BEFORE THE ZONING COMMISSION OF THE DISTRICT OF COLUMBIA

Washington Real Estate Investment Trust **BZA Application No. 16661**
Public Hearing: March 1, 2001
ANC 2D, also in proximity to ANC 6B

SUPPLEMEMENTAL STATEMENT OF THE APPLICANT

I
Introduction

Washington Real Estate Investment Trust (the "Applicant") hereby submits this supplemental statement in response to the report from the D.C. Office of Planning ("OP") to the Zoning Commission. The Applicant received the OP Report on the day of the initially scheduled hearing, December 18, 2000. The Applicant requested a postponement to provide an opportunity to respond to OP's concerns and to work with the community. OP has cited various reasons in recommending denial of the Application. The Applicant responds herein.

D.C. OFFICE OF ZONING
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II
The Subject Site is Zoned C-M-2

OP claims the subject site and the surrounding area have been rezoned to BP/CR, despite the following: (i) neither the Official Zoning Map, nor any other public document provides official public notice of such "rezoning"; (ii) after the Zoning Commission held a hearing on the proposed Buzzard Point rezoning on September 12, 1996, no vote was held and no decision was rendered by the Commission; (iii) Zoning Commission Orders No. 850 and 910, issued in 1998 and 1999, respectively, involving a nearby property, both clearly characterize the area as zoned M and C-M, in concurrence with the Zoning Map; and (iv) no right of appeal has been afforded any affected party, as would be the case if the 1996 proposed rezoning had in fact been decided. If the subject site were in fact deemed to be zoned BP/CR, it would be a violation not only of the D.C. Zoning Act, but also of the Applicant's constitutional right to due process. The Zoning for the subject site remains C-M-2 and the EEF use proposed in the Application is permitted by special exception.

BZA
Case No. 16661
Exhibit No. 28

Board of Zoning Adjustment
District of Columbia
CASE NO.16661
EXHIBIT NO.28

A. The Zoning Act

The Office of Planning presumedly takes the position that under Section 3202.5 of the Zoning Regulations, commonly referred to as the "set down rule", the Commission's decision to schedule a hearing for the 1996 proposed rezoning has effectively rezoned the subject site without the benefit of the Zoning Commission's vote on the proposal, as required by the Zoning Act. Under the Zoning Act, the Zoning Commission has only two ways to rezone a property: (1) by holding a hearing (D.C. Code § 5-417), making a decision by a majority vote (§ 5-416), and issuing proposed and final rulemaking and securing NCPC review (§ 5-417); or (2) by emergency action with appropriate justification.

B. Narrow Purpose of the Set Down Rule

The set down rule was never intended to provide a process by which the Zoning Map could be amended without the majority vote of the Commission and other procedural requirements. When the Zoning Commission adopted the set down rule, the Commission was aware that, in order to avoid a blatant violation of the Zoning Act and principles of due process, the set down rule must operate narrowly to effect only the limited purpose for which it was enacted. As such, the set down rule does not operate to rezone property without due process. It operates only to prevent property owners from rushing to file for building permits to vest rights under existing zoning when the Zoning Commission has decided to schedule a proposed downzoning for hearing.[1]

The set down rule was intended to preclude vesting under the existing zoning if the Commission had already decided to schedule a downzoning for hearing and "thereafter took *timely* [emphasis added] action to reduce the size, density or range of uses." (See Z.C. Order No. 516, Vesting of Construction Rights.) It does not, and cannot,

[1] In Order No. 636, the Zoning Commission stated that the set down rule would "...protect the public interest against the *last-minute* [emphasis added] establishment of any use that would become nonconforming upon the adoption of amendments to the zoning map..." (p.2). The present application, filed four and half years after the set down date, cannot be considered a "last-minute" action.

provide protection of an indefinite length of time. It provides an opportunity for "timely" action, not for a hold of unlawful duration.

C. Due Process

While the set down rule was adopted to avoid the rush of permit applications before a Zoning Map amendment, the rule was based on the presumption that the map amendment process provided by the Zoning Act would be finalized in a reasonable time period. OP's contention that the set down rule applies for over a four and a half-year period of time would constitute abuse of the set down rule.

The Office of Planning is proposing that the Commission treat the 1996 proposal as a *de facto* rezoning that should remain in effect indefinitely. Under that interpretation, no hearing would be required, no majority vote of the Commission would be required, and no right of appeal would be available to affected parties. This was never intended by the Zoning Commission when it adopted the set down rule, ostensibly because it was aware that to abuse the set down rule in such a way would clearly violate the Zoning Act as well as an affected property owner's due process rights.

D. The Past Action of the Commission Supports the Applicant's Interpretation of the Set Down Rule

The past action of the Zoning Commission supports the Applicant's interpretation of the set down rule. Zoning Commission Orders No. 850 and 910 approving the Florida Rock PUD became effective November 26, 1999. That case was filed after the proposed Buzzard Point rezoning hearing, and the order was issued while that case was still "pending"[2]. Under OP's suggested interpretation of the set down rule, the site would have been zoned BP/W-2 and BP/CR at the time the case was heard since that was the

[2] The 1996 Buzzard Point rezoning case may, in fact, not even be pending. Several cases propose that inaction by an administrative agency should be interpreted as a denial. Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093; Public Citizen Health Research Group v. Commissioner, FDA, 740 F.2d 21; Sierra Club v. Thomas, 828 F.2d 783; Carpenter v. Tahoe Regional Planning Agency, 804 F. Supp. 1316; Deering Milliken, Inc. v. Johnstonn, 295 F.2d 856; Norco Construction, Inc. v. King County, 801 F.2d 1143;

most restrictive zoning under consideration. OP, however, in its supportive report indicated the site's zoning as M. Similarly, in the Findings of Fact, Order #850 refers to the zoning of the site as M. In that case, the set down rule was not interpreted to change the site's zoning. OP's position is inconsistent. OP has apparently changed its analysis in the present case to fit its general opinion of the application. This is patently unfair to the Applicant and deflects emphasis away from the crucial issue – that the application safely meets the special exception requirements for EEF use, pursuant to Section 802A of the Zoning Regulations.

