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April 20, 2001

BY HAND

Ms. Sheila Cross-Reid
Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Room 210
Washington, DC 20001

D.C. Department of Consumer and Regulatory Affairs
2001 APR 20 PM 4:46

Re: BZA Case No. 16702; Georgetown Incinerator; 3100 South Street, N.W.; Square 1189, Lot 88

Dear Ms. Reid:

Pursuant to the Board's request at the conclusion of the April 17, 2001 hearing in the above referenced matter, attached you will find the following information:

1. Proposed Findings of Fact and Order along with a disc with the order;
2. Correspondence between Jonda McFarlane and Anthony Lanier regarding the possibility of including a roof top restaurant in the project;
3. Photograph of the site model;
4. Elevations for: (a) approved east side; (b) proposed east side; (c) approved west side; (d) proposed west side; (e) 31st Street; (f) K Street; and (g) Wisconsin Avenue;
5. Site plan; and
6. Transcript of April 19, 2001 Meeting of the Commission of Fine Arts.

BZA
Case No. 16702
Exhibit No. 57

Board of Zoning Adjustment
District of Columbia
CASE NO.16702
EXHIBIT NO.57

We are transmitting a copy of the Proposed Findings of Fact and Order to the Office of Zoning staff by e-mail to spruitt@dcoz.dcgov.org. Additionally, we are sending by hand delivery, the Citizen's Association of Georgetown and Advisory Neighborhood Commission 2E a copy of the above enclosures.

Sincerely,

ROBINS, KAPLAN, MILLER & CIRESI LLC

Richard B. Nettler

Jeannine Rustad Zigner

cc: Citizen's Association of Georgetown:
c/o Barbara Downs (by hand delivery)
Advisory Neighborhood Commission 2E

Government of the District of Columbia
Board of Zoning Adjustment

Application No. 16702 of the Millennium Georgetown Partners LLC, pursuant to 11 D.C.M.R. 3103.2 for two area variances pursuant to Sections 930.1 and 931.1 of the Zoning Regulations from the height and floor area ratio requirements, respectively, so as to permit the construction of a mid-rise, mixed-use development consisting of residential condominium, theater, hotel and retail uses at 3100 South Street, N.W. (Square 1189, Lot 88).

HEARING DATE: April 17, 2001
DECISION DATE: May 1, 2001

I. SUMMARY OF EVIDENCE:

1. The subject application was filed on February 2, 2001, by the Millennium Georgetown Partners LLC (hereinafter "Millennium"), for two area variances to allow construction of a mid-rise, mixed-use development consisting of residential condominium, theater, hotel and retail uses. The subject property is located in the W-1 zone district.

2. The purpose of the Waterfront district is to encourage diverse compatible land uses at various densities; including combinations of residential, offices, retail, recreational, and other miscellaneous uses. Waterfront districts are intended to be relatively self-contained by supplying a variety of housing, service, employment and recreational opportunities in one location. This characteristic allows one area to serve many different needs of a single population and to thereby reduce the amount of vehicular traffic generated by the uses in the districts.

3. Matter of right uses in the W-1 district include multiple dwelling, hotel, retail and theater uses. 11 D.C.M.R. §901.1. The W-1 district permits a maximum height of 40 feet, and a maximum density of 2.5 FAR, of which no more than 1.0 FAR may be in other than residential uses. The height for development on the site may be increased to 60 feet by the Zoning Commission if an application for a planned unit development had been pursued.

4. Under § 3100.1 of the Zoning Regulations (11 D.C.M.R.), the Board may approve an area variance, provided that the applicant meets the conditions specified in §3103.2 of chapter 31 of this title, including that: (1) the property is unique because of its size, shape or topography; (2) the owner would encounter practical difficulties if the Zoning Regulations were strictly applied; and (3) the variance will not cause substantial detriment to the public good and will not substantially impair the intent, purpose and integrity of the zoning plan.

5. The site is located within the midst of the waterfront area of the Old Georgetown Historic District and occupies the entire square bounded by Wisconsin Avenue, N.W. to the west, K (Water) Street, N.W. and the Whitehurst Freeway to the south, 31st Street, N.W. to the east and South Street, N.W. to the north. The Property overlooks the Potomac River. The Property contains 99,661 square feet (2.10 acres) of land and is the site of, *inter alia*, the former Bayou Club, two Copperthwaite Lane houses, the landmark Brickyard Hill House and the Georgetown Incinerator.

6. There is a steep slope of twenty (20) to thirty (30) feet between South and K Streets, N.W. The site is comprised of predominantly rock and, due to the property's location on the waterfront and the extensive excavation required for the construction of the parking and theaters, there is a need to construct under the water table. Uses below the water table along K Street are restricted. Additionally, the property is located adjacent to the elevated Whitehurst Freeway, which also restricts the placement of uses on the site.

7. The Georgetown Incinerator, an Art Deco-style building, is located on the eastern portion of the site. Erected in 1932, the Georgetown Incinerator has been out of operation since 1971. The Incinerator has been declared a contributing building to the Old Georgetown Historic District. Since it ceased operation, the Incinerator has been the subject of many procurements by the District of Columbia to identify a re-use of the building. Prior to the award of a contract to Millennium to purchase and develop the building, those procurements did not produce any feasible development projects.

8. Other historic buildings on the site include the Brickyard Hill House, an historic landmark, and two associated structures, known as the Red House and 3133 Copperthwaite Lane. The Brickyard Hill House, which was constructed by the first Mayor of Georgetown, and associated structures have been moved off-site, across the street during the construction of the project, and will be returned to the site upon completion of construction.

9. The area to the north of the Property is predominantly characterized by low-scale, federal-style residential townhouses. Also located to the north of the Property is the Grace Church. The waterfront, which is located to the south of the property, as well as the area to the east and west of the Property, is characterized with modern, large-scaled commercial structures.

10. The proposed development, which is currently under construction, will consist of a 91-suite Ritz Carlton hotel, a multi-theater cinema, retail, 28 residential condominiums and an underground garage which contains 355 parking spaces and is designed to accommodate valet parking for 600 cars. The development is a single building under the definition of the Zoning Regulations. However, it has been designed to appear as several separate buildings so as to be compatible with the surrounding historic district. As such, the project will consist of several mid-rise residential and hotel "buildings" grouped around a plaza, with the Incinerator and smokestack in the center. The theater occupies a predominant portion of the development. The retail portion will be built on the corners of 31st and K Streets, and Wisconsin Avenue and K Streets, with the theater fronting mid-block along K Street, with parking in the inner core. The residential elements of the project will overlook the Whitehurst Freeway and offer views of the Potomac River.

11. In early 1997, Millennium was selected by the Department of Housing and Community Development ("DHCD") to develop the site. Millennium's proposal was selected because of its housing, theater, retail and parking components. During the summer of 1997, the sale of the surplus Incinerator site was reviewed by the District of Columbia Financial Responsibility and Management Assistance Authority, the Council of the District of Columbia and the National Capitol Planning Commission ("NCPC"). Because the sale involved a contributing building to the Old Georgetown Historic District, the NCPC referred the matter to

the Advisory Council on Historic Preservation for review under § 106 of the National Historic Preservation Act of 1966. That review resulted in the imposition of an historic preservation covenant which governs the rehabilitation of the Incinerator and redevelopment of the site.

12. Since preservation of the Incinerator and construction of new parking underneath the Incinerator was not feasible, Millennium purchased the remaining portion of square 1189 from private property owners for the principal purpose of constructing the underground parking and meeting other programmatic requirements of DHCD. The construction of this additional parking on the Incinerator site mitigates the loss of the present parking along that portion of the Potomac River in Georgetown which has been transferred to the United States Park Service for conversion into a park.

13. In 1998, Millennium's proposal received extensive review and approval from government and neighborhood organizations, including DHCD, the Office of Planning, Advisory Neighborhood Commission 2E, the Old Georgetown Board ("OGB"), the Commission on Fine Arts ("CFA"), the Georgetown Business and Professional Association and neighboring property owners, such as Grace Episcopal Church. On May 7, 1998, OGB gave conceptual approval to the proposed development and on June 22, 1998, the CFA did as well, including recommending the approval of the demolition of some of the buildings formerly on the site, as non-contributing to the historic district. Preliminary permits for the demolition of those buildings were filed in June 1998, on behalf of their current owners, and the demolitions were formally approved by the OGB on July 9, 1998. The project was then reviewed by the DHCD Architectural Review Panel, the Mayor's Agent for D.C. Law 2-144, and the Historic Preservation Review Board. An alley that bisected the project was closed by the Council, and, because of the size of the site, the project was also reviewed by the Office of Planning under its Large Track Review regulations.

14. In its review of the project, the Mayor's agent concluded that "the project constitutes a project of special merit" for the following reasons. (a) it provides for full building restoration of four historic buildings including an historic landmark; (b) the uses selected through a open competition provides the greatest benefits to the community and the city; (c) other than the existing Convention Center, the project benefits far exceeds those proposed for other special merit projects; (d) the proposed project goes far beyond what could be built as a matter of right to address arts, retail, residential and parking issues which have a high priority in Georgetown; and (e) the project will provide vitality for a neglected area.

15. Although Millennium could have obtained a waiver from any or most of its parking requirements because of the existence of the historic structures on the site, Millennium is providing 355 parking spaces and the parking garage is designed to accommodate valet parking for 600 cars.

16. Millennium, through Anthony Lanier, testified as to the need to subsidize the theater use due to the current financial condition of the theater industry. Mr. Lanier testified that Loews Cineplex Entertainment Corp. ("Loews") had been selected to manage the theater complex and, in return, had committed to contribute $25 million to the build-out of the theaters and $1.75 million in annual rent. However, in early 2001, Loews filed for protection under the Chapter 11 of the Bankruptcy Code and, as a result, is unable to make these financial

contributions. According to Mr. Lanier, in the absence of the promised capital from Loews and the promised income stream from a lease of the space for movie theaters, Millennium is unable to obtain further construction financing without additional assurances regarding the viability of the project. Millennium investigated other solutions for making the project feasible, including replacing the theaters with a K-Mart. However, because the theater portion of the development, which has a volume equivalent to three stories, is under the Whitehurst Freway and under the water table, other retail uses and residential uses could not be substituted for the theaters. Given Millennium's success in developing condominiums, the solution was to add additional residential units. However, because of the historic preservation limitations imposed on the site, by virtue of the existence of four historic buildings, including a historic landmark, the development of six additional residential units and the conversion of unusable space within the existing project could not be accomplished without resorting to the need to obtain the subject zoning relief.

17. Mr. Lanier also testified as to the additional restrictions and requirements imposed on the development of the property by the District, including the requirement to include at least 100,000 square feet of residential space, 30,000 square feet of retail uses and parking for 250 cars, plus one parking space per additional 500 square feet of additional land area. Mr. Lanier testified that, in order to accommodate the parking requirements while protecting the Incinerator, Millennium acquired the adjacent sites in Square 1189. With regard to the theater use, Mr. Lanier testified that DHCD considered the theater use an important amenity because of the dearth of theaters in the District and its positive impact on the Waterfront.

18. Loews submitted a letter to the Board outlining its current financial condition. According to Lowes, the movie theater industry has experienced severe financial hardship. Ten theater circuits have filed for bankruptcy and others are in default. In addition, the District is one of the few major metropolitan areas that does not have a major modern multiplex. In order to remain competitive with the suburbs, the District needs to have multi-screen theaters. Loews stated that, despite its inability to make the financial contributions to the project, it remained committed to opening and managing a theater complex in the project, and that it considered this an important project. [According to Mr. Lanier, despite the economic condition of Loews, Loews would still manage the theater complex within the project for a fee but would no longer contribute toward construction or pay the lease amount agreed to prior to its bankruptcy.

