GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

**ZONING COMMISSION ORDER NO. 16661**
**Case No. 16661**

**Case No 16661 of Washington Real Estate Trust**, pursuant 11 DCMR § 3104.1, for a special exception under subsection 802.4 and a parking variance under subsection 3103.2 and section 2101 to construct an electronic equipment facility (EEF) in a C-M-2 District at premises 1501 South Capitol Street, S.W. (Square 657, Lot 817).

**HEARING DATE:** March 1, 2001
**DECISION DATE:** March 1, 2001

## DECISION AND ORDER

The Applicant filed an application seeking special exception approval for an EEF as well as relief from parking and loading requirements, on October 30, 2000. The proposed facility would be constructed on property owned by the Applicant at 1501 South Capitol Street, SW. On the date of the scheduled hearing, prior to the taking of any testimony, the Zoning Commission, on its own motion, voted to deny the application on the ground that the relief requested could not be granted.

## PROCEDURAL HISTORY

The hearing on this application was originally scheduled for December 18, 2000, but was rescheduled to March 1, 2001. On November 3, 2000, the Office of Zoning mailed the Applicant's representative, the Office of Planning, the owners of all property within 200 feet of the subject property, the Councilmember for Ward 2, and the local ANCs (2D and 6B), notices of the December 18, 2000, hearing. Notice of hearing was published in the *D.C. Register* on November 10, 2000, at 47 DCR 9016. The Applicant's affidavit of posting, dated December 5, 2000, indicates that zoning posters were placed in three locations, at and around the subject property, on December 1, 2000.

The recommendation of the Office of Planning ("OP") to deny the application was received on December 15th, 2000.

The Applicant submitted a supplemental statement on February 15, 2001.

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The Commission received no requests for party status.

Prior to hearing any testimony on the merits of the application, the Commission requested the applicant to address the impact of § 3202.5 of the Zoning Regulations on the Commission's ability to grant the relief requested. After discussion, the Commission voted to deny the application because, pursuant to § 3202.5(b), this application must be processed as if the property were zoned CR. EEFs are not permitted in a CR zone by virtue of an emergency rule in effect at the time of the hearing and this decision.

## FINDINGS OF FACT

1. The subject property is located at 1501 South Capitol Street, S.W. (Square 657, Lot 817), in the Buzzard Point/Capital Gateway area ("Buzzard Point").

2. The property was purchased by the Applicant in 1974 and has been used for industrial purposes since that time. (Statement of Applicant, pg.1).

3. The building is a warehouse currently under lease by the Metropolitan Police Department ("MPD"). It is being used for vehicle maintenance and as the home of MPD's mobile crime unit. MPD has stated that it will not renew its lease. (Statement of Applicant, pg. 1).

4. The Applicant applied for a special exception from the Commission in order to construct and operate an EEF on the site, and also requested zoning relief from parking and loading requirements contained in chapters 21 and 22 of the Zoning Regulations (title 11, DCMR).

5. This application was made pursuant to emergency rulemaking in place at the time of the hearing, adopted February 2, 2001, and published in the February 23, 2001 edition of the D.C. Register (48 DCR 1843).[1] EEFs are prohibited in a CR district pursuant to 11 DCMR § 602(r), but are permitted as a special exception in a CM zone pursuant to 11 DCMR § 802A.

6. On the Zoning Map of the District of Columbia, the Applicant's property is designated CM, Commercial Light Manufacturing.

7. On September 12, 1996, the Commission voted to hear a proposed rezoning and overlay for Buzzard Point (ZC Case No. 96-3/89-1). Hearings on the proposed map amendment and overlay took place on November 21 and 25, 1996.

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[1] The emergency rulemaking was identical with respect to CR zoning as the emergency rulemaking published in the December 8, 2000, edition of the D.C. Register (47 DCR 9775).

8. The proposed map amendment, as advertised, would have rezoned the Applicant's property as BP/CR.

9. At the conclusion of the 1996 hearings, the Commission asked OP to supply additional information concerning possible use of the PUD process along the waterfront. (TR.18; Feb 12, 2001, Mtg., TR. 20).

