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VIA HAND DELIVERY

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

ZONING COMMISSION
District of Columbia

CASE NO. 07-21
EXHIBIT NO. 59

RECEIVED
D.C. OFFICE OF ZONING
MARCH 31 2008

Re: Post-Hearing Submission Material in Zoning Commission Case No. 07-21

Dear Members of the Commission:

On behalf of Per Star M Street Partners, L.L.C. and 2213 M Street Limited Partners (collectively the "Applicant"), we hereby submit the Applicant's draft order (Tab A), as well as the Applicant's response to the post-hearing submission filed on March 24, 2008 by R.S. Sandi Holdings, LLC ("Sandi Holdings"), the party in opposition.

I. BACKGROUND

As shown on the Applicant's architectural plans and elevations submitted in the record of this case, including the plans included with the post-hearing submission filed on March 24, 2008, the Applicant proposes to construct a hotel on the subject property. The hotel will be constructed to a height of 110 feet, which is permitted under the CR Zone PUD regulations. In addition, the hotel includes three roof structures, each of which measures 18 feet, 6 inches in height above the roof.

Sandi Holdings' only objection to the PUD application is with regard to the location of the western wall of the roof structure, relative to Sandi Holdings' four-story building to the west. As shown on the Applicant's plans filed with its post hearing submission on March 24th, the revised plans show that the roof structure side walls will be set back from the northern and western side walls of the hotel. In addition, the color of the roof structure side walls has been revised to be a different, more recessive color than the color of the side lot line walls, in order to reinforce the fact that the roof structures are separate elements from the side walls of the

building. Further, the revised plans show that the Applicant has articulated the side walls of the hotel to better integrate them with the architectural design features of the hotel facades on 22nd and M Streets.

II. THE ROOF STRUCTURE SETBACK ISSUE

As discussed below, the Applicant believes that neither the regulations nor the 1910 Height Act require a setback along the western lot line wall of the proposed hotel. However, in the event the Commission determines that a setback is required, the evidence of record demonstrates that flexibility from this requirement should be granted since the location of the proposed penthouse will not have any adverse impact on Sandi Holdings' property.

In the substantive portion of its post-hearing submission, beginning on page 2, Sandi Holdings sets forth five reasons why "the Commission should require a roof structure setback on the western side wall of the proposed hotel".¹ The Applicant responds below to each of the five issues raised in Sandi Holdings' post-hearing submission in the order presented in that submission.

a. The Proposed PUD Meets the Applicable PUD Standards

The Applicant agrees with Sandi Holdings' statement that the Zoning Commission has the authority to modify the design of a PUD *if* the design of the project is inconsistent with the PUD standards. However, the Applicant's submissions, the Office of Planning reports and testimony at the public hearing, and the Applicant's land use and zoning expert report and testimony all provided detailed analyses and conclude that the proposed hotel meets the standards of the Zoning Regulations and the PUD requirements, advances the purposes of the Comprehensive Plan, is consistent with the Future Land Use Map and Generalized Policy Map, complies with the guiding principles in the Comprehensive Plan, and furthers a number of the major elements of the Comprehensive Plan. In particular, "the impact of the project on the surrounding area," including the Sandi Holdings property, is "acceptable, given the quality of public benefits in the project." See Section 2403.3. Sandi Holdings has not submitted any evidence that would lead to a different conclusion or require the Commission to modify the design of the proposed hotel.

b. Sandi Holdings Has Provided No Credible Evidence to Demonstrate That The Location of the Penthouse Will Have A Negative Effect on the Value of the Sandi Building

Sandi Holdings alleges in its post-hearing submission that "the lack of a setback will have a negative effect on the value of the Sandi building and any residential addition to its building due to the enormous height of the proposed hotel's western wall and venting of fumes from its kitchen and parking garage." First of all, Sandi Holdings has not presented any evidence or testimony whatsoever in this case to support a claim that the construction of this PUD will have a negative effect on the value of its property. A simple bald assertion by counsel for Sandi

¹To the extent that Sandi Holdings' assertions under the first two headings in its March 24 letter are relevant to this issue, they are addressed in the Applicant's arguments herein.