19. Millennium's architect, Shalom Baranes of Shalom Baranes Associates, was accepted as an expert in architecture. Mr. Baranes testified as to the design of the project and its relationship to the difficulties presented by the nature and uniqueness of the property.

20. Mr. Baranes explained that a plaza was designed to maintain the three-dimensional sense of the Incinerator and to provide maximum visual access from several directions, all focusing on the smokestack of the Incinerator. Additionally, the project has been designed to maintain a view shed of the Incinerator from the south of the property, which view shed is visible across the Potomac River. Mr. Baranes testified that the exterior of the Incinerator will be carefully restored to its original condition and will be renovated and adapted for hotel common areas.

21. Mr. Baranes explained that the project has bee designed as a single building under the Zoning Regulations. However, by taking advantage of the steep slope of the site, the project has been developed so as to appear to be comprised of several buildings, so as to be compatible with the surrounding historic district. With regard to the architectural style of the elements of the project, Mr. Baranes explained that they have been designed to bear a close relation to the architectural design of the Incinerator, while also maintaining their own clear and distinct identity. The intent of this style is to bridge the Incinerator's deco styling and the more prevalent federal style of Georgetown by combining elements of both styles. With regard to the scale of the project, Mr. Baranes explained that the proposed massing of the project has been designed so as to blend with the surrounding structures and to provide a transition between the residential townhouses to the north and the modern, large-scale commercial developments to the south. Mr. Baranes illustrated the compatibility of the height of the building with the surrounding neighborhood through the use of an elevation of the buildings along K Street, NW, which reach elevations of up to 117 feet.

22. Mr. Baranes testified that the site presented difficulties in designing the project due to its steep slope, as well as the Whitehorse Freeway. These elements combined to create an area which is not pedestrian friendly and created a challenge as to the type of use that would be successful in this area. Adding further challenge as to the type of use that could be placed in this location was the composition of the site (i.e., rock), as well as the need to construct below the water table. Mr. Baranes noted that rarely does a property present the challenges of the need to both blast through rock as well as the need to construct below the water table. Mr. Baranes testified that the theater use was an ideal use for this area, as it would attract a large amount of pedestrians to the area, allowed for the use of its parking by other businesses and residents during the day and did not have the same restrictions from being located below the water table.

23. With regard to the slope of the property, Mr. Baranes testified that the plans of the buildings have been organized to take advantage of the steep sloping nature of the site. The lower subterranean levels step up the hill around the Incinerator. Careful attention has been given to the heights of the new buildings so that they are consistent with the heights of the roofs of the buildings surrounding the Property. The theaters and retail space will occupy the southern part of the development below the Whitehurst Freeway, with the residences above. The hotel portions of the project, which will be accessed through the Incinerator, are on South Street, Wisconsin Avenue and 31st Street, N.W. The entrances to the cinemas, commercial parking and loading docks will be from K Street, N.W. By placing the theater entrance along K Street, N.W., the project has been developed to create major pedestrian access to the south side along K Street, N.W.

24. With regard to the historic structures and nature of the site, Mr. Baranes testified that, in addition to replicating the Copperthwaite Alley viewshed, preserving the Incinerator and its accompanying smokestack in their entirety, the historic Brickyard Hill house and two associated alley dwellings will be restored and relocated along South Street, N.W. Pedestrian and automobile access to the hotel and condominiums will also be from South Street, N.W. In addition to preserving the historic houses and creating the historic precinct, Mr. Baranes explained that Millennium agreed to maintain the interior open space of the Incinerator. Mr. Baranes explained that, if Millennium were able to demolish the Incinerator and the historic

buildings, or utilize the open space surrounding the historic buildings, Millennium would be able to provide additional uses to subsidize the theaters without the need for zoning relief. For example, if the open space being preserved within the Incinerator were available for use, an additional three (3) to four (4) floors could be provided within that space. Mr. Baranes testified that, as a result of the loss of the financial support from Loews, Millennium was unable to comply with Zoning Regulations while also complying with its obligations to the City. Mr. Baranes testified that the development constraints and the nature of the site precluded utilization of non-variance methods for subsidizing the theater use and development. Mr. Baranes testified that, after studying the project, the solution was to convert unusable space in the existing development to usable space, including more parking, and insert an additional floor plate into the two (2) residential condominium elements of the development. Mr. Baranes testified that the effect of this modification was to increase the height of the two (2) residential buildings by ten percent (10%), as well as the allowable gross floor area of the project from 2.48 FAR to 2.89 FAR. Any visible changes are significantly set back from South Street, N.W. and will be minimally visible from the Waterfront and invisible from K Street, N.W.

25. In response to the community's concern regarding the additional height in the residential portions of the building, Mr. Baranes testified that the design of the residential elements were modified to include set backs along Wisconsin Avenue, N.W., 31st Street, N.W., as well as to the east and west of the Incinerator view shed. Mr. Baranes explained that the set backs along Wisconsin Avenue and 31st Street were provided in response to concerns raised by the Citizen's Association of Georgetown ("CAG"), while the set backs to the east and west of the view shed of the Incinerator were provided at the request of the Old Georgetown Board, which had approved the design without the setbacks along Wisconsin Avenue and 31st Street.

26. Mr. Baranes also addressed several points made in the letter submitted to the Board by CAG. First, Mr. Baranes explained that the open space surrounding the historic buildings on the site has gotten larger and that he didn't understand how CAG could support its allegation that such open space had all but been eliminated. Second, Mr. Baranes explained that Millennium never proposed to place a restaurant on the roof of the Incinerator and that the restaurant contemplated for the top mezzanine of the Incinerator was moved to a lower location in order to preserve the open space within the Incinerator. Mr. Baranes explained that Millennium never included a roof top restaurant in any plans due to the requirements for safety, which would require the construction a large stairwell for egress in case of emergency. This testimony was supported by a letter submitted to the record by Jonda McFarlane, former Chairman of Advisory Neighborhood Commission 2E. Lastly, Mr. Baranes testified that, contrary to the statement in CAG's letter that the setbacks from the adjoining streets had been reduced, setbacks had been increased as a result of the community's concerns.

27. Millennium's architect, Carrie Alice Johnson of Gary Edward Handel & Associates, testified as to the modifications to the interior of project in response to Millennium's need to subsidize the theater use. Ms. Johnson testified that the additional residential units were added by inserting an additional floor plate into the two (2) residential elements of the development and utilizing existing interior open space in those buildings. By using the existing open space for residential purposes, the FAR of the overall project was increased. Ms. Johnson explained that, in order to save on construction costs, the plans regarding mechanical equipment for the theaters were modified so as to add a concrete slab to previously open space upon which

the mechanical equipment will sit. Although this created significant savings in the construction costs eliminating the need to add additional amenities (and therefore additional height) to the project, due to the heavy weight of the equipment, it added to the FAR of the project. Ms. Johnson explained that ten (10) additional parking spaces are also provided by utilizing existing interior open space. However, such use did not contribute to the additional FAR, as these spaces are located below grade.

28. Emily Eig of EHT Traceries, Inc. was accepted as an expert in architectural history on behalf of Millennium. Ms. Eig testified as to the preservation of the historic structures on the site, including the Incinerator, Brickyard Hill House, the Red House and a former stable previously located along Copperthwaite Lane. Ms. Eig explained that the Brickyard Hill House and associated structures were being preserved and had been moved across the street, off the site during construction and would be returned to the site upon completion of construction. The Brickyard Hill House was for Robert Peters as rental property, circa 1802-1806. Peters, the first Mayor of Georgetown, owned the entire square, and this building stands as one of, if not, the oldest wood-frame and brick nogging building in Georgetown. It is designated as an individual historic landmark in the District of Columbia. Ms. Eig explained that the Brickyard Hill House would be returned to its original location and the two associated structures would be returned to approximately their previous locations. Millennium has agreed to maintain open spaces around these historic buildings so that location of these historic buildings, as well as the Incinerator, is designed so as to create an historic precinct. In addition to creating this historic precinct, a covenant had been placed on the property prohibiting the demolish of the Brickyard Hill House and associated structures, as well as prohibiting the use of the open space within the Incinerator.

29. Ms. Eig testified that the increase in height proposed for the new construction will not have a negative impact on the historic resources on site, nor on the Old Georgetown Historic District. The additional height proposed does not take away from the unique character of this site, but rather improves the architectural character of the new building. The change in design better distributes the building mass, allowing for a more articulated volume—including a modulation of roofscape forms and setbacks, as well as varied heights from the street. The existing development surrounding the project includes Washington Harbour (3020 K Street); Jefferson Court (1025 Thomas Jefferson Street); Dodge Center (1000 Wisconsin Avenue); The Paper Mill, 3251 K Street/3250 Grace Street; Flour Mill, 3261 K/1000 Potomac Street, Office Building, 3333 K Street/1001 34th Street. These buildings are of a large scale, massing, volume, and height, several of recent construction, all representative of a type compatible with the industrial rather than residential character of Georgetown. According to Ms. Eig, the profile of these buildings follows the bold geometry of 20th-century industrial architecture. Large, strong forms, often incorporating earlier structures, built of solid materials, generally employing brick, metal, and stone to form their mass rather than the brick and wood of earlier periods. These structures are larger and taller than their commercial and residential neighbors above M Street, but are compatible to one another, to the waterfront, their part of the Historic District. Ms. Eig also stated that the increase in height is consistent with the character of the continual response to new uses and requirements, is not inconsistent with the historic district in this area, and is not harmful to the historic resources in its immediate environs.

30. A traffic report, which had been prepared in conjunction with the Department of Public Works in 1998, was submitted by Millennium. According to this report, the peak demand for parking occurs during the weekdays between the hours of 1:30 p.m. and 3:00 p.m. During the early evening hours, the demand for off-street parking drops significantly, and parking lots in the surrounding area have a forty percent (40%) to sixty percent (60%) vacancy rate. As a result, the project's parking, along with other parking facilities within the area, should satisfy nighttime demands generated by the development of the theater amenities, while contributing significant extra daytime parking capacity for the area.

31. Letters of support were received from the Waterfront Center Limited Partnership, which is the owner of the Waterfront Center office building located at 1010 Wisconsin Avenue, N.W.; Grace Episcopal Church, which is located directly across South Street, N.W. to the north of the site; and other neighboring property owners. Additionally, many neighboring property owners signed a petition in favor of the application.

32. The Reverend David Bird of Grace Episcopal Church testified in favor of the application and requested a speedy decision so that construction could continue.

33. Dorothy Miller, a resident of Columbia Plaza in Foggy Bottom testified in opposition of the application. She testified that the Incinerator uses will exacerbate traffic around Washington Circle. However, she was unable to explain how the increased height or FAR would result in this condition.

34. By letter dated March 7, 2001, the DHCD, which has been involved with the project since 1996, when it offered the site for development, strongly supported the variance requests. The DHCD letter emphasizes the importance of the movie theater complex and the need to add the extra floor of residential units in order to maintain the viability of the project. Additionally, Jim Thackaberry testified on behalf of DHCD on behalf of Millennium. Mr. Thackaberry testified as to the development constraints imposed on Millennium with regard to the required uses of the property. Mr. Thackaberry testified that the theater was important to the project, as well as the waterfront, Georgetown and the District, as it was viewed as an anchor to attract people back to this area of the waterfront.