10. In 1997, the Commission conducted two decision meetings on the proposed rezoning and overlay for Buzzard Point but did not vote on the proposed amendments.

11. Section 3202.5(b) of the Zoning Regulations (title 11, DCMR), provides that applications for building permits filed after a map amendment is set down for a hearing are processed in accordance with the existing zoning designation or the zoning designation being considered in the set down, whichever is more restrictive ("set down rule").

12. Instead of having the Zoning Administrator review its building permit application for zoning compliance, the Applicant availed itself of the self-certification process, pursuant to 11 DCMR § 3113.2.

13. The self-certification process permits an applicant to directly request special exception relief, rather than receiving a "zoning memorandum" from the Zoning Administrator indicating that the structure or use indicated on the buildings permit application requires special exception approval.

14. The self-certification form filed by the Applicant stated that the subject property was zoned CM.

15. Under proposed text amendments currently being considered by the Zoning Commission, an EEF would be permitted in a CR district as a matter of right, provided that the EEF use occupies 25% or less of the building's gross floor area or is located 100% below ground level. A hearing on this rulemaking was completed on May 7, 2001. On June 11, 2001, the Commission postponed until June 21, 2001, its vote on whether to take proposed action on the rulemaking. On June 21, 2001, the Commission took proposed action to adopt the amendments. A final vote is expected to occur September 17, 2001.

16. Since the September 12, 1996, hearing, OP has continued to study the Buzzard Point area and gather more information.

17. OP conducted a public workshop regarding Buzzard Point and other issues in May 2000. (Feb 12, 2001, Mtg., TR. 12).

18. At the Commission's meeting of February 12, 2001, OP presented a status report on the Buzzard Point rezoning and overlay. OP represented that: 1) it would bring the Commission up to date on the proposed Buzzard Point rezoning and overlay at the Commission's meeting in March, 2001; 2) it would forward the Buzzard Point rezoning

package to the Commission; 3) it intends to recommend interim zoning of the Buzzard Point area, largely mirroring the rezoning proposed in 1996; and that 4) it plans to present a refined zoning package for Buzzard Point within one year. (Feb 12 Mtg., TR 20-25, 28-29). At that meeting, the OP's Director also represented that the proposed rezoning and overlay remains valid and that today's social and economic conditions in Buzzard Point were largely anticipated and accounted for in the 1996 draft of the proposed rezoning and overlay. (Feb 12, 2001, Mtg., TR. 33-34).

19. At the Commission's meeting of March 12, 2001, OP again reported on the proposed Buzzard Point rezoning and overlay. At that meeting, OP represented: 1) that it plans to make some changes to the initial draft; and 2) at a recent meeting with major property holders in the area, no serious objections were voiced in response to the proposition of moving forward with the rezoning as it was presented in 1996. (March 12, 2001, Mtg., TR. 12-15). A hearing on the Buzzard Point rezoning and overlay is scheduled for Thursday, September 20, 2001.

19. At its April 16, 2001, meeting, the Commission decided to advertise for a further hearing, scheduled for July 19, 2001.

20. Only recently has there been any significant development interest in the Buzzard Point area. (TR. 18; Feb 12, 2001, Mtg., TR. 32-33).

21. The Applicant concedes that its prejudice due to the application of the set down rule was limited to having to wait several months until the final EEF rules were promulgated. (TR. 26).

22. A hearing on the EEF rulemaking was completed on May 7, 2001. On June 11, 2001, the Commission decided to delay until June 21, 2001, its vote on whether to take proposed action on the rulemaking.

23. Buzzard Point is part of the Anacostia Waterfront Initiative Project, which was officially announced on March 24, 2001. (TR. 18, 28). The Project, which is still in its formative stages, was created by a partnership among the District government, over a dozen federal agencies, and numerous community groups. It envisions an entirely new waterfront that will "unify the diverse waterfront areas into a cohesive and attractive mixture of commercial, residential, recreational, and open-space uses"[2]. Among the goals of the Project is to link neighborhoods to each other and to the Anacostia riverfront.