E. Under the Set Down Rule, The Proposed Use is Permitted as a Matter-of-Right

If the Applicant is subject to OP's extreme interpretation of the set down rule, then this site would be subject to the most restrictive zoning being considered under the proposed rezoning. EEF use was, in fact, permitted as a matter-of-right in the CR zone at the time the proposed rezoning was set down for hearing in 1996. Under OP's theory, special exception approval would not be required for the proposed use. We do not think the Zoning Commission intended such a result.

F. The Set Down Rule Does Not Apply in BZA Cases

As mentioned above, the set down rule was intended to apply only in certain defined situations. The Zoning Regulations specifically remove the present case from the narrow reach of the set down rule. Sections 3202.6 and 3203.9 provide that building permits and certificates of occupancy authorized by the Board of Zoning Adjustment[3] "may be processed in accordance with the Zoning Regulations in effect on the date those orders are promulgated;". These Sections immediately follow the set down rule and operate to except the BZA application from the set down rule. This is because the necessary procedural time frame for a BZA case precludes the Applicant's ability to file

[3] This application was originally filed with the Board of Zoning Adjustment. It was transferred to the Zoning Commission when the proposed Emergency Regulations regarding EEFs were amended, giving the Zoning Commission authority to hear such requests. Corporation Counsel has determined that all Zoning Regulations which apply specifically to the BZA, under the special exception process, will apply similarly to the Zoning Commission proceedings on this matter.

"last-minute" building permit applications, thereby making the set down rule unnecessary.

III
Redevelopment

OP contends that approval of this Application would "substantially undermine" an economic revitalization of the area. OP's argument fails in light of the following facts about the proposed use. The proposed EEF will: (i) replace the current auto repair garage, a high impact industrial use, with an electronic equipment facility, which will be cleaner, quieter, more attractive, and have a significantly reduced parking demand; (ii) establish a high-tech use that may attract other favored business enterprises, both established and entrepreneurial, providing the potential to spark an actual economic revitalization for Buzzard Point; (iii) significantly increase the property value of the subject site, thereby increasing revenues to the District of Columbia[4]; and (iv) provide a gateway, both physically and symbolically, to economic revitalization in the Buzzard Point area.

OP reports that "a nationally recognized planning authority" has stated that a zoning emergency[5] exists by permitting additional M or CM type uses in the Buzzard Point area. The Applicant is not proposing an "additional" M or CM type use. The proposed use will replace an existing industrial use in an existing building. It will not create a new industrial use on a vacant site.

The city has been considering the future of Buzzard Point for several years. On September 12, 1996, a Zoning Commission hearing was held to address the proposed rezoning of the Buzzard Point area from its current zoning to BP/CR and several other

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4 Along with the property value increase, EEFs contain valuable personal property, which will dramatically increase personal property taxes paid to the District.

5 Rather than a zoning emergency, an economic development emergency exists in this location of the City. The rate of unemployment in this ANC is much higher than the average for other ANCs, development has been nonexistent and property values have not risen as in other parts of the District. The proposed EEF use will instantly raise the value of the subject site and be an important first step in economic revitalization in the area. EEF use is the right use at the right time for this depressed area of the City – a low-impact, economical use which is an excellent transition use to begin the area's economic revitalization.

zone districts. The regulations proposed in 1996 recognized that existing industrial uses should be permitted to remain and expand. In fact, the 1996 proposal provided even greater protection for the industrial uses than that permitted under the non-conforming use regulations.[6] This provision was intended to protect the industrial uses existing in the Buzzard Point area and ensure their ability to continue for many years. There has always been a recognition that a highly industrial area such as Buzzard Point will transition to the desired mixture of uses slowly, and that some industrial uses will be phased out gradually while others will remain indefinitely.

A decision on the 1996 case was withheld pending the receipt of additional information requested from OP. Four and a half years have passed since that hearing. OP is still examining the area and has not yet provided the requested information to the Commission. In fact, OP has suggested the hiring of a consultant to study the area further. As a result, the Commission has not rendered a decision. OP's assertion that prohibiting certain uses in this area is now an "emergency" is troubling in light of OP's delay of four and a half years on the 1996 proposed rezoning. It is important to note that in the four and a half years since the Buzzard Point rezoning hearing, there has been no development in the Buzzard Point area. The Applicant's proposal provides a low-impact, efficient, productive use that could potentially spur significant investment in the surrounding area, yet it is characterized by OP as a hindrance to economic revitalization. The facts surrounding this application simply do not support OP's conclusions.

A major reason for OP's enthusiasm for the redevelopment of this area is the presence of the waterfront south of the subject site. However, the subject site is a considerable distance from the waterfront and is separated from the waterfront by several industrial uses (See Exhibit B for aerial photographs illustrating the distance between the waterfront and the subject site.) While the Applicant recognizes the significance of

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[6] Section 1605.1 of the previously-proposed regulations reads: "A commercial or industrial use that is first permitted in the CM or M zone and that is in existence with a valid Certificate of Occupancy as of date, shall be deemed a conforming use and shall be entitled to expand as a matter of right up to the commercial floor area ratio and height limits of the underlying zone district;..."

Buzzard Point as a planning area, a variety of uses will contribute to the success of the waterfront plan. These uses must take into account the unique features of each site. The subject site, because of its proximity to the elevated highway, the other industrial uses in the square, its considerable distance from the waterfront and its proximity to long haul fiber, is inappropriate for many uses, however, is ideal for EEF use. The shortest distance to the waterfront from the subject site is 850 feet, but this is interrupted by the elevated highway. The distance due south from the subject site to the water is almost half a mile, 2,018 feet. More importantly, the proposed use may spur economic development in the area, the same goal of OP's planning initiatives for the area.

OP reports that the "proposed data hotel fits the profile of the uses about which [the nationally recognized planning authority] was concerned" (M and C-M uses). Until the recent passage of the emergency EEF regulations, EEFs were considered to be in the same category as office use. EEFs are a low-impact, low-traffic, quiet, clean, economical use of land. OP has reported that it opposes the proliferation of EEFs because they may create "dead zones" and hinder a vibrant streetscape. OP has never implied that these uses are high-impact industrial uses that harm the surrounding community due to noise or parking impacts. In the present case, however, OP now reports that the proposed data hotel does "fit the profile" of the typical manufacturing and industrial uses currently existing in the Buzzard Point area. This is simply not true. It is quite clear from the land use survey attached as Exhibit B that the proposed EEF use bears little resemblance to the high impact industrial uses east and south of the subject site.