35. The National Park Service, Department of the Interior, submitted a letter in support of the application. The Park Service stated that the project will provide substantial parking, which is necessary in light of the Park Service's commitment to close the Harbour Parking facilities in order to convert the area into a park. A letter of support was also received from the Waterfront Commission. **[?]**

36. The site of the application is located within the jurisdiction of ANC 2E. ANC 2E, which is automatically a party to this application, submitted a written statement stating that, although it was concerned about the added massing and height of the revised project, it did not object to the requested relief and would rely on the Commission of Fine Arts and the Old Georgetown Board regarding height and sight lines.

37. The Citizen's Association of Georgetown ("CAG") requested party status in opposition to the application. Party status was granted, conditioned upon submission of a

copy of CAG's bylaws evidencing that the board of CAG was authorized to take action in opposition to the application and evidence that there members of CAG located near or adjacent to the site. CAG's opposition to the application was based upon its concern regarding the visual impact of the increased height of the project and its prior support of the rezoning of the site and surrounding area to W-1.

38. Barbara Downs testified on behalf of CAG. Ms. Downs testified that CAG has, for a long time, been in support of Millennium and its various projects in the Georgetown area. Ms. Downs admitted that Millennium has had many meetings with the community, including CAG, regarding the design and development of the project. Ms. Downs commended Millennium on its preservation of Incinerator, Brickyard Hill House and associated buildings, as well as Millenniums provision for extensive parking. However, Ms. Downs testified that the board of CAG was concerned about height of the project and the reliance on financial "hardship" to justify the requested variances. Without offering any support or evidence, Ms. Downs alleged that granting the variance would be tantamount to rezoning the site and would create precedent for other developers faced with "economic inconveniences." Ms. Downs also stated that it did not matter whether Millennium met the criteria for an area variance, CAG could not support any increase in height above 40 feet and that, even though the increased FAR inside the project was invisible, it could not support that variance request either.

39. Ms. Barbara Zartman also testified on behalf of CAG. Ms. Zartman alleged that Millennium had previously promised to include a roof-top restaurant on the Incinerator and that the inclusion of this restaurant had justified some of the height of project. However, on cross examination, Ms. Zartman admitted to having never seen any plans which included such a restaurant nor had been present at any meetings in which Millennium had made any representations regarding the inclusion of a roof-top restaurant.

Ms. Zartman further alleged that the site had been zoned W-1 with the anticipation that the buildings in the waterfront along K Street, N.W. would not have a height over forty (40) feet. However, on cross examination, Ms. Zartman acknowledged that Millennium was entitled to measure the height of the building from South Street, the elevation of which was significantly higher than K Street.

Ms. Zartman also alleged that Millennium had agreed to provide public space in the core of the site, which public space had been deemed by the City Council to be "glorious public space from the core of the building", but that this public space had "all but disappeared" and was not public. On cross examination, Ms. Zartman acknowledged that this public space was depicted on Millenniums present plans.

Lastly, Ms. Zartman claimed that what troubled many people about the project was not the additional floor, but what had already been approved during the reviews of the project in 1997 and 1998.

40. The Commission on Fine Arts ("CFA") submitted a letter in opposition to the application based upon its belief that the increased height of the project was in violation of the height restriction established for the site. The CFA had not yet had an opportunity to review the re-design of the project when it submitted the letter. At its meeting on April 19, 2001, the

CFA stated that it had no discretion to approve of an increase in the height of the project and left that to be determined by the Board of Zoning Adjustment.

41. By Memorandum dated April 9, 2001, and testimony at the hearing, the Office of Planning recommended that the requested height and FAR variances be granted. The Office of Planning noted that the Incinerator project was an important project to the District and the Georgetown area, especially the waterfront, and has undergone an intensive process of agency reviews and community consultation. The Office of Planing stated that the development of the site has been impacted by its steep slope, as well as the historic preservation requirement of retaining and respecting the Incinerator Building, retaining historic buildings (the Brickyard Hill House, the Red House and 3133 Copperthwaite Lane) and providing open space around the historic buildings. The result of retaining the historic buildings and providing open space around them is that these combined spaces requires a large area of approximately thirty-three percent (33%) of the total site area. It was the opinion of the Office of Planning that the variances could be granted without causing substantial detriment to the public good. The Office of Planning stated that the additional height had limited visual effect, and that the set backs provided on Wisconsin Avenue and 31st Street, N.W. in response to the community's concerns adequately addressed such concerns.

42. Andy Altman, Director of the Office of Planning testified in support of the application. Mr. Altman stated that this was an important project to the District which will provide many substantial benefits to the city. Mr. Altman noted that when the W-1 zone district was adopted for this site, it was expected that there would be flexibility with regard to the height restrictions. Mr. Altman further noted that regulations for a planned unit development (PUD) for the site provide for a height of sixty (60) feet and an FAR of 3.0. Although Millennium has not requested approval of a PUD for the site, Mr. Altman pointed out that the project has received as much, if not more review, than what is usually bestowed upon an application for a PUD. In light of the provisions in the PUD regulations for additional height and FAR, as well as the contemplation by the Zoning Commission in rezoning the site to W-1 that there would be flexibility with regard to height, Mr. Altman stated that the requested variances were consistent with the Zoning Regulations and map. Accordingly, Mr. Altman requested an expedited decision in favor of the application.

43. The Department of Public Works submitted a letter in support of the application. DPW stated that the addition of six more residential units would have no adverse effect on traffic or parking and reiterated its support for the traffic and parking analysis previously reviewed by it during the Large Tract Review process.

II. PROPOSED FINDINGS OF FACT:

Based on the evidence of record, the Board finds the following:

44. The Incinerator project is an important project to the District, Georgetown and the waterfront. The project was initially designed to be a matter-of-right project. Integral to the project and the decision of the DHCD to award the development of the site to Millennium was the inclusion of theater and residential uses.

In order to meets its obligations to preserve the Incinerator and provide a significant amount of parking, Millennium purchased the remainder of the square. Covenants were placed on the Property requiring the preservation of the Incinerator and detailing the uses and minimum square footage for the uses required for the project. The Deed restrictions require Millennium to provide in the Incinerator project at least 100,000 square feet of residential space, 30,000 square feet of retail uses and parking for 250 cars, plus one parking space per additional 500 square feet of additional land area, although, because the Incinerator is an historic building, the zoning regulations provide a waiver from the parking requirements.

45. The Board finds that the covenants regarding the development of the property prevent Millennium from providing the necessary additional uses without requiring zoning relief. For example, if applicant were able to use the interior space of the Incinerator, an additional three (3) to four (4) floors could be provided for within that space, thus eliminating the need for a height variance.

46. The Board finds that the Zoning Commission, in rezoning the site to W-1 in 1973, did not contemplate that the Board would be divested of the authority to grant area variances in appropriate circumstances, and, understood that, in other circumstances, the height and FAR of a development in the W-1 zone could be increased. This is supported by the Zoning Commission's findings of fact regarding the rezoning, as well as the provision in the zoning regulations for an increase in height to sixty (60) feet and an FAR of 3.0 for planned unit developments. The Zoning Commission did not authorize similar increases in height in the W-2 and W-3 zones.

47. The Board finds that location of the elevated Whitehurst Freeway along with the steep slope of the site make the area along K Street, N.W. unfavorable to pedestrian traffic and, consequently, unfavorable for development or alternative uses.

48. The Board finds that the theater industry in general has recently experienced severe economic problems, resulting in many companies in the industry, including Loews theater, filing for protection under Chapter 11 of the Bankruptcy Code. As a result, the Board finds that Loews is unable to contribute the $25 million it had previously committed to the build out of the theater element of the project and $1.75 million in rent on a yearly basis.

49. The Board finds that, despite its current financial condition and inability to contribute to the build out of the theater complex, it will operate the theater complex upon completion of the project.

50. The Board finds that there are practical difficulties in developing the property which arise from the uniqueness of the property, including the topography of the property, the historic landmark buildings required to be preserved, the water table, the Whitehurst Freeway, the requirement of open space around the historic buildings, the preservation of the Copperthwaite Alley view shed, the additional parking requirements mandated by the Department of Housing and Community Development and the other deed restrictions on the development of the property, as well the financial condition of the theater industry.

51. The Board finds that the CAG did not offer evidence to support its allegations that the requested variances will substantially impair the intent, purpose, and integrity of the Zoning Regulations and Map are cause harm to the surrounding neighborhood.

52. Millennium has addressed the community concerns regarding the additional height of the two (2) residential buildings by providing set backs of the additional height.

53. The impact of the additional height is minimal, as it affects only twenty-three percent (23%) of the site area of the Incinerator project and has little visual impact.

54. The height of the project is consistent with the surrounding neighborhood.

55. The Office of Planning, Department of Public Works, Department of Housing and Community Development, Waterfront Commission and the National Park Service have recommended that the Board approve the height and FAR variances for the project.

56. The project has received support from the Waterfront Center Limited Partnership, which is the owner of the Waterfront Center office building located at 1010 Wisconsin Avenue, N.W.; Grace Episcopal Church, which is located directly across South Street, N.W. to the north of the site; and other neighboring property owners.

57. The project is currently under construction and scheduled to be completed in early 2002. However, without the requested relief, the project cannot be completed.

III. CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing findings of fact and evidence of record, the Board concludes that Millennium is seeking two area variances pursuant to Sections 930.1 and 931.1 of the Zoning Regulations from the height and floor area ratio requirements, respectively, so as to complete the construction of a mid-rise, mixed-use development consisting of residential condominium, theater, hotel and retail uses at 3100 South Street, N.W. (Square 1189, Lot 88). Granting such variances requires a showing that the strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulty upon the owner arising out of some extraordinary or exceptional condition of the property, such as exceptional narrowness, shallowness, shape, or topographical conditions. D.C. Code § 5-424 (g)(3). Further, the Board must find that the application will not be of substantial detriment to the public good and will not substantially impair the intent, purpose, and integrity of the Zoning Regulations and Map.

The Board is thus empowered to grant an area variance where it finds three conditions:

(1) The property is unique because, *inter alia*, of its size, shape or topography;

(2) The owner would encounter practical difficulties if the zoning regulations were strictly applied;

(3) The variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zoning plan.

Roumel v. District of Columbia Bd. of Zoning, 417 A.2d 405, 408 (D.C. 1980); *see also Association For The Preservation Of 1700 Block Of N Street, N.W. v. Board of Zoning Adjustment*, 384 A.2d 674, 678 (D.C. 1978)(the applicant must demonstrate that compliance with the area restriction is unduly burdensome and the practical difficulties are unique to the property).

Reviewing the criteria for an area variance recently, the Court, in *Capital Hill Restoration Society, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939, 941-942 (D.C. 1987), stated that the

> threshold requirement to show that the property is unique with respect to the hardship or difficulty asserted as grounds for the variance means the property owner must present proof that "the circumstances which create the hardship *uniquely* affect the *petitioner's property* * * * ." *Taylor, supra* note 6, 308 A.2d at 234 (emphasis in original).

Id.; see also Russell v. Board of Zoning Adjustment, supra, 402 A.2d at 1235 (the requirement that the practical difficulty be caused by the uniqueness of the property "insures relief for problems peculiarly related to the * * * land or structure, and not shared by other property in the neighborhood, thus avoiding a de facto amendment of zoning laws.").

Millennium must demonstrate that compliance with the area restrictions is unduly burdensome and the practical difficulties are unique to the site. In finding an extraordinary or exceptional condition, the Board may rely upon a confluence of factors. Thus, a condition inherent in the structures built, rather than in the land itself, may also serve to satisfy an applicant's burden of demonstrating uniqueness. Here, the site is indeed unique, as that term has been applied for area variances, and a practical difficulty does result from the strict application of the Zoning Regulations. Moreover, given the fact that the requested relief affects less than twenty-five percent (25%) of the site area of the Incinerator project and has little visual impact, the departure can accurately be described as minimal.