24. The Commission considers the land use decision regarding Buzzard Point one of the most important land use decisions this city has undertaken in 50 years. (TR. 28).

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[2] From the Anacostia Waterfront Initiative Project's Website: anacostiawaterfront.net.

## CONCLUSIONS OF LAW

The disposition of this case involves the interplay between two of the Commission's rules.

The first is the set down rule, codified at 11 DCMR § 3202.5. The set down rule explains how the Zoning Administrator is to process building permit applications filed when the Commission is considering amendments to the property's zone designation. It indicates that if a building permit application is filed prior to the Commission's decision to hear a map amendment, the application may be processed under existing zoning (11 DCMR § 3202.5(a)). [3] However, in order to preserve the *status quo,* applications filed after a decision is made to "set down" a map amendment for hearing are to be processed under the stricter of either the proposed or existing designation (11 DCMR § 3205(b)).

The second rule is the self-certification rule, 11 DCMR § 3113.2. Prior to the rule's adoption, no application for a special exception or variance could be filed unless the Zoning Administrator, in the course of reviewing a building permit application, had determined that either relief was needed. In 1999, the Zoning Commission adopted § 3113.2 to permit the applicant's attorney or architect to certify the need for zoning relief. Each self-certification includes an acknowledgement by the applicant that the Zoning Administrator is not bound by the self-certification. Thus, if the certification is in error, the building permit application may still be referred back to the BZA or the Zoning Commission, even if the erroneously requested relief was granted.

There is no dispute that this application was filed after the date on which the Commission decided to set down the Buzzard Point rezoning for hearing. Had the Zoning Administrator reviewed the matter, the building permit would have been processed as if the property were located in a CR District, and the Applicant would have been referred for a use variance, rather than the special exception requested. The Applicant, however, self-certified the underlying zoning as CM, a zone district in which special exception relief is available for EEF use.

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[3] The March 6, 1996, edition of the Zoning Regulations (DCMR, Title 11) does not correctly reflect the version of §3202.5 adopted by the Commission. The subsection should read as follows:

> (a) If the application is filed on or before the date on which the Zoning Commission makes a decision to hold a hearing on the amendment, the processing of the application and completion of the work shall be governed by subsection 3202.4; and ...

The relevant provision of section 3202.4 provides:

> Any construction authorized by a building permit may be carried to completion pursuant to the provisions of this title in effect on the date that the permit is issued ... .

Because self-certification is in lieu of Zoning Administrator review, an application that is self-certified is subject to the same processing rules that apply to the building permit application it replaces. The self-certification rule was never intended to require hearings when the certification is clearly in error, as is the case here.[4] Thus, this application must be reviewed as if the subject property is zoned CR. Because the emergency rule does not permit EEFs in a CR zone, the Commission cannot grant the relief requested.

The Applicant urges the Commission not to apply the set down rule in this case because more than four years has passed since the original decision to hear the matter. The Applicant argues that, due to the passage of time without final action, application of the Commission's set down rule has established a *de facto* permanent rulemaking without using the requisite notice and comment procedures contained in the Administrative Procedures Act, approved Oct. 21, 1968 (82 Stat. 1204; D.C. Code § 1-1501 *et seq.*) ("APA"), and § 5 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 798; D.C. Code § 5-417). The Applicant also advances an argument that the set down rule does not apply to special exceptions by virtue of 11 DCMR §§ 3202.6 & 3203.9. The Commission finds neither argument persuasive.

The set down rule is essential for the Commission to make meaningful zoning decisions. By preserving the status quo while a map amendment is being considered, the rule ensures that there is no sudden rush to develop in the face of the pending change, and allows the Commission to undertake the type of extensive deliberation often required when a map amendment is proposed. In fact, the safeguards embodied in the set down rule were initially encouraged by the Court of Appeals prior to the rule's promulgation.

