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VIA HAND DELIVERY

D.C. Zoning Commission
441 4th Street, N.W., Suite 210
Washington, DC 20001

Re: Response to NCPC Recommendation Regarding Zoning Commission Case
No. 07-21 – Application for Consolidated Approval of a Planned Unit
Development

Dear Members of the Commission:

The purpose of this letter is to provide comments to the Zoning Commission regarding the National Capital Planning Commission's ("NCPC") recommendation on the above-referenced PUD project, marked as Exhibit 64 of the record, as well as the NCPC Staff Recommendation which was adopted by NCPC on May 1, 2008. NCPC's recommendation indicates that the proposed project would be adverse to the federal interest because it does not conform to the requirements of the Height of Buildings Act in the following way: "the roof top penthouses exceed the allowable height [because they] are not set back from all the exterior walls as required by the Act." Accordingly, NCPC recommends that "the Zoning Commission require the applicant to modify the project design to set back the penthouses from all exterior walls of the building a distance equal to their height above the adjacent roof as required by the Height of Buildings Act."

The Applicant's Proposed Penthouses Meet the Required Setback

The Applicant's three proposed penthouses are set back a distance equal to their height (18 feet, 6 inches) from the north and west elevations of the building, which are the only portions of the building that front on a street. The penthouses are set back six inches from the north and west lot lines, which abut the adjoining properties to the north and west, and are set back between 0 and 6 feet from the edge of the roof abutting the interior courtyard. This courtyard abuts a public alley at the rear of the property.

ZONING COMMISSION
District of Columbia

CASE NO.

07-21

EXHIBIT NO.

45 (ORIGINAL)

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Under the Height Act, penthouses must be set back from the "exterior walls" a distance equal to their respective heights above the adjacent roof. The term "exterior walls" in the Height Act provision has historically been consistently interpreted to mean only those walls that front on a street. The current NCPC recommendation and Staff Recommendation would have the Zoning Commission depart from that long-standing interpretation of the Height Act – including its own past decisions – and now take the position that the federal law must be applied more restrictively to include all walls of the building, and not just the street frontage walls. The District has never adopted this position, and it is at odds with the intent and purposes of the Height Act.

The Legislative History of the Height Act Supports Penthouse Setbacks at Street Walls Only

NCPC's recommendations flatly contradict 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 advanced only recently in one case by NCPC, which was rejected by the Zoning Commission.

The Zoning Commission squarely addressed this issue 14 years ago 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 was to be set back a distance equal to its height along 21st and H Streets, but would not have a 1:1 setback ratio 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 Zoning Commission found otherwise.

In reaching its decision, the Zoning Commission relied on the testimony of the Zoning Administrator, who is charged with enforcement of the Height Act.² The Zoning Administrator noted that:

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.

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

[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 building 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).

What is significant in that case is that NCPC endorsed the Zoning Administrator's interpretation of the setback provisions of the Height Act. 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 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 relies upon NCPC's action of February 2008 in Z.C. 07-26, which had almost the identical fact pattern, and an identical recommendation. That recommendation, which changed years of consistent interpretation by NCPC on this issue, was rejected by the Zoning Commission and final approval for that project was granted by the Zoning Commission in April.

NCPC's recommendation also relies upon the definition of the term "exterior wall" from the Dictionary of Architecture and Construction (which heretofore has not previously been cited) to determine that an exterior wall has "one face exposed to the weather or to earth." This rationale is used to justify the claim that the north and west walls abutting the adjacent buildings, and the north and west walls abutting the interior courtyard, are "exterior walls" under the Height Act. However, there is nothing preventing the adjacent properties to the north and west from being redeveloped in a manner which covers the north and west lot line walls, such that these walls are no longer "exposed to the weather", and thus, under NCPC's new analysis, no longer exterior walls. Notwithstanding the foregoing, NCPC has consistently interpreted the Height Act in a manner where walls that have been "exposed to the weather" have been determined not to be "exterior walls" for purposes of the Height Act. Rather, the only focus heretofore has been on exterior walls that abut a street.

NCPC asserts that the proposed project is inconsistent with the Preservation and Historic Features Element of the Comprehensive Plan with respect to the following policy: "Preserve the horizontal character of the National Capital through enforcement of the 1910 Height of Buildings Act." However, NCPC does not challenge the actual height of the penthouses themselves, but only the setback as a function of the height. Whether

or not the setbacks are increased, there will be no infringement on the "horizontal character of the National Capital."

Under the principle of *stare decisis*, NCPC is bound by the 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.

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).

No such explanation was given by NCPC in Z.C. 07-26, nor was such an explanation offered in this case. Based on the 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.

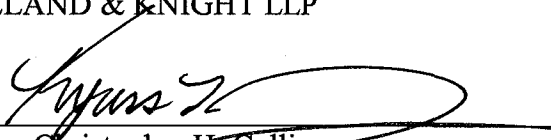
Conclusion

Based on the foregoing, the Applicant respectfully requests that the Zoning Commission find, consistent with years of past precedent, and its own prior rulings, that the setback provisions of the Height Act apply only to those portions of buildings fronting on a street; that the roof structures as proposed in this case meet those setback requirements; and therefore, that the proposed building complies with the Height Act.

Respectfully submitted,

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By:



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Attachments