The difficulty in complying with the Zoning Regulations are due to unique circumstances peculiar to the Incinerator site.

1. The topography and construction conditions inherent in the Property create a practical difficulty for development consistent with the dictates of DHCD. The slope of the site between South and K Streets, N.W. is between twenty (20) and thirty (30) feet. There are few other developable sites in the city with this condition. Further complicating matters is the nature of the site, which is predominantly rock, as well as the need to construct under the water table. Lastly, the Property is located adjacent to the elevated Whitehurst Freeway.

2. The Property is improved by the landmark Brickyard Hill Houses and the Incinerator, a contributing building within the Old Georgetown Historic District. In total, four (4) historic buildings are required to be preserved and incorporated into the development. These factors are unique to the site. In a similar context involving the Corcoran Art Gallery, the court, in affirming a decision of the Board, made it clear that, while historic buildings within a historic district may have characteristics which are shared by all buildings within that district, "the landmark status of a single building is legally predicated on the unique attributes of that building." *United Unions v. Board of Zoning Adjustment*, 554 A.2d 313, 317 (D.C. 1989). For that reason, the court and the Board further recognized that the "designation as an historic landmark reflects characteristics of exceptional design requiring special treatment in the planning of contiguous structures and additions." *Id.* That situation equally applies to Millennium's property. Furthermore, there is no other structure in the historic district that has the qualities of the Incinerator and presents the challenges of developing adjacent to it. The Georgetown Incinerator, which was previously abandoned and has suffered severe deterioration, is being preserved and the project designed so as to respect it. For example, buildings have been designed so that no roofline is higher than the Incinerator smokestack. The requirement that it be preserved precludes construction of any portion of the project underneath it. Similarly, the preservation of the Brickyard Hill Houses requires Millennium to forego development of the available FAR that is utilized by those buildings.

3. In addition, as already noted, when the Property was transferred from the District to Millennium, the Deed restrictions require Millennium to provide in the Incinerator project at least 100,000 square feet of residential space, 30,000 square feet of retail uses and parking for 250 cars, plus one parking space per additional 500 square feet of additional land area. Because the Incinerator is an historic building, the Zoning Regulations provide a waiver from the parking requirements. Notwithstanding that relief, Millennium agreed, in order to protect the Incinerator and provide the parking, to acquire the adjacent sites to fulfill DHCD's development requirements. Additional restrictions on the development of the Property includes the requirement of the preservation of the former Copperthwaite Alley view shed.

4. Integral to Millennium's proposed project is the inclusion of the theater use. The DHCD sought this use when it awarded Millennium the right to develop the Property. However, because the cinema industry has recently suffered financial hardship, it has become increasingly difficult to preserve the theater use. Thus, the variances sought, and the additional residential units that will be provided through the variances, are necessary to subsidize the theater use on the site.

Clearly, the development of the Property offered many challenges from the outset, both from the nature of the Property, as well as the requirements imposed by the District. Thus, practical difficulties to Millennium arise from the uniqueness of the Property. That is, the topography of the Property, the historic landmark buildings required to be included in the project, the preservation of the Copperthwaite Alley view shed, the additional parking requirements mandated by DHCD and the deed use restrictions. As a consequence, when the theater component to the project went bankrupt, Millennium developed practical difficulties in complying with the Zoning Regulations in order to comply with its obligations to the City because the unique factors present at the site precluded utilization of non-variance methods for subsidizing the theater use and development.

After studying the project, the solution was to insert an additional floor plate into the two (2) residential condominium buildings and utilize existing interior open space in those buildings so as to allow for the provision of additional residential units, as well as additional parking. The additional residential units will allow for the subsidization of the theater use of the site by significantly reducing construction costs, thus making the project viable.

The economic considerations that have forced Millennium to seek relief are relevant to the practical difficulty aspect of the area variance issue. In *Tyler v. District of Columbia Board of Zoning Adjustment*, 606 A.2d 1362, 1367 (D.C. 1992), the court held that the Board could rely on economic factors to evaluate this issue, even if it was not relevant to the uniqueness issue. *Id.* at 1365-1366. In *Tyler*, the court held that the Board had failed to demonstrate how the admittedly unique factors applicable to the property in that case also created practical difficulties. Rejecting petitioners' claim that the Board could not rely on economic factors, the court merely stated that it could not determine whether the decision was based on non-economic or economic factors where, in its decision, the Board had rejected the economic justification. *Id.* at p. 1365-1366. With regard to economic considerations, the court said that it eliminated, in its decision in *Gilmartin v. Board of Zoning Adjustment*, 579 A.2d 1164, 1170 (D.C. 1990), "any doubt that '[e]conomic use of property' may properly be 'considered as a factor in deciding the question of what constitutes an unnecessary burden or practical difficulty in [area] variance cases . . . '". *Id.* at 1367. *See also Wolf v. Board of Zoning Adjustment*, 397 A.2d 936, 943 (D.C. 1979) (Board properly granted area variance to permit conversion to three-unit apartment where "marketability" of property would otherwise be "unfeasible" and investment would yield loss rather than profit). *See generally* Arden H. Rathkopf & Darren A. Rathkopf, The Law of Zoning & Planning § 38.04, at 38-48 to 38-53 (1991) (discussing need to prove "significant economic injury" in order to show practical difficulty).

This is not a situation where the applicant has sought to manufacture unique conditions. Those conditions existed prior to the time the property was purchased and are the primary reason why the project cannot be constructed without resort to the Board.

In addition, the Incinerator project will have no adverse impact on the surrounding neighborhood and will not substantially impair the intent, purpose and integrity of the zone plan. The effect of the proposed changes to the project is to minimally increase the building height of the two (2) residential buildings by ten percent (10%), as well as the allowable gross floor area for the project from 2.48 FAR to 2.89 FAR. In addition to having minimal visual impact on the surrounding neighborhood, the Incinerator project's type and intensity of use, scale and parking / traffic impact are all compatible with the area.

The Incinerator project is also compatible with the Generalized Land Use Map of the Comprehensive Plan. With regard to the scale of the project, the proposed massing of the project has been designed so as to blend with the surrounding structures and to provide a transition between the residential townhouses to the north and the modern, large-scale commercial development to the south. The buildings have also been designed so as to respect the Incinerator smokestack. As to parking and traffic, according to a Georgetown parking study conducted for the Department of Public Works ("DPW") in conjunction with the Georgetown Waterfront Commission in 1998, contrary to popular belief, the peak demand for parking occurs during the weekdays between the hours of 1:30 p.m. and 3:00 p.m. During the early evening hours, the demand for off-street parking drops significantly, and parking lots in the surrounding area have a forty percent (40%) to sixty percent (60%) vacancy rate. Consequently, the project's parking, along with other parking facilities within the area, should satisfy nighttime demands generated by the development of the theater amenities, while contributing significant extra daytime parking capacity for the area.

The additional height and FAR do not adversely affect the light, air, privacy or visually intrude on nearby properties. The Board concludes that the requested relief would alleviate conditions related to the property that make strict compliance with the Zoning Regulations practically difficult. The addition does not impair the intent, purpose, or integrity of the Zoning Regulations and Map. Nor do the requested variances result in an adverse impact on the community.

When the Zoning Commission adopted the Waterfront Zones in 1973, it stated that the new zones "encourage the desired residential development, while taking full account of the natural and historic features of the area." The Zoning Commission stated further that

> [n]ew private sector investment in the privately-held land areas of the Georgetown Waterfront is essential to make the desired mixture of uses a reality. There must be sufficient development density to encourage the construction of new facilities as well as the renovation and reuse of older buildings. The District of Columbia needs new residential population to offset a population decline. The new zoning text contains provisions that permit a higher level of density for residential use than for commercial use in a mixed use context, thereby providing an economic incentive for residential construction. Residential development has a lesser impact on the environment and on traffic conditions than does commercial development.

The Zoning Commission provided for the 40 foot lowest density W-1 zone in the area along most of the C & O Canal [with a 60 foot height for PUDs], the bulk of the land directly on the riverfront and the vistas to the Potomac River from M Street down Wisconsin Avenue. Apart from the W-3 area mapped in the lower eastern portion of the Waterfront area, where the topography and road access system can accommodate the greatest height and bulk, and where the Fine Arts Commission has already approved initial private development plans, the remaining

portions of the Waterfront, including the area adjacent to Rock Creek and along K Street, were zoned to a medium density 60-foot W-2 zone.

The new zoning imposes the low density W-1 zone for certain existing enclaves of townhouses to encourage their preservation and continued use and encourage re-use of existing structures for new activities.

The District needs new economic development to generate increased economic opportunities for its citizens and to broaden its tax base. The economic consultants agreed that the Georgetown waterfront is a viable area which can be developed to compete successfully with other parts of the Metropolitan region for new residents and shoppers. To prohibit reasonable amounts of such development in favor of exclusive townhouse zoning would not be in the best interests of Georgetown or the District as a whole.

The Board accorded ANC 2E the "great weight" to which it is entitled. With regard to the ANC's concern regarding the additional height and massing, the Board is persuaded that Millennium has adequately responded to those concerns by re-designing the project to step back from Wisconsin Avenue and 31st Street, N.W.

The Board concludes that the applicant has met its burden. It is hereby **ORDERED** that the application be **GRANTED**.

VOTE: 3-0 (Sheila Cross Reid, Anthony Hood and Susan M. Hinton in favor of the application)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

FINAL DATE OF ORDER:

From: Anthony Lanier <alanier@eastbanc.com>
To: "Jonda R. McFarlane" <JondaMcFarlane@compuserve.com>
Date: 4/18/01 3:50PM
Subject: Re: Incinerator

Jonda, thank you for the fast response. I understand everybody's concerns as to bulk, more so since I have stood at Wisconsin and M and said goody to the broad vista which was and will be no more.

Had you heard a summary of what it has taken to get this project off the ground however, any listener would conclude, that the redevelopment of the site has been more than philanthropic, it has been sheer madness. No wonder everyone else caved and left the scene. For the team to complete this structure will be close to a miracle.

In this context, the additional height is irrelevant, since it will only be seen from the south side of the Ritz buildings, and a small corner from Wisconsin (instead of a sun ray hitting the street at 28 degrees, it might be 30 degrees. A view of the river over the buildings, one way or the other, is illusory. As a result the argumentation of sight lines is contrived at best.

In the end we will all stand on some spot and either conclude that it was a good or bad idea to build it. I can only hope it will turn out to be a building worth the unbelievable effort it took.