IV
Pedestrian Movement and Streetscape

OP reports that M Street is expected to be a major pedestrian route, and therefore EEF use on the subject site is not compatible with this area. The subject site is three blocks from M Street. It is difficult to understand OP's reasoning that one EEF site on a single lot a full three blocks from M Street will have such a negative impact on this expected pedestrian movement. There are many areas throughout the city which are three blocks away from Connecticut Avenue, Wisconsin Avenue, and other pedestrian

corridors, which contain compatible uses of land that do not generate significant pedestrian traffic. OP also implies that since M Street, three blocks away from the subject site, is accessible to a Metro station, the site's proximity to Metro should be considered a negative factor. The subject site is a considerable distance from the nearest Metro station.[7] The Navy Yard Metrorail station is 1,700 feet (across South Capitol Street) from the subject site and the Waterfront Metrorail station is 2,600 feet from the subject site. In addition, pedestrian movement from the subject site to the nearest Metrorail station is non-existent, and highly unlikely in the future. The subject site is effectively on a dead-end street, bounded to the east by a three-story high elevated highway, South Capitol Street, and to the south by a heavy industrial use. The elevated highway, the surrounding system of one-way streets and the predominance of industrial uses from the subject site to the waterfront make access to and from the subject site difficult, and result in limited pedestrian movement in the immediate area. A use which is economically dependent on pedestrian traffic would not be viable on the subject site. Further, the current use has a much greater negative impact on pedestrian movement because police cars block surrounding sidewalks when lining up for repairs.

OP reports that approving the application would "extend the useful life of the warehouse use," when in fact denial of the application would serve to extend the useful life of the warehouse use indefinitely. It is likely that many of the surrounding industrial uses will continue as non-conforming uses (or as conforming uses with the ability to expand, under OP's position on the zoning for the subject site – see footnote 63) indefinitely until economic revitalization becomes a reality in the Buzzard Point area. Economic revitalization will not result solely from OP's planning initiatives, but rather as a result of investment in the area such as that proposed by the Applicant.

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[7] Several EEFs approved under these regulations are in fact more accessible to Metrorail stations than is the subject site. 101 K Street data center has a shorter and much more direct route to a Metro Station than does the subject site (see Exhibit C).

V
Proliferation of EEFs

OP reports that approval of this application may cause the installation of telecommunication cable in the area, thus creating a proliferation of EEFs that will undermine revitalization efforts in the area. Does OP now propose halting the inevitable advancement of communication technology in the area for the purpose of ensuring economic revitalization? It is reasonable to expect that fiber optic cable will eventually be in every part of the City, joining electricity and running water as essentials for modern development. It is not only incongruous, but also outside the scope of OP's function (OP does not have the responsibility for determining fiber optic cable distribution), for OP to oppose this application as a means to prevent fiber optic capabilities in the Buzzard Point area.

Regardless of the future of communications technology in the area, the Zoning Commission has the authority to disapprove EEF use in this area, thereby controlling any potential proliferation and preventing any "dead zones". We are unaware of other EEF uses currently existing in the surrounding area. Conversion of this site from an auto repair garage to EEF use will be an excellent transition use from the residential area to the north of the site to the industrial area to the south of the site.[8]

Attached as Exhibit D are two examples of similar facilities, one in an office district and one in a mixed-use residential district. These facilities have not created "dead zones" or caused other negative effects that OP suggests would be the case at the subject site.

VI
Residential Neighborhood

OP reports that EEF use on the subject site would not enhance or expand the residential character of the neighborhood. In contrast to this conclusion, in its recommendation of approval of an EEF facility at 175 R Street, N.E., (Application No. 16664) OP concluded that EEF use adjacent to an established residential neighborhood as

[8] OP agreed in its report, writing that "the property sits in a transitional location between residential and industrial uses."

a low-impact use which would be preferable to an existing warehouse use. Regarding the subject site, OP reports "the property sits in a transitional location between residential and industrial uses."(p. 6) In the 175 R Street report, OP makes a similar statement, but then adds an additional sentence: "The use of the property as an EEF will provide a very low impact use adjacent to an established residential neighborhood."(p.5) It is illogical that OP would use the same analysis in the two highly similar situations, yet reach two such different conclusions.[9] When compared to 175 R Street, the EEF use on the subject site is even more beneficial to the neighborhood because it will replace a large and actively used vehicle repair garage that has affected the community with overflow parking. The EEF use will serve as an ideal buffer between the residential community to the north and the industrial uses to the south.[10] The EEF use is also an excellent transitional use in the economic revitalization sense because it has the potential to attract the types of businesses and employees which may be interested in investing or residing in the Buzzard Point community.

VII

The Application Meets the Requirements of the Regulations

The Applicant, as expressed in detail in the previously filed Statement of the Applicant, meets the requirements promulgated by the emergency EEF regulations. The Applicant will briefly address some specific areas of the regulations that OP noted in its report. OP reports that EEF use on the subject site will inhibit a vibrant streetscape because the site will provide no retail use. Curiously, OP also reports that "the unique location of the property relative to the elevated bridge ramp and existing heavy industrial uses make retail an unlikely use for the structure in the near future." The subject site is not located in proximity to an existing or proposed Metro station or a pedestrian corridor.

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9 According to OP in the case of 175 R Street, an EEF is beneficial as a buffer between residential and industrial uses. (p.5.) According to OP in the present case, EEF use "would not contribute to enhancing or expanding the residential character of the neighborhood, nor would it provide neighborhood serving uses or contribute to creating a demand for neighborhood serving uses." (p.2)

10 OP reports that the applicant's proposal "will improve the external appearance of the property."

Establishment of an EEF on the subject site provides the potential for increased business activity within the neighborhood, thereby fostering economic development.

VIII
The Application Is In Conformance With the Comprehensive Plan

The Comprehensive Plan designates the subject site and the surrounding area as a production and technical employment area, as well as a medium/high density commercial and high-density residential area. The Comprehensive Plan provides that "the objectives for production and technical employment areas are to encourage the growth of centers of high technology, research and development, and to provide for essential support services and nonpolluting production activities." (10 DCMR 1109.1.) The provision of the proposed EEF use on the subject site, a high-tech, non-polluting activity, would fulfill this objective.