In *Citizens' Ass'n of Georgetown, Inc., v. Washington*, 291 A.2d 699 (D.C. 1972), the District of Columbia Court of Appeals was petitioned to order the Zoning Commission to hold a hearing on interim map amendments intended to preserve the *status quo* in the Georgetown waterfront area in the face of a sudden interest in developing the area. Although the Court ruled that it lacked the jurisdiction to grant the relief, it noted: "It would be difficult to argue against the proposition that since rezoning of the area apparently will eventuate in the not distant future, no important construction should take place there before rezoning is accomplished, if this is avoidable." *Id.* at 703. The court further stated that it would be "natural to assume that . . . the Zoning Commission. . . would take whatever legal precautions that may be available to prevent this, lest well-laid plans for the Waterfront lose much of their expectation or worse, become futile exercise. And speaking of this, it is usually the first hole in the dike that brings the flood." *Id.*

In addition, the Court of Appeals in *Speyer v. Marion Barry*, " 588 A.2d 1147, n.19 (D.C. 1991), in a footnote, favorably cited a New Jersey Case, *Donadio v. Cunningham*, 277 A.2d 375, 382 (1971), which stated that municipalities should be afforded an opportunity to amend their zoning

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[4] In contrast, the BZA has heard cases where the self-certification appeared questionable, with the understanding that the Zoning Administrator would ultimately decide whether the relief was available. The defects in this self-certification are patent. It therefore serves no purpose to conduct a hearing where inevitably the Zoning Administrator would reject the application and refer the matter back for a use variance.

ordinances and appeal from adverse decisions, and that steps taken by landowners while such proceedings are pending should not result in the vesting of rights.

The Commission firmly believes that the proposed Buzzard Point overlay presents exactly the type of situation that the set down rule was designed to address. The Buzzard Point area has been the focus of an extensive map amendment process. Now, as the process is nearing completion, the Commission cannot allow the mere passage of time to allow an onrush of development to proceed under now obsolete zoning designations. This would completely undermine the process and make the Commission's final action with regard to this area a practical nullity. Furthermore, the Buzzard Point rezoning process is now central to the larger Anacostia Waterfront Initiative, which will decide the future of not only the Buzzard Point area but of the entire Anacostia River waterfront. Therefore, application of obsolete zoning designations could have adverse consequences for a very large and important portion of the District's land base.

The Buzzard Point rezoning is very much alive. The Commission advertised the proposed map and text amendments for further hearing in the June 1, 2001, issue of the *D.C. Register*. The advertised rule includes changes that stem from the Commission's discussions during its February, March, and April meetings of this year. As a result of these discussions, Squares 601, 602, 656, and 800, Lot 22 have been added to the proposed overlay area and Squares 700 and 701 are being advertised with alternative re-zonings of either BP/CR or BP/C-3-C. The advertisement explained the text changes as follows:

> After consideration of the record thus far, and after hearing from the Office of Planning, the Commission believes that further refinement of the previously advertised text is desirable. In particular, the Commission is concerned that matter of right development in the proposed BP/W-2 District may not be appropriate. Some degree of Commission oversight may be necessary to assure the fullest utilization of the open spaces resulting from mandatory setbacks. In addition, Commission review will offer a flexible mechanism for granting bonus density in recognition of the setback provided and for determining, in each instance, whether bonus density may be constructed on-site or may only be sent off-site through a combined lot development. To that end, the Commission is advertising provisions which would make all uses, building, and structures in the proposed BP/W-2 District subject to the Commission's approval as special exceptions. The portion of the advertised amendments that relate to properties abutting M Street has also been expanded, and an alternative version, which would subject such properties to special exception approval by the Zoning Commission, is also offered for public comment.

From the foregoing, it is evident that the Buzzard Point result is not dormant. It continues to represent the means by which this waterfront area can be beautified and invigorated. The application of the set down rule is therefore as important now as it was four years ago.