"Jonda R. McFarlane" wrote:

> Good morning, Anthony -
>
> My recollection regarding the rooftop restaurant matches yours. Yes, I -
> and many others - thought the idea was a truly splendid one, and pushed you
> to consider it. I think it was clear from the beginning, however, that you
> (and your investors) would have to be very enthusiastic about the idea for
> it to become a reality, as it would have been somewhat difficult/expensive
> to overcome the logistical difficulties.
>
> Having said that, I remember your team gave us the impression at the time
> the ANC toured the site that you would "go for it." But it wasn't long
> till you pulled it out of the plans, and you both explained and defended
> your reasons for doing so.
>
> People who are realistic and pragmatic know that not every suggestion made
> to a developer can be implemented - for lots of different reasons. When
> the idea seems to create such an enormous benefit for the public, though,
> it's hard to see it go.
>
> As a footnote, I do think that having such an open view line to the river
> since you began construction has made it even more difficult for folks to
> envision the added bulk that you are asking for. I am hopeful that you
> will keep trying to find ways to lessen that sense of immensity that has
> been the most difficult aspect of the project since the beginning...
>
> All best,
> Jonda

From: "Jonda R. McFarlane" <JondaMcFarlane@compuserve.com>
To: "INTERN[redacted]alanier@eastbanc.com" <alanier@eastb[redacted].com>
Date: 4/18/01 10:59AM
Subject: Incinerator

Good morning, Anthony -

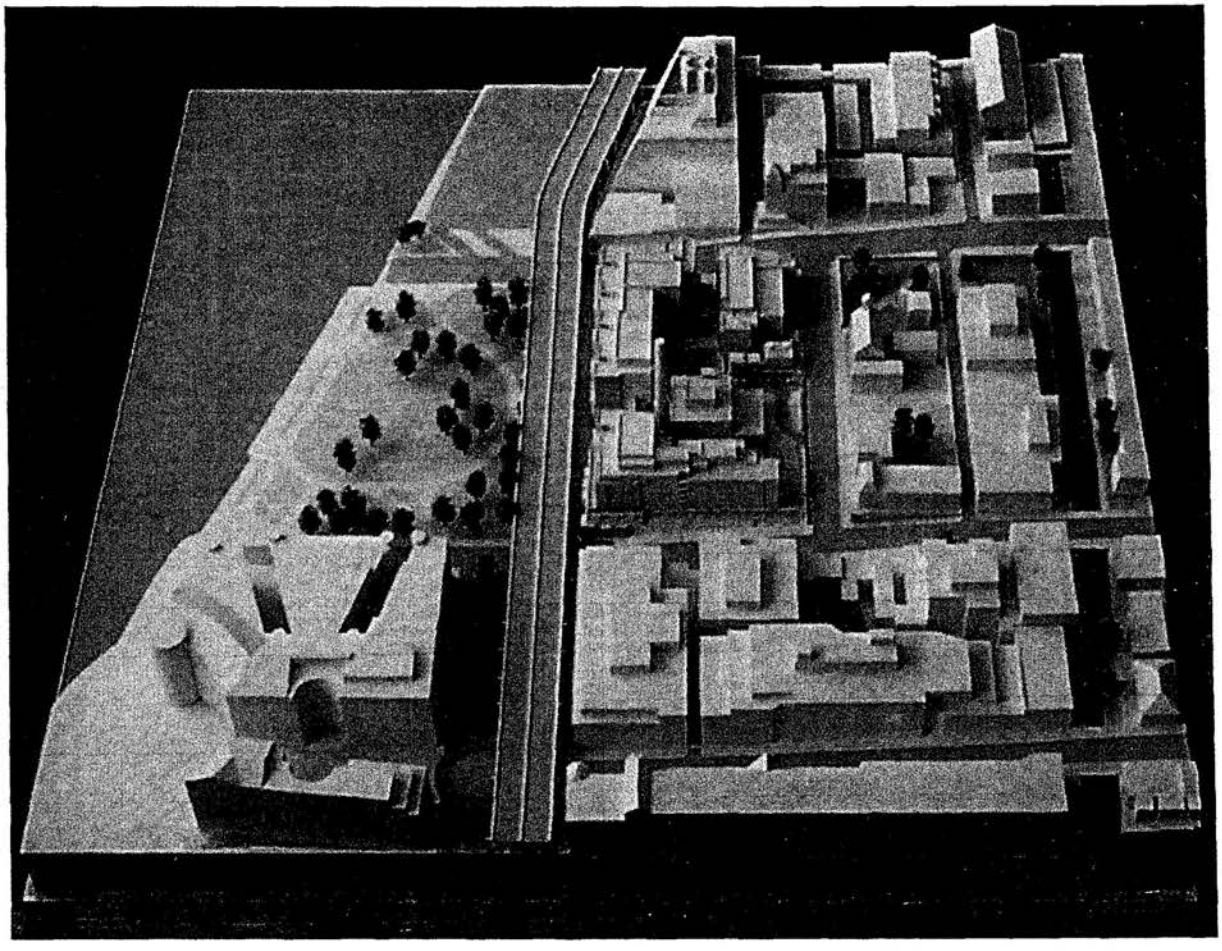
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All best,
Jonda



SITE MODEL



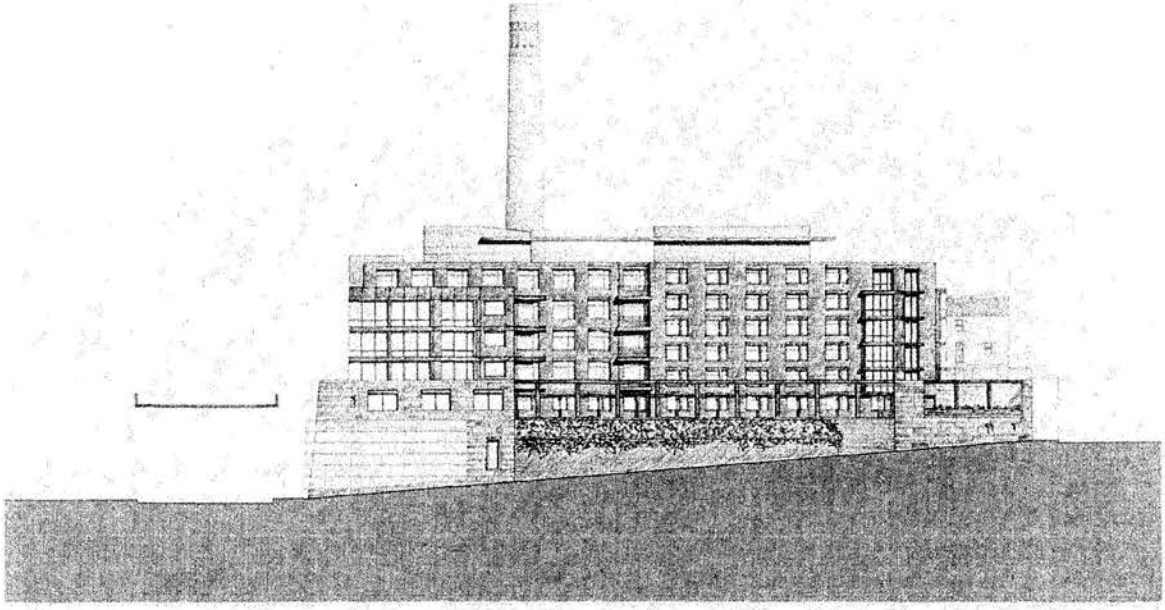
PROPOSED K STREET ELEVATION -- EAST SIDE



APPROVED K STREET ELEVATION -- WEST SIDE



PROPOSED K STREET ELEVATION -- WEST SIDE



GEORGETOWN INCINERATOR
WASHINGTON, D.C.

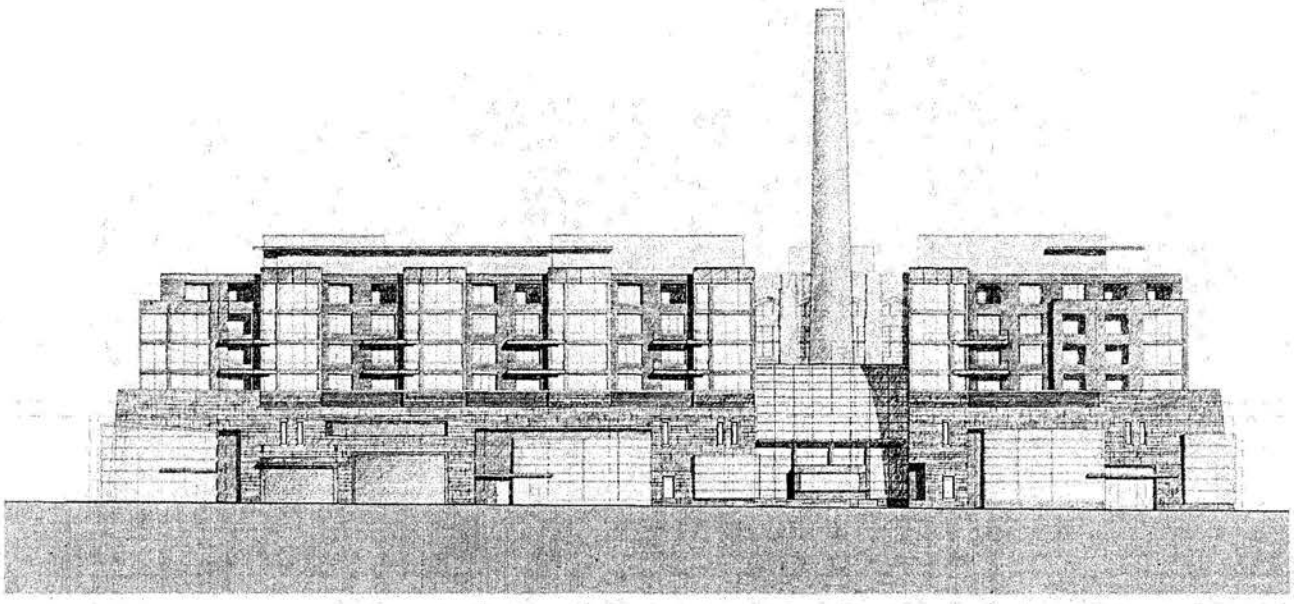
MILLENNIUM PARTNERS OF WASHINGTON, D.C. INC.

31 STREET ELEVATION

NOV 5, 1998

SHALOM BARANES ASSOCIATES
GARY EDWARD HANDY AND ASSOCIATES ARCHITECTS

A-18



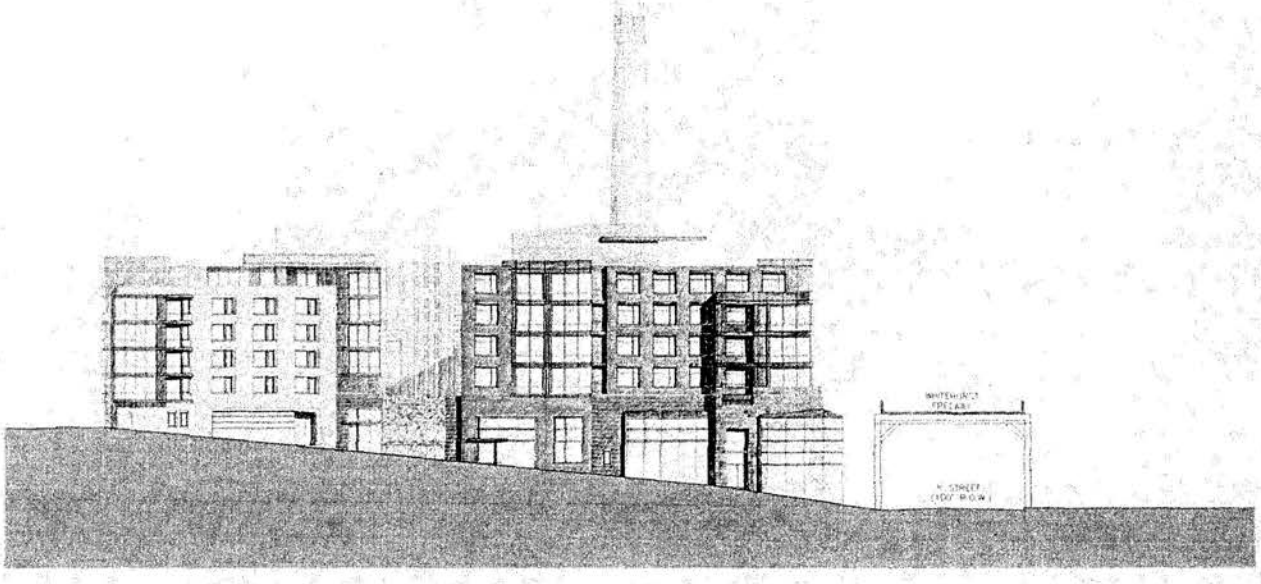
GEORGETOWN INCINERATOR
WASHINGTON, D.C.