The Comprehensive Plan also provides that production and technical areas are designated for, among other areas, "[a]reas where buffering can protect adjacent residential areas from adverse impacts or where no residential areas are present:" (10 DCMR 1110.2(a)). The proposed EEF use will fulfill this function adequately as a buffer between the adjacent residential and industrial areas. Although the OP report did not raise these important issues, OP did not oppose the proposed use based on the Comprehensive Plan. In fact, all four EEFs approved to date under the temporary regulations are also located in a production and technical employment area, as designated in the Comprehensive Plan.

IX
Other Jurisdictions

OP relies upon the opinions of planning departments in several other cities in implying that EEF use is not a preferential use of land in downtown areas. OP provides no evidence that these cities have fought the establishment of EEFs in industrial areas containing fuel oil tanks, cement mixing plants and electric generation plants. OP's contention that approval of this application will lead to a proliferation of EEFs resulting in a "dead zone" is without basis because the Commission has control over the further establishment of EEFs in this area.

OP did also report that "almost all cities agreed that these facilities could also make economical reuse of old and existing warehouses."(p. 3)

X

Conclusion

Approval of this application will permit an economic use of land that will potentially spur economic revitalization in the Buzzard Point area. The proposed EEF provides a low-impact use that will be a considerable improvement to the current use, will improve the attractiveness of the subject site and will provide considerable additional revenues to the district. The Applicant strongly disagrees with the conclusion of the OP Report, a conclusion which is in stark contrast to the conclusion of recently issued OP reports approving similar sites for EEF use. Most importantly, the application meets the special exception standards pursuant to the regulations, and must therefore be approved.

Respectfully submitted,

SHAW PITTMAN

By: Allison C. Prince 2/15/01
Allison C. Prince

By: Martin P. Sullivan 2/15/01
Martin P. Sullivan

Attorneys for the Applicant

Document #: 1075394 v.5

A



Distance from site to nearest water.
820 feet – Across the elevated highway and
Florida Rock cement mixing plant

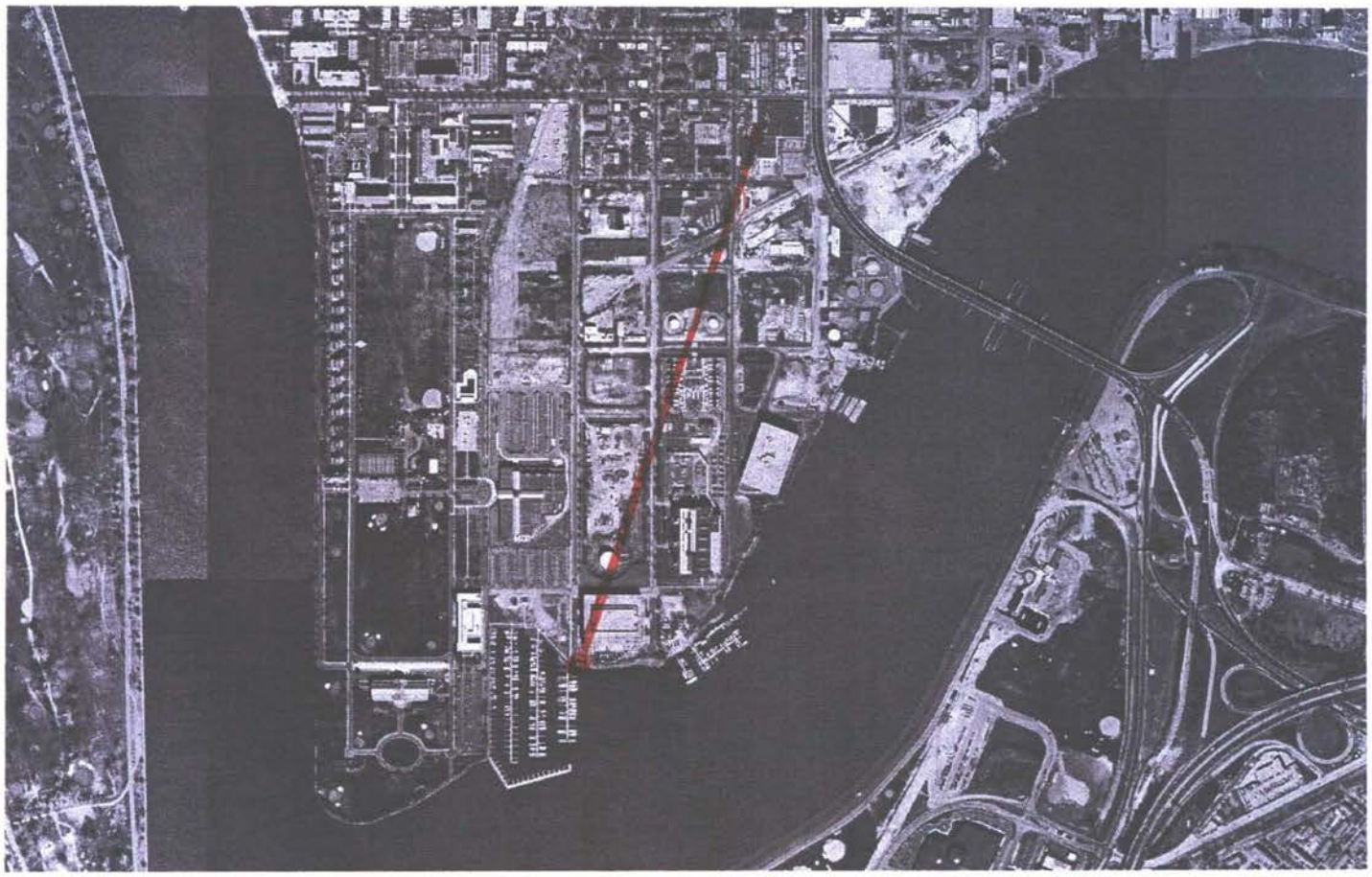
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Distance from site to nearest water -
west of the elevated highway – 1,150 feet

