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April 7, 2008

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. ~~07-26~~ ⁰⁷⁻¹⁸ - 10th & F Streets PUD
1000 F Street, N.W. (Square 347, Lots 18, 19, 818-821)

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Dear Members of the Commission:

Introduction

Pursuant to sections 3024.1 and 3024.3 of the Zoning Commission's regulations, Jemal's Up Against the Wall, LLC ("Applicant") respectfully requests the Zoning Commission to reopen the record and accept the following response to the report of the National Capital Planning Commission ("NCPC") dated March 6, 2008, which was filed after the close of the record.

NCPC advises the Zoning Commission that the proposed planned unit development ("PUD") adversely affects the federal interest due to purported violations of the Height of Buildings Act of 1910 ("Height Act") and recommends that the penthouse and "parapet" 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. While the Zoning Commission has previously addressed these issues, the Applicant nevertheless provides this supplemental information demonstrating that the project fully complies with the height limitations and penthouse setback requirements of the federal law. Accordingly, there is no basis for requiring the redesign of the roof elements or denying the PUD based on the Height Act.

ZONING COMMISSION
District of Columbia 18

CASE NO.

EXHIBIT NO.

07-18
43

The Penthouse Setback Issue

The Applicant's proposed penthouse is set back a distance equal to its height from the north and east elevations of the building, the only portions of the building that front on a street. The penthouse is not set back along the south elevation, which is constructed on the lot line and abuts the adjoining property, or along the rear elevation, which abuts an alley.

Under the Height Act, penthouses must be set back from the exterior walls a distance equal to their respective heights above the adjacent roof. Similarly, the Zoning Regulations provide that a penthouse must be "set back from all exterior walls a distance at least equal to its height above the roof upon which it is located." 11 DCMR §§ 400.7(b), 770.6(b). Although the language is similar, the term "exterior walls" in the Height Act provision has historically been interpreted to mean only those walls that front on a street. In contrast, the Zoning Regulations have always been interpreted more strictly to include all exterior walls of the building, regardless of whether they front on a street.

NCPC, however, has departed from the long-standing interpretation of the Height Act – including its own past decisions – and now argues that the federal law must be applied more restrictively to include all exterior walls, not just street frontage walls. 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 Penthouse Setbacks at Street Walls Only

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 the phrase "exterior wall" in isolation and ignoring the legislative history of the Height Act, NCPC has created a new interpretation of the setback requirements never before advanced by NCPC, the Zoning Commission or any other federal or local agency.

The Zoning Commission squarely addressed this issue in Zoning Commission Order No. 749-A (Case No. 93-3C), dated April 29, 1994, *reconsid. denied*, ZC Case No. 749-B, July 22, 1994.¹ There, the George Washington University ("GW") and the Greater Washington Education Telecommunications Association ("WETA") received approval for a PUD to construct a new building at 21st and H Streets, N.W. The penthouse would be set back a distance equal to its height along 21st and H Streets, but

¹ The Zoning Commission's decisions in Z.C. Case Nos. 749-A and 749-B were appealed to the D.C. Court of Appeals; however, the Zoning Commission asked the court to remand the case so that the findings and conclusions in the order could be clarified. The case was remanded but the Zoning Commission never took any further action and the entitlements granted under the orders lapsed when the applicants elected to abandon the project. There has not been any action by any court or by the Zoning Commission to invalidate the orders.

would not have a 1:1 ratio setback at the rear and side of the building. Opponents argued before the Zoning Commission and at NCPC that the lack of penthouse setbacks at the rear and side of the building violated the Height Act. The Commission found otherwise. In reaching its decision, the Commission relied on the testimony of the Zoning Administrator, who is charged with enforcement of the Height Act.² The Zoning Administrator noted that:

[t]he 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 be 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.

Memorandum to the Acting Director for the Office of Zoning from the Zoning Administrator, November 24, 1993, Zoning Commission Case No. 93-9C, Exhibit No. 90 (emphasis added). See Exhibit A. The Office of Attorney General also submitted a letter to the record endorsing the Zoning Administrator's interpretation.

The Zoning Administrator based his decision on the long-standing interpretation that the term "exterior walls" in the Height Act had been historically interpreted to mean walls fronting on a street. Documents supporting the Zoning Administrator's position included a July 27, 1953, Opinion of the Office of Attorney General regarding penthouses above the height limits; a May 13, 1953 Memorandum from the D.C. Director of Inspections regarding housing for air conditioning equipment above the 130-foot level; a July 15, 1958 report of the Zoning Advisory Council on proposed amendments to the roof structure setback provisions of the Zoning Regulations; as well as numerous BZA Orders approving relief from the penthouse setback provisions along interior lot lines where penthouses exceeded the maximum height under the Height Act. See also BZA Order No. 17109, November 8, 2005 (neither Zoning Regulations nor Height Act require penthouse setbacks along interior lot line walls).

NCPC also endorsed the Zoning Administrator's interpretation of the setback provisions of the Height Act in the WETA case. Over objections raised by its staff in a report dated March 2, 1994, and based on advice of its counsel, NCPC found that the proposed WETA PUD "would not adversely affect the Federal Establishment or other Federal interests and would not be inconsistent with the Comprehensive Plan for the National Capital." See Report to the Zoning Commission of the District of Columbia, NCPC File No. ZC. 93-9C, March 3, 1994, and Draft NCPC Staff Report. In analyzing

² See Z.C. Order No. 07-13 (Randall School PUD), March 21, 2008, at 4 (Zoning Administrator interprets the Height Act).

the objections raised by the ANC on the setback provisions of the 1910 Height Act, NCPC counsel advised that:

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 [Report of the Advisory Council on Proposed Amendments to the Zoning Regulations dated July 16, 1958], 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.