MILLENNIUM PARTNERS OF WASHINGTON, D.C. INC.

K STREET ELEVATION

SHALOM BARANES ASSOCIATES
GARY EDWARD HANDEL AND ASSOCIATES ARCHITECTS

A-16



GEORGETOWN INCINERATOR
WASHINGTON, D.C.

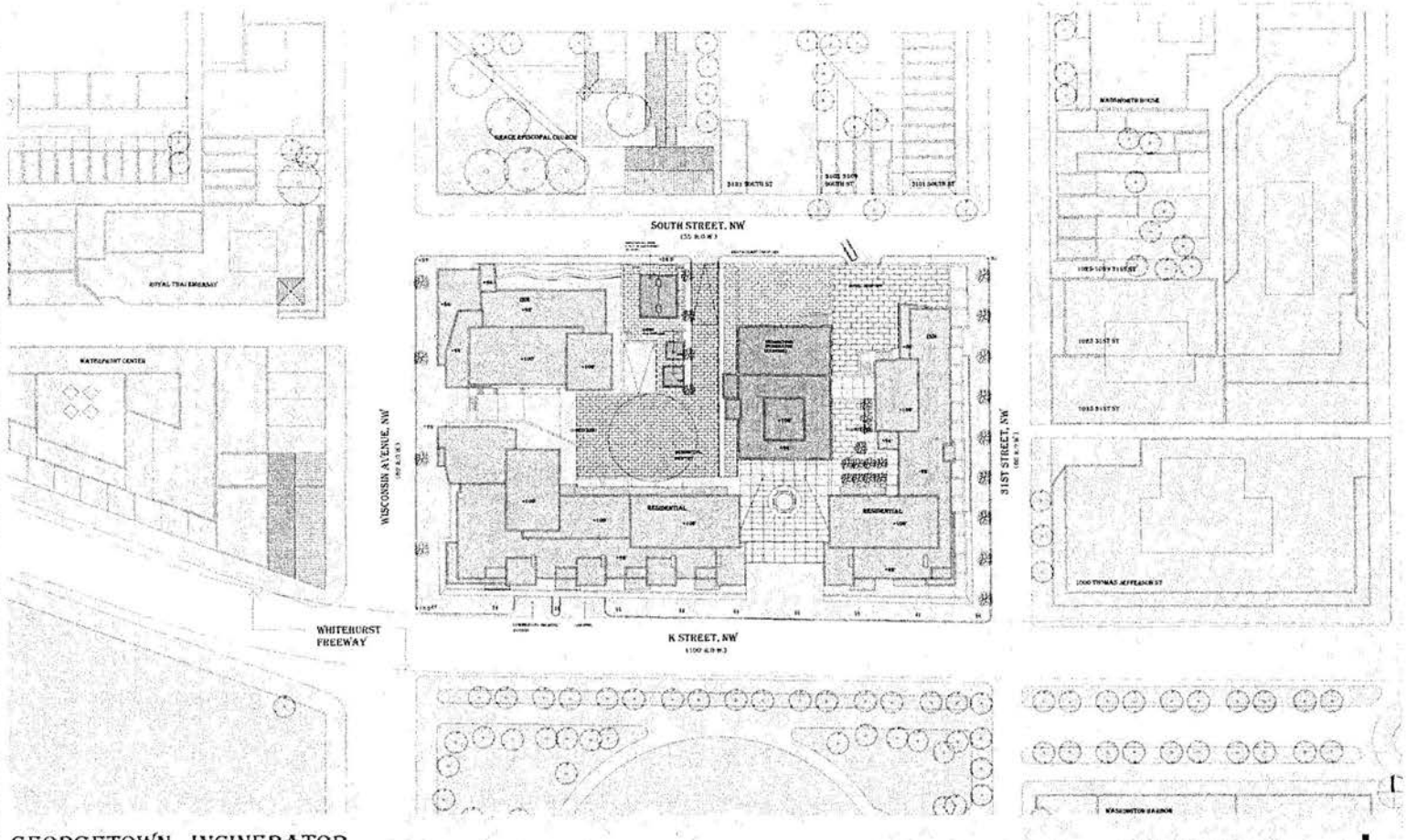
MILLENNIUM PARTNERS OF WASHINGTON, D.C. INC.

WISCONSIN AVENUE ELEVATION

NOV 5, 1998

SHALOM BARANES ASSOCIATES
GARY EDWARD HANDLE AND ASSOCIATES ARCHITECTS

A-17



GEORGETOWN INCINERATOR

WASHINGTON D. C.

SHALOM BARANES ASSOCIATES
GARY EDWARD HANDEL AND ASSOCIATES ARCHITECTS

A1

SEPTEMBER 5, 1996

MILLENNIUM PARTNERS OF WASHINGTON, D.C. INC.

Commission of Fine Arts Hearing
April 19, 2001

Acting Chair Harry G. Robinson: With the one that was discussed earlier this morning it's on the first page, Case 0G01 that's 90 with the 3100 South Street N.W. That's the Georgetown Incinerator project and it should be the action is related back to the letter that was sent to the chairperson of the BZA. I do have copies of that letter if you want.

Lanier: Esteemed member of the Commission by name is Anthony Lanier and I am one of the developers of the controversial incinerator project and I wanted to take this opportunity to clarify perhaps some issues affecting this project. As you may know we got to this situation inadvertently as a result of the economic demise of not a tenant but an extremely important component of our project we selected originally in order to create an amenity to the project which was not being utilized during day time, namely extraordinarily complex and expensive parking garage of accommodating 600 cars which during the day is not utilized by the cinemas while it brings life to K St. which currently is dead in the evening and invigorates the K St. life. I would like to take this opportunity to dispel a rumor that this argument is a contrived argument. I have this discussion briefly with Secretary Atherton last week but it comes to my attention that we lack credibility in the argument of the movie situation and while I am neither shareholder for the movie chains nor do I have more inside than many other people. I can assure you that as sure as tomorrow is Friday the movie industry will not recover financially from where it is within the next 12 months. Major corporations much clever than I have lost their entire investment in these companies and the movie industry is effectively in bankruptcy. Now

what does that really mean. It doesn't mean that we won't be seeing movies but it does mean that they cannot contribute to the complex as originally complicated. We are therefore missing an economic investment by the movie cinemas in the amount of $25 million, plus the rental stream in the amount of $1.7 million which we need to replace now because we are currently in construction of precisely that element so we are not given the luxury to look far and away for a solution. We either have to stop or find a solution which resolves the issue for us now. That is why we come up with another floor on part of the project. That other floor allows us to convince our construction lenders that we have an alternative revenue source which we can apply to the completion of the project thus making up for the failure of the moving industry to a) contribute $25 million, and b) providers with a creditworthy rental stream of $1.7 million. So in essence, in gross terms we have facing a lack of somewhere in the range of $35 million on a project in mid-construction. The second issue I think I would like to address is that without wanting to debate Secretary Atherton's eloquent assessment of what constitutes hardship or a difficult side. I doubt if there are many projects that have gone through more reviews than this single project. And when you listen to the litany of approvals we have obtained to build this project you must ask yourself at the end if we have lost our mind or if we are philanthropists. We have been in front of this Commission and the Old Georgetown Board I believe 17 times. We have been twice in front of the City Council, we have been in front of the Mayor's Agent, we have been in front of NCPC, the National Park's service the design committee of the Department of Housing, many times in front of ANC and the

Business Association of Georgetown and while I do this as a matter of life never have I gone to this extreme. It has a result an extremely difficult project to bring about.

Robinson: Well have these approval conferences weren't added on after you started this. I mean they have been for years. Anybody who has worked in the city knows the nature of all this. Especially your architect. I can't believe this is [inaudible].

Lanier: We can all look back and say hindsight is 20/20 and while we are lucid people it still turned out to be a much more elaborate process than anyone of us had predicted and nevertheless with all our predictions when you start into a process of this nature you do not you don't have the ability to know everything up front. When you buy a sight for the city in an RFP you don't know how deep your rock is, what kind of rock you have, if you are going to get water, if the chimney is going to fall, if the chimney is not going to fall and what concessions you enter into during the course of that transaction. As an example we did not know that we would have to provide let's say 600 parking spaces. We entered into an agreement with the city to provide 250 in a site where you have a very marginal periphery since it is occupied by a major structure in the center you did not have the opportunity to provide these parking spaces hence we have to proceed and acquire eight other properties in order to find a block of space where we could be the parking and providing this parking structure we also came to this commission and with the help of this commission we are given the ability to demolish some of the buildings which were found were contributing? So when the commission views the 40 foot height limit I do believe that the commission has the opportunity to look at it in the context of what this project means. Just as the Commission has the ability to look at an old building and determine

if it is historic and significant or non-contributing so without wanting to educate the commission as to what is possible or not I just beg to differ that this is simply an absolute term that needs to be seen in the context of the project and if the commission is so finding I would like to have the opportunity of an architect kind of explain what I tried to do in commercial terms or layman's terms in an architectural context. Perhaps simply for your understanding of our view I understand that we don't have to have the same view at all times, that there is a right to differ and I am perfectly happy to accept that we don't come out with the same solution. I just want you to understand that our position is one which is based on voracity, true hardship and always a desire to build in the context of what we believe and we are a big believer of this historic district in Georgetown. I love it as much as anybody else and I always am trying to maintain it and hope that it will one day be the jewel of our nation. And with that if you would be kind enough and would like to have Shalom speak a couple of words.

Robinson: I'm sure that your conversations with the Secretary of the Commission were enlightening in that he presented our position correctly. I want you to understand that we are constrained not by some discretionary ability to grant conditional rule. The reason I ask Mr. Atherton to speak about the exceptions to the height and zoning in the city was for the purpose to understand clearly that we don't have the discretion to say "gee we feel really bad for you. As you've said the movie industry is in major disrepair and maybe they are, and we are willing to acknowledge that and to solve the problems. We don't have that discretion. The Georgetown Act , in fact is about height and density. As Mr. Atherton said the zoning exceptions relating to conditions contributed by the site are

things that couldn't be foreseen when zoning was applied to the city lot by lot and was to owners and architects some, some manuvering room to respond to their programs and to the zoning department. I'm just not aware of any exception to be made either of the Georgetown Act or to the zoning commissions regulations for economic hardship. I don't know want to cut Shalom off and you must know that whenever he comes here we are all willing to sit and see what he shows us because it is always well done as this was. I don't want to put him in a position to trying to make something real that's not going to be real. I mean we're constrained by laws and acts and we act within their framework and I don't know the exception and ask Mr. Atherton is it exception of economic hardship? And there is none. If there was a way for this commission to assist you and not violate the tenants on which we stand we can certainly do that but I don't know what they are. If Shalom can make that presentation, I am perfectly willing to hear what he has to say and I take my hat off to him. I don't think that avenue is available to any of us.