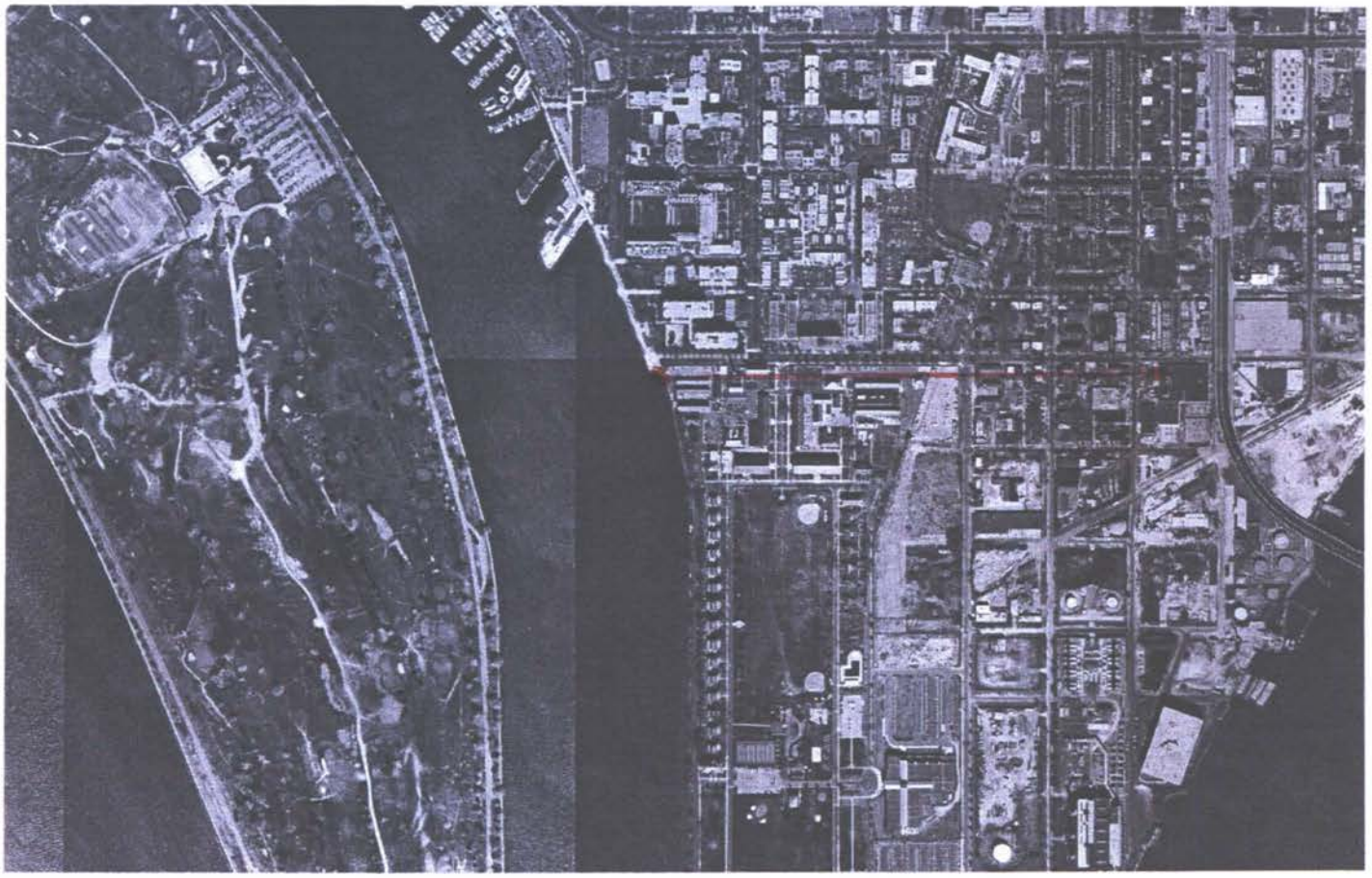


Distance due south from the site
to the water – 2,018 feet



Distance from site southwest to tip
of 1996 proposed BP overlay – 3,117 feet

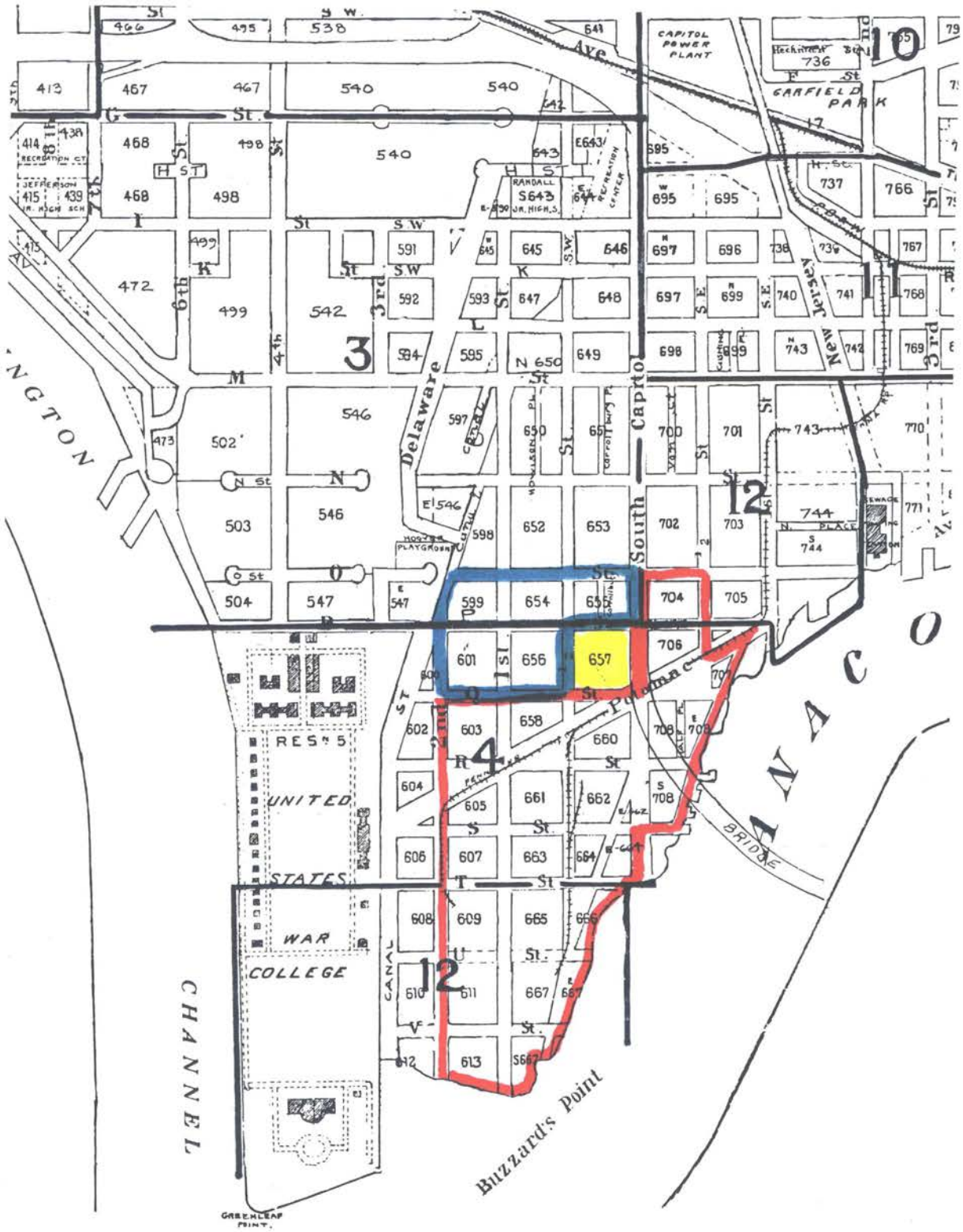
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Distance due west from site
to water – 2,560 feet