Holdings in a post-hearing submission, without substantiation, doesn't make it so. Secondly, this Commission has held that the appropriateness of the height and density of a PUD should not be evaluated based upon the existing heights and densities on surrounding properties, but rather on what is permitted for the area in the Comprehensive Plan. See, e.g. Order No. 06-31, John Akridge Development Company PUD, 5220 Wisconsin Avenue, NW, at paragraphs 49-51. Accordingly, the Commission should evaluate the proposed PUD not on the basis of the adjacent four-story Sandi building, but rather upon what is permitted for the area under the Comprehensive Plan. The proposed development is consistent with the Comprehensive Plan.

During the course of the public hearing, the only testimony submitted by Sandi Holdings through its expert witness alleging adverse impacts was that the Sandi Holdings building could be built to a height of 90 feet, and would be adjacent to a 20 foot taller building (plus penthouse). Sandi Holdings' expert witness also testified that the District's urban fabric, which includes taller buildings adjacent to shorter buildings, is inconsistent with good urban design. (See Tr. at 325-326). The expert also stated multiple times that he did not do any light or air studies to support Sandi Holdings' claims that the proposed hotel would have an adverse impact on light or air, but he went on to speculate that there would be such impacts. (See Tr. at 304, 306, and 327). Moreover, Sandi Holdings has not submitted any evidence to support its claims that the juxtaposition of taller buildings adjacent to shorter buildings is inconsistent with urban design principles.

With respect to light and air, the Applicant has submitted shadow studies which demonstrate that the proposed building will not cast any undue or excessive shadows on the Sandi building, especially when compared with a matter-of-right scenario. Based upon information in the record, the Sandi office building appears to occupy the entirety of its lot, with no open space. Moreover, there are windows on the north and south sides of the Sandi building, but not on the east side. Therefore, it would not be possible for the proposed hotel, located directly to the east of the Sandi office building, to cast any shadows into any windows on the Sandi building.

Finally, even though Sandi Holdings has failed to demonstrate a nexus between the lack of a setback and the alleged adverse impacts stemming from the location of the kitchen and garage exhaust, the Applicant has revised the roof plan to indicate that features will be installed to direct exhaust air in an eastward direction and away from Sandi Holdings' property.

c. The BZA's Decision in Appeal No. 17109 of Kalorama Citizens Association Confirms the Established Law in the District that a Set Back is Not Required For a Penthouse on an Interior Lot Line Wall

Sandi Holdings attempts to misconstrue and trivialize the plain language of the Board of Zoning Adjustment's decision in Appeal No. 17109, arguing that it "should be read in context in favor of Sandi".² That decision provides an in-depth discussion of the circumstances under

²Sandi Holdings also attempts to rely upon this Commission's decision in Order No. 749-A. Specifically, Sandi Holdings claims that the Commission's position that the roof structure setback requirements in the Height Act "have always been interpreted by the Zoning Division as being required...from the property line which adjoins a street"

which a roof structure must be set back from an exterior wall. The plain language of that decision explains in detail:

"the historical treatment of the term 'exterior walls' under the Zoning Regulations and the Height Act. While there have been differing opinions regarding the correct interpretation of exterior walls under the Height Act, the Zoning Commission has adopted the view that the Height Act requires [that a roof structure must be] set back only from a property line which abuts a street. [citations omitted]....

While the term 'exterior walls' has been interpreted more broadly under the Zoning Regulations to include a wall set back from the property line that abuts a yard or court, as opposed to a street or alley, it has not been interpreted to apply to a side yard constructed to the lot line of an abutting property. This type of wall has been considered a 'party wall' or 'common division wall', not subject to the set back requirements.[citations omitted]. Accordingly, what distinguishes an exterior wall for zoning purposes is not whether it is exposed to the elements, but whether it is set back from a property line.

...In light of the fact that 'exterior walls' is neither defined in the Height Act nor the regulations, but has a history of interpretation by the Zoning Commission, the Zoning Administrator, NCPC, and this Board, and that the historical interpretations referenced above support the stated purpose of the Act and the regulations, respectively, this Board concludes that these interpretations should apply.

Accordingly, in this case, the two walls from which the penthouse is not set back at a distance equal to its height are not exterior walls because they are built to the property line and abut the adjacent properties..."