Lanier: I don't believe that our case is based on hardship and far from me taking away to answer, chipping away on Shalom's time. The trigger of this issue is based on economics but the variance we are seeking is because we do not have as a result of the unique aspects of the side the ability to add mass, if you so want, without dealing with height. We have a lot of surface, we could easily come to you and say let's not argue about height why don't we just try and declare the incinerator noncontributing building and then we have space to resolve this. So the uniqueness of the side is what creates the difficulty. The fact that we are only able to build on let's say without being necessary perfectly accurate on 50% of the side and 50% of the side is occupied by openness, space and the incinerator structure.

That I believe is our argument. Had we known what we know today, we could easily approach this project as was suggested by the city as a PUD and we would have had the ability to build up to 60 feet and change all sorts of things in our life that I wish we had. But our intent at the time was to build a matter of right project and I feel stupid today in the middle of construction trying to amend the project. It's not desirable. Had I know that this is, the next time I'll know better and build myself this flexibility but our goal was to be as fast as possible within the envelope prescribed.

Robinson: Mr. Atherton, would a PUD the designation have allowed them to exceed what is now imposed in terms of height and depth. I mean that development strategy doesn't override the zoning or the Old Georgetown Act?

Atherton: I mean, had they gone the PUD route, from our perspective, the forty foot height regulation would prevail. I don't think there is any doubt about that.

Lanier: That to me draws a legal conclusion and I am out of it.

Robinson: Thank you.

Baranes: I was going to say I'm going to do two things here I've never done before, one of them is to talk to you about drawings so that you have drawings and the other thing is to talk to you about zoning which I've never done before. Let me start, I'll limit my presentation to that discussion of these issues of zoning. Let me start with just one very straightforward, simple issue which is the FAR that Mr. Atherton discussed this morning. This is the case where the topography is not working for us it's actually working against us. If you look at our zoning submittal to the district I think you have copies of it right here, which you will see is that 23% of our allowable FAR, then equates to 58,000 square

feet is this built below the South Street level. So in fact we're losing a lot of that area down on K Street, the area above it there are several levels buried into the hill, there are some fairly intricate calculations associated with that and the cost against the project is 58,000 square feet. That's just a zoning calculation we went through, and it has been accepted by the district, and that's how we are building. Of the 248,000 square feet they are allowed in FAR, 58 are below the South Street elevation. Now let me talk a little bit about – yes?

Robinson: And your point about that 58,000 square feet is what?

Shalom: I was really just trying to clarify a statement that was made this morning, where I think the point was made that none of that area counted against us and in fact the FAR; in fact, it does count against us. It's part of their calculation. The reason it's important here is because that area, first of all you start down at the K Street level, there are very limited uses you can place down there for different reasons. There's a prohibition against placing any residential down there, any hotel rooms down there, because the 100 year flood level is an elevation 17.5. K Street is about an elevation 10, 10 1/2, so there are very limited uses that you can place down there. We were very fortunate in this instance to have the theaters. They are one of the few uses that actually will go to the 100 year flood plan level. A lot of retailers won't do that, some retailers will, but there is in terms of requirements that we have to meet, we cannot place any of these other uses down there. We can never insure it. So, that is an issue. We are struggling with the fact that anything you put down there does count against the FAR and then on top of that the uses are limited that we are allowed to place down there. With respect to the test that we have to

meet with regard to this variance that we are asking for and I think Mr. Atherton read part of it to you this morning. It does have to do with the uniqueness of the site, and the practical difficulties the site creates against the design of the project and we have designed and gone through the Board of Zoning Adjustment many, many times over the last 20-25 years where we have historic buildings on our site and because of the presence of the historic building we could not achieve the FAR, we could not achieve the height, we could not achieve the setbacks, and the board has routinely accepted the presence of these historic buildings on the site as presented, meeting that test of the zoning. And Mr. Nettler informed me this morning that it actually if it has been contested in the courts then it's been upheld. That's second hand information as far as I am concerned. All I can attest is the fact that we have been through this process ourselves and the board has accepted the presence of historic buildings that's creating practical difficulties. So on this particular site, the parcel that we started out with was the incinerator parcel, the historic parcel which ran from South Street was a single lot all the way down to K St. and the measuring point there, the way zoning allows you to measure and the way the way the FAR is calculated, essentially yields you a situation where a lot of that space that you have to assert at the bottom of the site in the flood plain counts against you in the FAR and the zoning does accept that as a practical difficulty attributable to the uniqueness of the site. I mean that's a fairly straightforward argument. The other issue as it specifically relates to height that I think is really important to think about, is the fact that we have W1, W2, W3 in Georgetown and the heights for those three zones are 40, 60 and 90 I believe. When you look at the zoning regulations it's only in the W1 which the zone that we're

in that you are allowed through the PUD process that you refer to this morning, to go up to 60 feet, to get an increase in height of an additional 20 feet. When the zoning regulations were changed back in the 70s, it was only in the W1 that this incremental increase in height was allowed. If you look at the PUD regulations for W2 and W3 we are not allowed any additional height. With the PUD the height limitations are 60/60/90 without the PUD they are 40/60/90. So it's only in this zone that you are allowed to increase in height. I think that was done because there was a recognition that with a W1 you would have a lot of issues with topography as Georgetown is laid out, and then buildings and special circumstances should be allowed to go taller. The only other issue I want to make and I'm going to rely on drawing here if you don't mind. When we were here a long time ago, 15 meetings ao, there was, this is the K Street elevation as seen from the river, this is the Whitehurst Freeway, and I remember that we had a lot of photographs as well as a drawing similar to this that address the issue of the height along K St. moving from the West to the East and there was I think a confirmation of the notion that the height is tall on the West side and it steps down towards the East and with that in mind we are seeing here the Washington Harbor across the street. Now what we've drawn here is the project with the proposed additional 10 feet. And I think that this relationship and these buildings stepping down to the east is something that the commission, and I remember Mr. Brown specifically commenting on this that this is an important feature here, there was a stepping down that would in sense reinforce the pattern in the skyline and I think it's important to understand that we are still maintaining that. I mean I think in terms of the stepping, the project still looks very well. Then of course you have the

issues of what are the site lines as you go down Wisconsin Avenue, 31st Street, I won't go into them, but we do have other boards if you want to see them. But because we added the setbacks of the Citizens of Association of Georgetown asked for and you did not see that last time, but we have reintroduced an additional 12 feet of setbacks on the top floors your view of the river as you go down Wisconsin or 31st is essentially the same as it is under this plan as it is under the plan that's been approved and is currently under construction. It's this old top floor and it's relationship to the penthouse that control your views of the river. When you look at the way we've added this floor and set it back they don't in any way impinge on the views of the project that you approved in the past year. So those I think are the essential issues, and it looks like was must have left something out.

Nettler: Richard Nettler, now it's on. I'm sorry Richard Nettler on behalf of the applicants: I just want to just for two minutes to add something because I think a context in terms of the waterfront zone is important to understand also because it was a very unusual rezoning that was done in 1973. If you know your history of the district which I know you do, it was pre-home rule, and it was the only instance in which there had been the litigation that had been brought against the district to ensure, pre-home rule, to insure that the zoning in the district was consistent with a comprehensive plan because at that time the comprehensive plan was a National Capital Planning Commission's comprehensive plan which had been adopted in the late 60s. What happened was this commission actually had approved development in Georgetown that was perceived by the National Capital Planning Commission that was the inland site which is to the east of this site that was in

the view of the National Capital Planning Commission on the Park Service at a height that was greater than what the Park Service believed was appropriate and the National Capital Planning Commission. What's important about this is that the Citizen's Association of Georgetown urged the zoning commission on an emergency basis to adopt regulations to change the height, to reduce that height, which the commission of fine arts supported and to reduce that height down as Shalom says to a W1 at 40, W2 was at 60, W3 was at 90. Actually W2 is all along here, W3 is down here. And in adopting that on an emergency basis the Citizen Association of Georgetown sued the city because they felt that in allowing these other projects to go forward they were still violating the comprehensive plan. And the only decision addressing this issue because home rule became into effect in 1974, the United States Court of Appeals directed the zoning commission to issue what's called in the federal terms a basis and purpose statement which doesn't exist under the local administrative procedures act and after that, while that case was pending the zoning commission then went back and issued this statement and in that statement they addressed the issue of the topography of Georgetown the heights that they were setting in Georgetown and the densities and why they were picking certain sites to have that height as well as the fact they had adopted these PUD regulations, which only as Shalom said, in the W1 would allow you to go above what they were setting as the height for a matter of right projects. And they did this because they understood that there were 1) the W1 was being done along the canal and there was a particular concern by the Park Service which was reflected in one member of the Park Service who was Mr. Stanton who was a part of the Zoning Commission was concerned about the heights along the canal,

2) on the river side of K Street which is going to be a park area and where you have the boat houses and the only other site that had been selected was this site the incinerator site because as was stated in the base and purpose statements they wanted to make sure that the vista down Wisconsin Avenue was preserved. But they recognized because of the topography that through the PUD process you could build up to 60 feet because that would still preserve the values that they were seeking to protect under that zoning. We are less than that 60 feet that was authorized and still is in effect under those zoning regulations as a PUD. And as Shalom stated, because we've stepped back the building as suggested by the Citizen Association of Georgetown, we are back at 40 ft. along Wisconsin Avenue in terms of the vista. So we have done exactly what the Zoning Commission expected to be done in 1973 for this project. 1) to make sure you retain that vista along Wisconsin Avenue and 2) as actually Mr. Hood the members of the Zoning Commission recognize in the Office of Planning at the hearing two days ago, that this project reviews - and that's why I think why Anthony was getting into all that reviews is analogous to a PUD project. The Department of Housing and Community Development had urged us when the project started to do this as a PUD which would have allowed us to go to 60 feet. We thought all along that we could do this within the 40 feet because we never anticipated the movie industry to go bankrupt and as Lowes has told the Board Zoning Adjustment 10 of the major movie companies around the country have all gone bankrupt and the Park Service has actually supported us in the seeking of this variance and has submitted a letter to that effect. So we've done everything that was authorized under the zoning regulations. We're not above the 60 feet, we're actually below 60 feet.

We are at 40 feet along the vistas and in terms of the area, most of the area that additional area that's being sought is actually inside the building, it's inside the building because we've turned what used to be unproductive space into usable space and that's where the additional density comes in. You don't see that additional density. The only additional density you see is in those small little pieces on K Street that are framing the incinerator tower and I just wanted at least clarify that aspect of it. The Zoning Commissions basis and purposes statement is extremely long it's about 30 pages, you can see for yourself it goes into all these issues of what it understood to be the issues that were raised why it was protecting the inland steel side, why it was doing the different height limitations. But it did create for the site the opportunity to go to 60 feet, thank you.

Robinson: This afternoon _____[inaudible].

[background voice inaudible]

Nettler: I can provide to you the letter from the Parks Service to the Board of Zoning Adjustment supporting the variances that were sought by the applicant. It was submitted to them, the representative of the Park Service, were here this morning, and they could have attested to the exact same thing. They submitted a letter in support of the variances that were being sought and if you would like me to provide with a letter I can do so.

Robinson: I am going to concede that yes. Do you have it with you?

Nettler: They had the letter actually with them this morning when they were here and fortunately they've left.

Robinson: Other comments from the commission?

CFA Member Emily Molina: I think we've pretty much said everything at our last meeting and I don't really see anything new here as you know from now having worked in Georgetown for several years and some of us who have lived in Georgetown for many more than that, there are many rumors stemming around. One is that all of the residential units have been sold and second that there is already and applicant for the theater space from Canada. Now those are probably two wild rumors, but they are circulating as you probably know.

Lanier: That is not correct.

Molina: And why is that?