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Subject Site

Residential Uses

Industrial Uses

PHOTOGRAPHIC SURVEY OF AREA SURROUNDING
SUBJECT SITE TO THE NORTH AND WEST








STOP





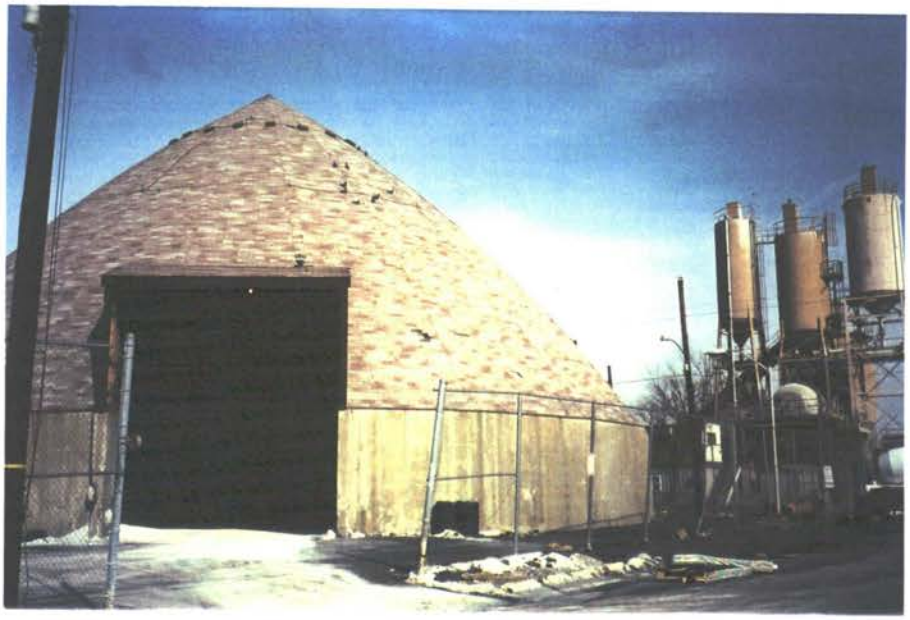
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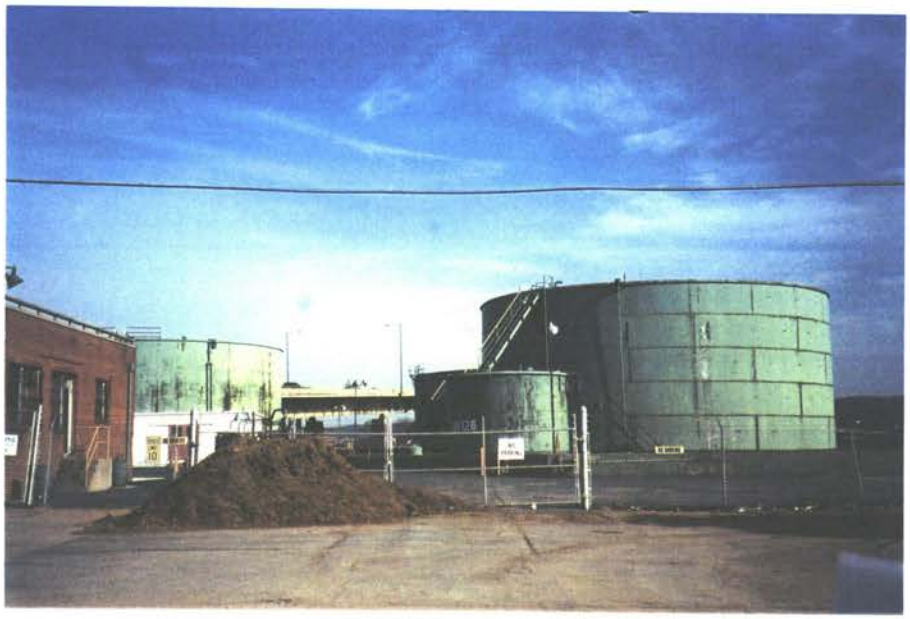