Note from Sandra Shapiro, NCPC Counsel, to George Oberlander, NCPC staff, Re: George Washington University/WETA Zoning Commission Case No. 93-9C, February 17, 1994 (emphasis added), a copy of which is attached as part of Exhibit B. Based in part on this advice, NCPC found that the federal interests of the Height Act were not adversely affected by the long-standing interpretation that "exterior walls" means only those walls fronting on a street. NCPC made a similar recommendation to the Zoning Commission on proposed text amendments to the penthouse regulations by stating that "the 1910 Height Act's requirement of penthouse setback from exterior walls is clearly intended to hide or screen penthouses from street views." See Z.C. Order No. 476, July 4, 1986, at 6.

In making its current recommendation on the Applicant's PUD, NCPC did not provide any rationale for its break from its previous interpretations, other than noting that it has changed its mind.³ Yet, under the principle of *stare decisis*, an agency is bound by these previous long-standing interpretations of the Height Act. If an agency determines to break from past decisions, it must explain its rationale and apply the new interpretation prospectively only. In *Reichley v. District of Columbia Department of Employment Services*, 531 A.2d 244 (D.C. 1987), the D.C. Court of Appeals held that:

if an agency's adjudication is a clear break with the past and a party reasonably relied to its detriment on the previous rule, then the new rule should be applied prospectively, unless the agency ... can demonstrate that this reliance interest is outweighed because prospective application would impose a severe administrative burden, otherwise interfere with a significant statutory interest, or fail to provide an essential reward to those who innovate change.

³See NCPC Transcript, March 6, 2008, at 68.

Reichley, 531 A.2d at 253; *see also Smith v. D.C. Bd. of Zoning Adjustment*, 342 A.2d 356, 359 (D.C. 1975) (established principles of *stare decisis* require that any change in long-standing interpretation of Zoning Regulations to be made prospective only).

Based on this long-standing administrative interpretation, "exterior walls" under the Height Act applies only to street frontage walls. There is no support for NCPC's position that the penthouse setback requirements should also apply to lot line walls or rear elevations. Examples of penthouses set back only along the street frontage (and where zoning relief was granted) are included in Exhibit C.

Rooftop Safety Railings Are Exempt from the Height Act

NCPC is also wrong in finding that the rooftop safety railing – which it mischaracterizes as a "parapet" – violates the Height Act. The Zoning Commission has already acknowledged that safety rails could be permitted as an exception to the height limits. In its order adopting the text amendments for roof structures, the Zoning Commission concurred with the Office of Planning's views that reduced penthouse height or increased setbacks would be extremely difficult. Instead,

OP indicated that the typical roof and penthouse could be improved in appearance by allowing greater flexibility in the choice of materials and/or by encouraging the introduction of landscaping and other decorative elements on the roof. Temporary restaurants, scenic overlooks, exercise facilities or employee lunch areas would bring users to the roof. *The necessary railing, which would be permitted as an exception to the height limit*, could be designed to act as an architectural embellishment in helping to provide a visual cap for the building.

Zoning Commission Order No. 46, 33 D.C. Reg. 3975 (July 4, 1986), at 2-3.

The Board of Zoning Adjustment reached a similar conclusion in BZA Appeal No. 17335:

An interpretation exempting safety railings from the Height Act is consistent with the Act's concern about safety and its exemption of structures that may be viewed and treated as embellishments. Further, it is consistent with the Zoning Regulations which do not calculate railings in the measurement of height [under section 2503.2]. Finally it is consistent with a history of rulings by Zoning Administrators that permitted safety railings above the height limit for rooftop pools and decks.

BZA Appeal No. 17335, November 16, 2006, at 4-5.

In fact, there are scores of buildings throughout the city, constructed to their maximum height, that provide safety railings above the Height Act limit. See Exhibit C. The fact that the Applicant's PUD proposes a glass railing to further reduce any potential visibility does not in any way change its security function or otherwise transform the railing into a parapet, as suggested by NCPC. As a safety railing, it is exempt from the Height Act, and may be constructed as proposed.

Conclusion

Based on the foregoing, the Applicant respectfully requests the Commission to find, consistent with past precedent, that the setback provisions of the Height Act apply only to those portions of buildings fronting on a street; that the roof structure as now proposed meets those setback requirements; that safety railings are exempt from the Height Act, including ones constructed of glass; and therefore, that the proposed building complies with the Height Act and does not adversely affect the federal interest. The Applicant further requests the Commission to take final action to approve the proposed PUD.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: Mary Carolyn Brown
Norman M. Glasgow, Jr.
Mary Carolyn Brown

Attachments

cc: Jennifer Steingasser, OP (w/attach. via hand delivery)
Stephen Mordfin, OP (w/attach. via hand delivery)
Paul Millstein, Douglas Development (w/attach. via hand delivery)
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Patrick Burkhart, SBA (w/attach. via hand delivery)
Steven E. Sher (w/attach.)