Lanier: Because we have not marketed. We never entered market status, we have only issued plans of this space some 60 days ago. And we not sold, contracted to sell, not promised to sell or any form of agreement whatsoever with anybody on any square foot on this project. And while it is true that we intend to move forward the theaters it is based simply on the basis that we have just built them. They are built.

Molina: I understand that. You are proceeding looking for a tenant?

Lanier: No, the theaters who were willing to operate them always are willing to operate them. The major difference is not that we won't have any movies anymore it is who has the risk of building a movie. Yesterday the risk of building movies was with the movie companies who understood the risk. Today the risk of building movies is with the building owners who don't understand it and this is an occurrence of 60 days. While your commission is not dealing with it there is a well known project in the city called Gallery place which started before we started the incinerator project which has $100 million dollars of city

capital support and still has not commenced construction because precisely this issue and now is go into the process of redesigning the building, decreasing the movies, decreasing the residential and adding office space. All I am trying to say is that every project you can look at which involves movies today is going through a redesign, a financial redesign and a structural redesign. We are just one of many. So, what is important to understand the movie operators love operating the movies but instead of them paying us, we will be paying them and the difference is simply somewhere in the range of $25 to $35 million we have to find without being able to show anybody credibly that there will be earnings against this $25, $35 million. Because all we will get if the movies are profitable we will get something but if they are not profitable none of which we really understand we may get nothing or very little or not a commensurate amount so it's really an odd situation we find ourselves in which has triggered us into this position but certainly not one we treasure or anticipated. Thank you. I hope that dispels that rumor.

Molina: You mentioned that the existing building the incinerator placed undo hardship on your in your project because it was there as part of the original structure and what if it had not been are you would have had that extensive square footage to use in a more profitable way. But there was an article in the *Washington Post* quite recently saying that the hotel is going to use the incinerator as a part of its lobby. Is that correct?

Lanier: Two answers you know that I have. One answer is that we always have attempted in a consensus with your committee and the Old Georgetown Board to retain as much as possible of the open-ended volume of the incinerator. So you, I don't know if you have ever been inside, but there are very few intervening structures within the volume once you

take away some of the crane and so on so in retaining this openness in the incinerator so that when you are walking underneath, you know where you are. So while we are utilizing it we certainly are not utilizing anywhere close to capacity. The other point I was trying to make is not withstanding the incinerator volume if there was no incinerator we would have a third more or half more of the site to build on. The third thing the incinerator has created is that it was an obstruction in order for us to deliver subsequent to our acquisition a concession to the citizenship that made it important for them. There is no requirement on the zoning or any law to build one parking space in this project. So 600 parking spaces in a site which is occupied at the time when we bought it by 50% by a I think 90 foot tower and an incinerator was basically that you had to carve out every parking space with a toothpick. You had to literally had a very like a moon shape site to work with which made it impossible to deliver any parking whatsoever. That was the basis of every failure of this project previously because it always was looking for parking and nobody could provide it.

Nettler: I guess trying to be somewhat exact, there is a terminology here that I want to make clear. We're not saying that the incinerator creates a hardship for us. What we're saying is that before you get to the issue of whether, one of the first things you have to get to in between the zoning process to determine whether you are entitled to an area variance is whether there is something unique about the site. And our argument is that there are historic buildings on the site that are unique and because this is a building that you did deal with the Corcoran not the present situation going on with the Corcoran but a few years ago when the Corcoran came before you for an addition, there was a zoning case

attached to that and a group adjacent property owners you had approved a project or a zoning adjustment approved the project and a group of property owners had sued the Board of Zoning Adjustment to overturn that and the Court of Appeals said that when you have a historic landmark building that that in and of itself settles the first part of the analysis in terms of whether you are entitled to a variance. The Corcoran was a landmark; it's unique. There are a lot of landmarks around Washington but merely having a landmark building on your site creates uniqueness. That doesn't mean you are entitled to a variance, but that settles the first part. The second part is, does the fact that you have the buildings on there create your practical difficulty? The practical difficulty is that because they are on the site and because the advisory counsel and historic preservation and the National Capitol Planning Commission, the District of Columbia all signed the memorandum of agreement they put a covenant on this site that precluded us from removing the incinerator building and we can't remove the brickyard hill houses which that we can't move this additional FAR that would have solved our problem into the area where those buildings occupy, so that's the practical difficulty. It's not that this is a hardship issue, we are not claiming a hardship issue. We are claiming these two components of the area variance requirements. Then the last requirement is - and I know you are not the BZA - I'm sorry that I am giving you this. And the last requirement is the zone plan, and I understand that is where you get into the issue of the 40 foot height. And that' where our argument comes back to. When you look at what the zoning commission said about it's re-zoning for W-1, where it allowed you to go to 60 in a W-1 zone and it recognized that the topography of certain sites, and actually ours in the only

one that has a topography in the W-1, that creates this issue, that you can take advantage of that topography and use the variations in the topography to actually give you a higher height out to 60 feet for the PUD for this site. The interesting thing is the zoning commission made it absolutely clear when they set this 40 foot height, at the same time recognize the topography of the 60 ft height, that they said and specifically said this, we are not saying that this is going to result in - cause we want it residential - that this is going to result in townhouses being built. We understand that if you take the topography, you could build apartment buildings, because you could take advantage of the fact that, as we are, you've got South Street as your measuring point, you've got a site that's a W-1, you can go up to 60ft through a PUD process or 40ft thought the regular matter of right process and still accomplish the objective they were seeking, which was 1) more residential 2) which was an entertainment area that they wanted on the waterfront, which is exactly what this was and 3) the elimination of the abandoned warehouses. That's the context in which you get into the zone plan and why they rezoned this and why we fit into that zone plan, which you supported. You did, you supported the rezone plan, you testistified in support of the rezone plan because you wanted the heights to be lower, you wanted to make sure that these things could be accomplished, but at the same time, recognize that there was a way to accomplish this within that rezoning that was being done.

Molina: Mr. Nettler,

Robinson: I am sitting here, and I'm putting my developer hat on and I am thinking that if there was an opportunity to provide, to do the additional height in whatever case, in W-1, the

developer wants to maximize the site, why wasn't this done as a beginning point? I mean why did we not see this additional story early on? I can't imagine giving away the space if you had it as a matter of right in the beginning.

Lanier: From a development standpoint we wanted to build a matter of right project in Georgetown. We had no intention of pushing the envelope. I have in 17 projects in Georgetown, never sought a variance for anything. And to the contrary, I am also very understanding of the fact that sometimes I didn't even get to build the full FAR as in the Eagle Liquor property, where I am building 3 stories instead of 5 stories, or whatever I could have built. So, our intent was to build a matter of right project and to expedite the process. In the process itself, certain issues came up with the citizens in order to accommodate them. Such as the parking; we started off with a small arts theater, with limited parking that we had to provide when the issue of the waterfront parking raised its head and people asked, "where are these hundreds of cars going to go?". That drove us to double the size of the project. So this has been a project which has changed all the time during the first say 12-18 on intent and size. If you then add on top of it that we should have then stepped back and done a PUD, in retrospect that is what we should have done. But our goal was always to build it as a matter of right, I'd hoped.

Robinson: This PUD would have given you the matter of right of the additional density and height and I just, you don't put your money in the stock market not to maximize it, and I would assume that you wouldn't put your money into this not to maximize it.

Lanier: This could get into a long story, but I can assure you that everything we are do in Georgetown is not driven to maximize our profits. That is, 80% emotion and 20% in

Lanier: I don't want to walk around the word hardship. But I just want to confirm that the cinemas will operate.

Robinson: I understand this. But not in the same way that you had planned. It still has the financial impact and that financial impact is what causing you to seek the variance for the additional height because you are build a matter of right building.

Lanier: That is the triggering event. Correct.

Robinson: So it is the financial hardship that is causing this request for the redesign of the extra floor.

Lanier: Without getting into terminology, it is the financing, the lack of a financial contribution in excess of $25 million as evidence in the letter by Lowes to the Board of Zoning Adjustment, which I am happy to provide you a copy of.

Robinson: That's what I understood, but I heard somewhere along line that it really wasn't the finances that was causing the request for this.

Lanier: Now we get to technicalities.

Robinson: Excuse me. Mrs. Broady has to go and she has a comment.

CFA Member Broady: I would like to say one thing because I did speak on this at the last meeting. I have, and I think we all do, a fair amount of sympathy, I don't have sympathy for the litany of approvals because this is a complicated project and that's the real world. So, I don't respond to that. I do have a certain degree of sympathy for mid course corrections that are mandated from something that you can't control. I think this is more complicated now to us that it was before simply because in a way you have terrific advantages from the topography of this site, which you have exploited and yet at the same time, you are trying to appeal a different thing. I also have a fair mount of sympathy for your ability if

hope of profit, sometime down the road. Since nobody else seems to be doing what we are doing, it is a test to the uneconomic basis of our venture. Contrary to our process on the Incinerator, another project we did build on in the west end, we did push everything to maximize profit. We were not in historic zone. We were building on a parking lot which had for three attempts to get a PUD accomplished failed. We still went back into PUD and succeeded. While we are for profit, it just did not seem that this project lent itself to that. And when you look back in history, it certainly doesn't.

Robinson: I agree. So now you have come to this point because of the financial strain of making tenant, who has pulled out and a possibility of similar tenant not taking that space and then your having to carry that financial burden.

Lanier: No, no, the cinema will take the space. We will have a cinema. It's just that we need to carry the financial burden.

Robinson: You need to carry the financial burden?

Lanier: Yes, yes.

Robinson: So, let me understand. I noted the last time we were here that the cinema was voted out and because of financial hardships, you needed to add a floor. And that's kinda the way we, I assumed we were approaching it. I am hearing today that you want to add an extra floor not because of financial hardship. So I need to... Mr. Nettler says it's really not a financial hardship. If you tell us that you are losing $25 million and you have to have a floor because of the cash.

it came to this to handle this from a design standpoint and I said as much the last time you were before us. But upon reflection and seeing the correspondence and greeting the BZA whatever this is. I don't feel that we are the commission to break you out of this process. I don't think it's appropriate for us to do that. I don't think in this case it's appropriate for us to take the lead. We don't take the lead in general over the Old Georgetown Board, I wouldn't do it here as I said before. You have complications with BZA so much as I think there is some sympathy to where you are. I honestly don't feel that we are the ones to break to out of it.

Lanier: And I appreciate that and I...

Broady: I wanted to just tell you that I think I have a little more than sympathy than some others for the height variance, etc. I'm clearly in the minority. But at the same time from a precedent setting standpoint and the standpoint of what's our mandate as a Fine Arts Commission, I would not feel comfortable taking the lead to kind of break this cycle.

Lanier: And I appreciate that. I don't believe we wanted to pressure you into a zoning decision or seek a zoning decision, we wanted avoid the zoning decision by this Board.

Robinson: With that comment, I would like to thank you for the presentation and tell you that we will take under consideration your request and at such as that there is a need for us to respond to you, we will do that.

Nettler: Is it possible...there was a question that I think in part was directed to me because I made a statement that I think added some confusion. If I could just clarify that.

Robinson: Sure.

Nettler: I meant hardship in a legal since. Because hardship under the zoning regulations requires you to do something else other than what we are doing. Actually, and I don't want to get into a legal argument, but the Court has said in that case, Gilmartin v. BZA, that economic considerations are specifically permitted in an area variance issue to address practical difficulties. It doesn't create a unique thing, it's not a hardship issue, it's the economic considerations can be addressed as part of the practical difficulty if trying to do something. That is the only context in which we bring the economic issue and with that, thank you very much.

Robinson: Thank you.