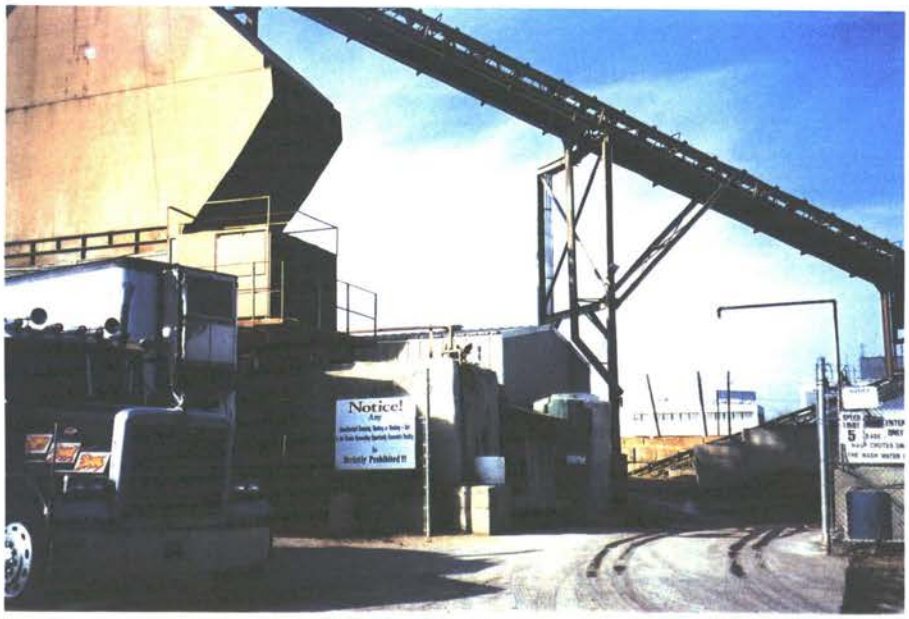




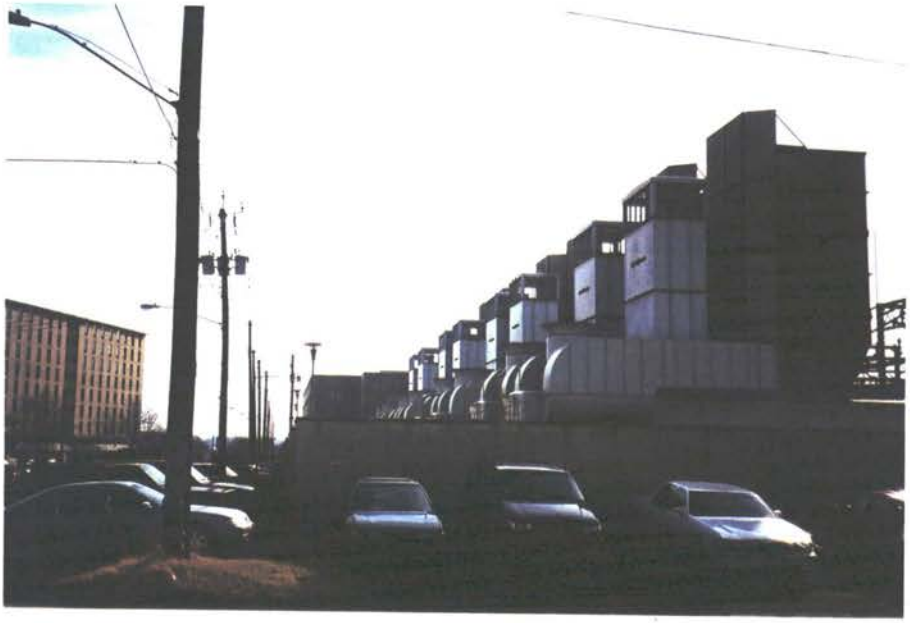







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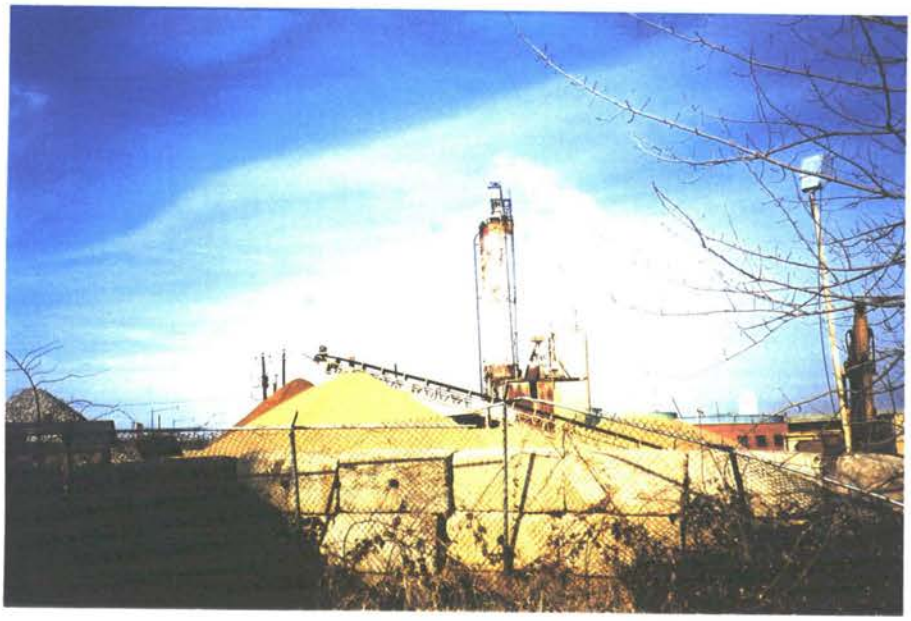