In addition, the Applicant was not in any way prejudiced during the time period following the set down of the proposed rezoning since it only recently proposed construction of an EEF. Up until the October 16, 2000 effective date of the EEF emergency rulemaking,[5] the Applicant could have constructed an EEF under CR zoning. Also, under the version of EEF rules currently being considered, the Applicant would still be able to request a special exception for an EEF, albeit for no more than 25% gross floor area. In fact, at the March 1, 2001, hearing, the Applicant conceded that its prejudice was limited to having to wait until a final version of such EEF rules were promulgated. Furthermore, because the Applicant still has an opportunity to comment on the proposed rules for Buzzard Point and EEFs, the protections afforded by the notice and comment provisions of the District of Columbia Administrative Procedures Act have been preserved. If the Commission were to decide to remove the Applicant's property from the overlay, or expand EEFs in CR districts, the Applicant could proceed as desired after publication of either final action.

The Applicant asserts that the Commission failed to apply the set down rule to the Florida Rock planned unit development ("PUD"), Zoning Commission Order Nos. 850 and 910, which is also in Buzzard Point and was approved after the proposed map amendment was set down. The Orders, the Applicant correctly notes, referenced the subject site as being zoned M, the zoning designation stated on the Zoning Map and not the designation proposed in the proposed rules. However, as noted above, the set down rule concerns the processing of building permits when a map amendment for the subject property is under consideration. It has no relevance in a request for map amendments, such as the Florida Rock PUD. The Commission had no cause to reference the zoning that could be applied to any building permit had the development proceeded under matter of right zoning.

Nor does the Commission agree with the Applicant's position that 11 DCMR §§ 3202.6 and 3203.9 make the set down rule inapplicable to special exceptions that are initiated through self-certifications. Sections 3202.6 and 3203.9 do indeed provide that building permits and certificates of occupancy issued pursuant to special exception orders may be processed in accordance with the zoning regulations in place at the time of the order. However, both rules were also promulgated well before the self-certification rule came into place. Thus, the rules were written at a time when no special exception was heard without a review by and referral from the Zoning Administrator. As noted earlier, had such a review occurred here, the application would have been processed in accordance with the proposed BP rezoning, and the Applicant would have been referred to the BZA for a use variance, not special exception relief. Thus, the rules relied upon by the Applicant were not intended to avoid the set down processing rule, but assumed such a review had already occurred. The Commission therefore does not interpret §§ 3202 .6 and 3203.9 as applying to special exceptions that are self-certified. Instead, as was done here, such special exception applications are reviewed in accordance with the set down rule.

In conclusion, up until October 16, 2000, the Applicant could have requested a special exception for an EEF. In a few months from now, it may once again be able to do so. Throughout this

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[5] ZC Order No. 929 (47 DCR 9775).

period, the Buzzard Point rulemaking has remained a pending and important matter before the Commission. In recent months, the Commission has taken measures to bring the rulemaking process to a conclusion. Given the Applicant's only recent interest in developing its property as an EEF, the impact of the set down rule on the Applicant has been slight. In contrast, to find that the application of the set down rule has somehow lapsed could nullify the Commission's hopes and efforts for Buzzard Point.

## DECISION

In consideration of the Findings of Fact and Conclusion of Law contained in this Order, the Zoning Commission for the District of Columbia **ORDERS** that Application No. 16661 be **DENIED**.

Vote of the Commission taken at a public meeting on March 1, 2001:

VOTE: **4-0-1** (John G. Parsons, Anthony J. Hood, Carol J. Mitten, Kwasi Holman, to deny, Herbert M. Franklin, not present, not voting)

This Order was adopted by the Zoning Commission at its executive session on July 26, 2001, by a vote of **3-0-2** (Carol J. Mitten, Anthony J. Hood, and John G. Parsons, to approve, Herbert M. Franklin, not present, not voting, Kwasi Holman, not present, not voting, no longer a member of the Commission).

In accordance with the provision of 11 DCMR 3028, this Order shall become final and effective upon publication in the District of Columbia Register on _____.

**BY ORDER OF THE D.C. ZONING COMMISSION**

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**ATTESTED BY:** _____
**JERRILY R. KRESS, FAIA**
**Director**
**Office of Zoning**

**FINAL DATE OF ORDER:** AUG - 6 2001

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

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**ZC APPLICATION NO. 16661**

As Director of the Office of Zoning, I hereby certify and attest that on AUG - 6 2001 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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**ATTESTED BY:**

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**Director**