed building are not setback at all on the east side of the building (SHT. F-17 and F-18; 10/28 TR. 32-33), and, therefore, violate the setback requirements of the Height Act." ADVISORY NEIGHBORHOOD COMMISSION 2A'S RESPONSE TO POST-HEARING SUBMISSIONS, BEFORE THE ZONING COMMISSION OF THE DISTRICT OF COLUMBIA, January 3, 1994, at p. 4. November 22, 1993, at page 3. In addition to this issue, ANC 2A also raises the issue of whether the studio penthouse falls within the exception in the Height Act.

> The Height Act does not include an exception for penthouses containing mechanical equipment. The only penthouses allowed above the otherwise applicable height limit under the Height Act are 'penthouses over elevator shafts' (D.C. Code 5-405(h)). The structure over the studios is not an elevator penthouse.

ADVISORY NEIGHBORHOOD COMMISSION 2A'S RESPONSE TO POST-HEARING SUBMISSIONS, BEFORE THE ZONING COMMISSION OF THE DISTRICT OF COLUMBIA, January 3, 1994, at page 3. After reviewing the two issues, I have concluded the following.

I. Setback

The Height Act references are to D.C. Code section 5-405(h) which 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." (Emphasis added) The main penthouse (which contains the elevator equipment) is not set back on the east side of the building. (D.C. Zoning Regulations also require set-backs; however, I do

not believe that the Commission has any Federal interest in whether a local agency permits exceptions to its own regulations as long as the Height Act is not implicated.)

The Building Height Act of 1899 provided an exception to height limits for "spires, towers and domes." The Act of 1910 added other rooftop structures, including elevator penthouses, and, without explanation, added the current requirement for setbacks. There appears to be no legislative history further interpreting the meaning of "exterior walls."

In a letter dated November 24, 1993, addressed to Madeliene H. Robinson, Acting Director, Office of Zoning, Joseph F. Bottner, Jr., Zoning Administrator, states that:

> The setback requirements of a roof structure under provisions of the Act of 1910 have always been interpreted by the Zoning Division as being required to set back from the property line which adjoins a street. The setback of a roof structure under the Zoning Regulations now requires roof structures to set back from the exterior walls. Consequently, it is my opinion that the Zoning Commission, under a Planned Unit Review, does have authority to waive the setback of a roof structure from a property line which does not adjoin a street.

I spoke with Mr. Bottner who told me that although he had no written authority for his position, he knew from his own experience that, at least since the 1960's, the Zoning Commission has consistently taken the position that the phrase "exterior walls," in the Height Act, refers to exterior walls adjoining a street. He further told me that there are many buildings in the District of Columbia on which elevator penthouses are not set back from exterior walls which do not face streets but rather face adjoining buildings, alleys, or courtyards.

I also spoke with Peter Maszak in the Corporation Counsel's Office whose responsibility is to advise the Zoning Administrator. He told me that although he was unaware of any written Corporation Counsel opinion, he had told Mr. Bottner that he was prepared to accept the Zoning Administrator's position based upon long standing administrative interpretation. (Wayne Quinn had told me that he had seen a Corporation Counsel opinion from approximately 1959 interpreting the setback provision but he can no longer find it. No one else seems to know where that opinion is either.)

I also received a package of materials from Wayne Quinn, attorney for the applicants, The George Washington University and the Greater Washington Education Television Association. (WETA) In addition to reiterating the position that the Zoning Commission

has consistently interpreted exterior walls to mean exterior walls facing a street, Mr. Quinn enclosed a Report of the Zoning Advisory Council on Proposed Amendments to the Zoning Regulations, dated July 16, 1958. (The Zoning Advisory Council at that time included a Commission official, William F. McIntosh). The Council was considering proposed regulations relating to the location of elevator and stairway penthouses and requiring setbacks on all sides. The report notes that:

> Set back provisions of such appurtenances are contained in the Act of June 1, 1910, (36 Sat. 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. Under the regulations recently repealed, the application of this provision was construed by the Zoning Commission to mean exterior walls from the street sides only, an interpretation considered in harmony with the Act and not in violation thereof. . . [T]he required set back of penthouses from all outside walls of the building does not in many instances serve any useful purpose to protect light and air for adjoining properties. . .

A copy of this entire report is attached.

In their pleadings, ANC 2A presents no other argument for the all around setback requirement other than the plain words of the Act itself.

Based on the above, it appears that, for at least forty years, and probably longer, those local entities with authority to administer zoning provisions in the District of Columbia have interpreted the Height Act setback provisions to apply only to exterior walls facing the street. 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. In this case, the force of this long standing interpretation may be somewhat undercut by the apparent lack of ambiguity in the statute itself. However, the ultimate question for the Commission is whether it believes that, in the absence of an adverse impact on any other clearly defined Federal interest such as Pennsylvania Avenue, the Federal interest it has consistently found in maintaining the integrity of the Height of Buildings Act is in any way compromised if this interpretation stands.

II. Studio Penthouse

As noted, ANC 2A is also contending that the "studio mechanical penthouse" does not meet the requirements of D.C. Code 5-405(h)

for an exception to the Height Act since it is not an elevator penthouse.

In this regard, there is an opinion of the Corporation Counsel, dated July 27, 1953, in which he concludes that the exception in the Act is not limited to penthouses over elevator shafts.

> I caused a study to be made of the Act approved June 1, 1910, and the legislative history of such Act, with particular reference to the last paragraph of section 5 of such Act, as a result of which I have concluded that the phrase in such paragraph, 'penthouses over elevator shafts, may be construed to include penthouses over stairways leading to the roof and penthouses *over other utilities necessary in connection with the operation of a building*, but not to include penthouses to be used for residential, office or business purposes. . . (Emphasis added)

OPINION OF VERNON E. WEST, DISTRICT OF COLUMBIA CORPORATION COUNSEL, July 24, 1953, at page 4.

Clearly, the Act of 1910 could not be presumed to enumerate every type of roof structure containing mechanical equipment necessary to operate a building in light of changing technology. In the particular situation at issue, the Corporation Counsel was considering a penthouse to house air conditioning and heating equipment and his opinion was based, in large part, upon construction requirements which could not have been foreseen in 1910. By the same token, therefore, an argument could be constructed to the effect that the Congress of 1910 could not have foreseen the need for the type of mechanical equipment needed in a building constructed for broadcasting purposes. (In the documents I have been given, ANC 2A does not raise the issue of whether the "roof" as described in the revised plans is a genuine "roof" under the statute.)

Again, if the issue is raised, the Commission may want to consider whether any harm is done to the Federal interest in the Height Act by an interpretation that the Studio Penthouse is a Penthouse covered by 405(h).

Please let me know if you need any further information.

Sandra Shapiro

cc: Mr. Griffith
Mr. Gresham
Ms. Stephenson