BZA Appeal No. 17109, at pages 12 and 13.

The language of Appeal No. 17109 is clear and unambiguous, is the most recent and in-depth discussion of this issue by either the Commission or the Board, and applies directly to this case. There is no reason for the Commission to revisit or overturn that decision in this case.

was actually a holding that was "influenced by the proposed design of the building" in that case. Then, in footnote 4 of its submission, Sandi Holdings admits that "The decision does not actually state this."

d. The Proposed Hotel is Consistent with the CR Zoning and Buildings in the Neighborhood

Sandi Holdings' argument that the height of the proposed hotel is inconsistent with other building heights "in this particular CR Zone" is also irrelevant. The Applicant is seeking approval to construct a 110 foot tall hotel based upon the merits of the project. As indicated in the Applicant's land use and zoning expert's report (Exhibit 39 of the record of this case) and testimony, there are a number of buildings in the vicinity of the proposed hotel, including the Ritz hotel directly across M Street, that are 110 feet in height. Sandi Holdings' attempt to draw an arbitrary distinction based upon "buildings in this particular CR Zone" ignores both the reality that there are 110 foot tall buildings in the neighborhood, and that the PUD regulations explicitly allow buildings in the CR Zone to be constructed to a height of 110 feet.

e. The D.C. Court of Appeals Decision in *Hefazi v. Stiglitz* is Directly Relevant to the Commission's Review of this Project And Supports The Applicant's Position

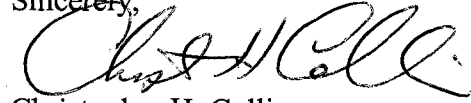
While ignoring the fact that, at the urging of its own counsel, Sandi's own expert witness speculated that the proposed PUD would have an adverse impact on Sandi Holdings' light and air, Sandi Holdings now claims that the D.C. Court of Appeals decision in *Hefazi v. Stiglitz*, 862 A. 2d 901 (DC 2004) "is of no help in deciding this case," simply because that was not a PUD case. The *Hefazi* case represents the definitive law in the District of Columbia, followed by 49 of the 50 states, on the "light and air" issue of whether a property owner has "a right to prevent [a neighbor] from using his property in such a manner as to affect their use and enjoyment of their own property." *Id.* at slip opinion 16. The Court held in the *Hefazi* case that, absent an express easement, "the actual enjoyment of the air and light by the [property] owner is upon his own land only." *Id.* Accordingly, under DC case law, Sandi Holdings cannot claim a legal right to light and air across the Applicant's property.

Sandi Holdings also relies upon the BNA PUD decision in Case No. 06-35, in which amendments to the project design were made in response to objections by an adjacent residential condominium association to the north of that PUD site, based on potential shadows. The major differences between that case and this one were that the neighbor in the BNA case was a residential condominium building directly to the north of the PUD site. In this case, the neighboring building is an office building to the west, with windows on the north and south sides, but no windows facing the PUD site. As stated by the Applicant's expert witness at the hearing, the Building Code does not require natural light and ventilation for an office building. The shadow studies presented in this case by the Applicant indicate that, as compared to the matter-of-right scenario, there will be minimal additional shadows cast on the Sandi office building, and they would be only on the roof, because the Sandi building occupies 100% of its lot. It will not be possible for any development on this PUD site to cast shadows into the windows of the Sandi building, given the relative positions of the properties and the location of the windows in the Sandi building.

III. CONCLUSION

For the reasons discussed herein, we believe the proposed PUD meets all applicable PUD standards, and should be approved consistent with the plans submitted by the Applicant. In addition, the record does not support any of the claims made by Sandi Holdings with respect to alleged adverse impacts of the proposed hotel on Sandi Holdings' property. We look forward to the Zoning Commission's favorable consideration of this application. Thank you.

Sincerely,



Christopher H. Collins



Kyrus L. Freeman

cc: Richard L. Aguglia, on behalf of R.S. Sandi Holdings, LLC (w/attachment, via Hand)
Asher Corson, Chairperson, ANC 2A (w/attachment, via UPS)
Steve Cochran, D.C. Office of Planning (w/attachment, via Hand)
Barbara Kahlow (w/attachment, via UPS)