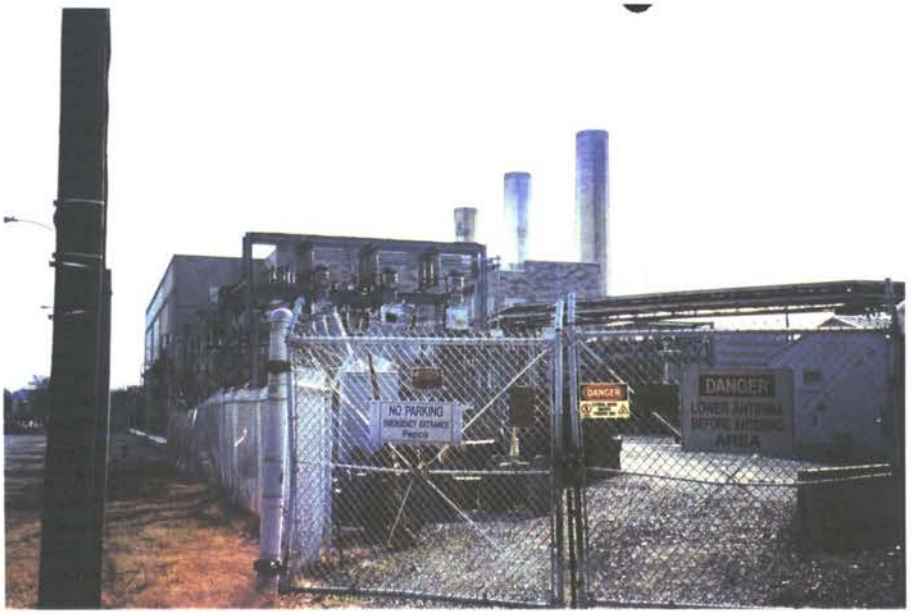








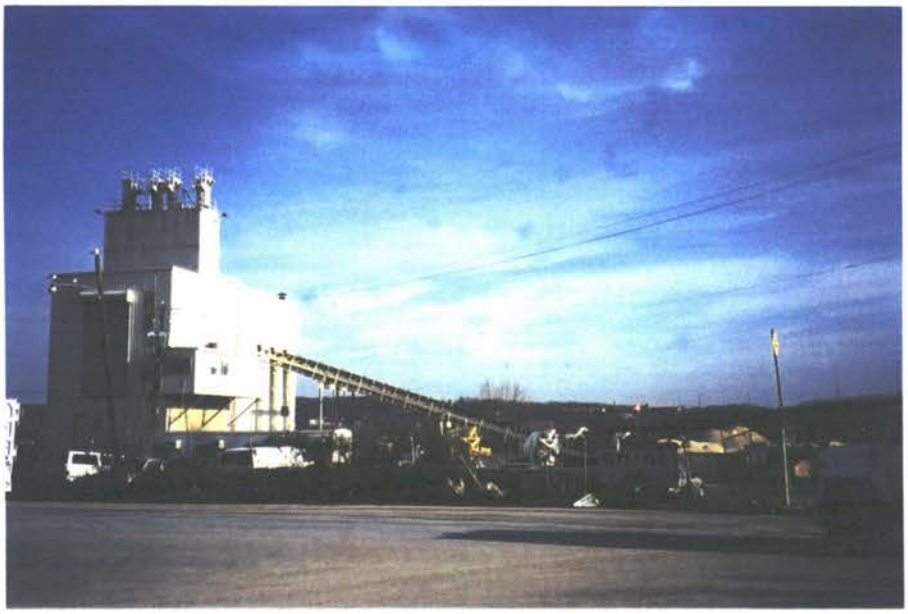



NO PARKING
DANGER
DANGER




BUZZARD POINT
PLANT







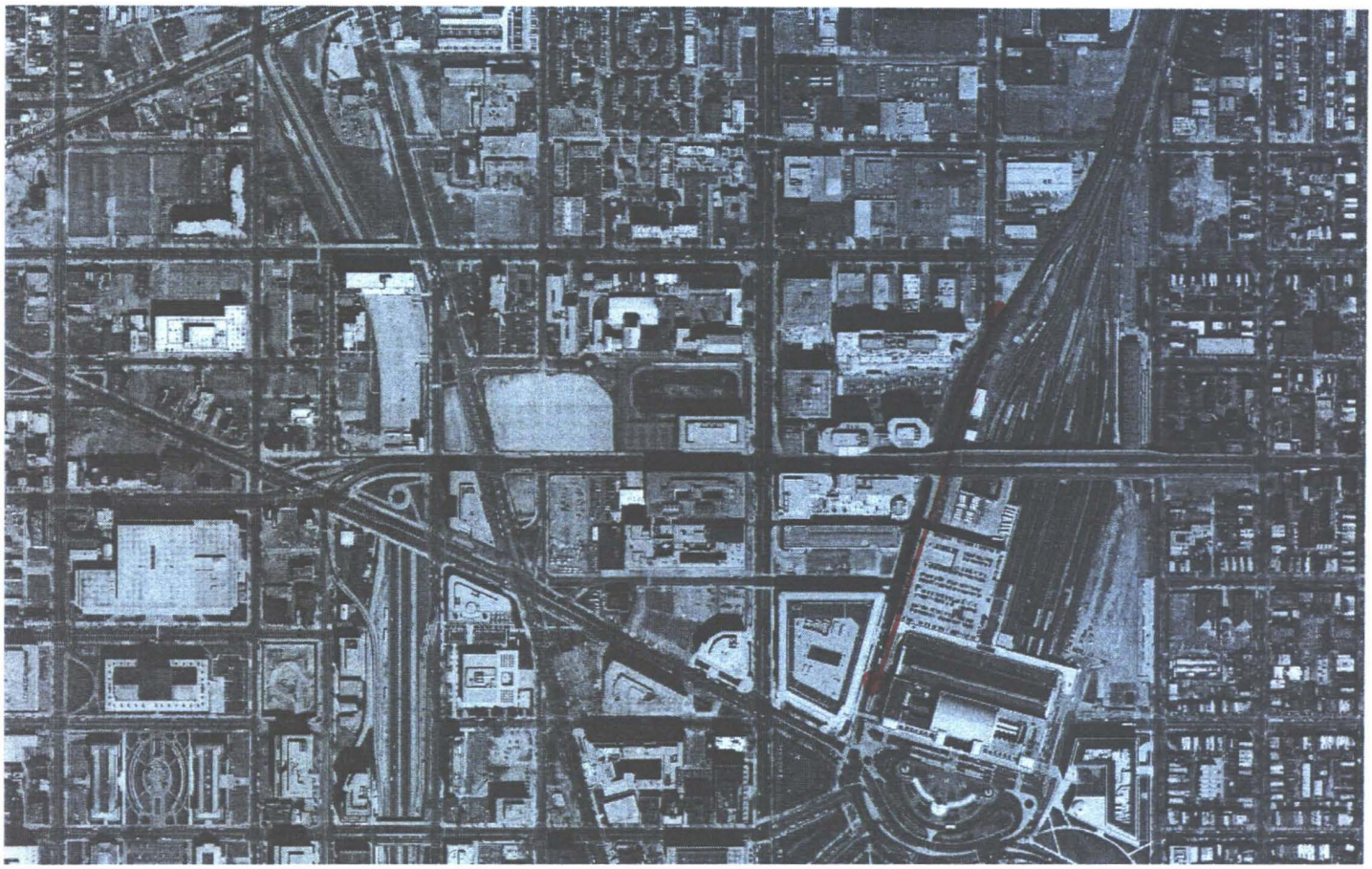




Distance from Subject Site to Navy Yard Metrorail =
1,700 feet – across South Capitol Street



Distance from Subject Site to Waterfront Metrorail station = 2,600 feet



Distance from approved EEF location (101 K Street, NE) to Union Station Metrorail station = 1,600 feet



Distance from Subject Site to M Street = 1,640 feet









PEPCO Electricity Generating Station – 1616 L Street, N.W.
(PEPCO facility is 1/3 of the street frontage of the building shown)





Telephone Switching Station at 2140 N Street, N.W. (corner of N and 22nd)
and the surrounding residential neighborhood


EMBASSY SUITES HOTEL


EMBASSY SUITES HOTEL