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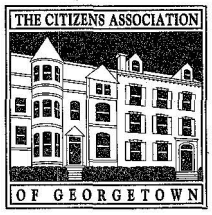
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April 27, 2001

Ms. Sheila Cross Reid, Chair
Board of Zoning Adjustment
441 Fourth Street, N.W.
Washington, D. C. 20001

Dear Ms. Reid:

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

Enclosed please find our detailed commentary on the Proposed Findings of Fact and Conclusions that were submitted by Millennium Georgetown Partners. The commentary includes our points of agreement, disagreement, as well as clarifications of fact. We believe that the record of the case requires the Board to deny the relief sought by the Applicant. Our belief is supported by the following six summary findings and conclusions:

1. The Applicant did not meet his burden of proof that this site is unique to the extent that it cannot be developed without the relief requested. The evidence presented affirms that a viable project had been fully approved for the site, with all the elements of topography, geography, and historicity accommodated. In fact, the slope of the site toward the view that was continuously referred to by the Applicant has been fully exploited already to provide premium extra height and density on the site. These prior approvals moot the argument for uniqueness of the site.

2. The prior approvals by the Zoning Administrator, the local ANC 2E, the local community, the Old Georgetown Board, the Commission of Fine Arts, the Department of Housing and Community Development, and City Council were granted based on matter-of-right development, subject to particular covenants and programmatic goals. These goals and covenants were known and accepted in advance by the Applicant as conditions of the initial purchase of the site, yet he now seeks relief from the consequences of those covenants while at the same time seeking to retain the other approvals.

3. Testimony by Applicant's witnesses that this site has a smaller zoning

BZA
Case No. 16702
Exhibit No. 65

Board of Zoning Adjustment
District of Columbia
CASE NO.16702
EXHIBIT NO.65

envelope than nearby properties is irrelevant. The height limit for this site is more stringent than nearby properties precisely because the sightlines and viewsheds of this particular property have always been considered more important and more worthy of preservation by the community, the D. C. Zoning Commission, and the Commission of Fine Arts.

4. Testimony by Applicant's witnesses arguing for "flexibility" in the height at this W-1 site so as to approximate the heights of nearby properties is irrelevant. The properties cited were developed under either the much taller C-M zoning or W-2 zoning.

5. Testimony by Applicant's witnesses that the maximum allowable height under a PUD process is irrelevant since the Applicant did not file under this provision, the case was not advertised under this provision, and the Applicant has not put on a case that would support a PUD application.

6. Arguments for height and area variances cannot be justified by changed economic circumstances. Moreover, a careful review of the record in this case reveals that the Applicant has presented no evidence that (a) other financial avenues had been explored – including various District economic-development incentives – or (b) the theater operations which will continue to operate at the intensity previously planned could not be structured into a bankable business plan under alternative ownership.

We appreciate the opportunity to present facts and arguments about this case which is so important to the Historic Georgetown community.

Sincerely,

Barbara Downs

Barbara Downs
President

Enclosure

COMMENTARY ON PROPOSED FINDINGS OF FACT AND ORDER

Government of the District of Columbia
Board of Zoning Adjustment

Application No. 16702 of the Millennium Georgetown Partners LLC, pursuant to 11 DCMR 3102.1 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 condominiums, multiplex cinemas, hotel, and retail uses at 3100 South Street, N.W., Square 1189, Lot 88.

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

On behalf of the Citizens Association of Georgetown, a party to the case.

We agree largely with the statements in paragraphs 1, 2, 4, 5, 7, 8, 11, 12, 13, 14, 19, 28, 31, 32, 37, 41, and 49.

I. SUMMARY OF EVIDENCE

We take exception with paragraphs:

3. The height allowed in PUDS is irrelevant since this is not a PUD proceeding; all prior approvals would need to be reconsidered to make this discussion relevant.

6. The change in elevation has been variously described by the developer as 20 feet, 30 feet, and 40 feet. The record is not clear as to which formed the basis for FAR and height calculation and where the measurement is documented.

9. The site directly opposite the project location is designated for development as a passive National Park, intended to provide easy access to the great asset of the Georgetown waterfront, as part of both national and District celebration of this cultural richness of the Potomac River.

10. The characterization of the project as a single building is inconsistent with zoning regulation; the "connectedness" of these buildings, according to the architect, is at a subterranean level when measured at mid-point of the block square.

15. New buildings on historic sites do not qualify for automatic parking requirement waivers (nor waivers of ADA compliance).

16. Mr. Lanier offered testimony that the theaters included in the originally approved development would be built and operated but would now be owned by Millennium Georgetown Partners. This would constitute a new source of revenue to the developer.

The constraints on use of the site were known and agreed to by the developer as the right to purchase the site was pursued.

17. It was asserted by the Office of Planning that the District is "underscreened" when compared to suburbs. There was no evidence presented to justify this assertion, or to justify the value of bringing "crowds" to the Georgetown waterfront.

18. Again, the revenue stream associated with the theater operation now accrues to MGP.

20. The viewshed from 31st Street has been eliminated, with no access at all to the site and its "public space" from this public street.

21. The argument that development on this site should be allowed to approximate that of nearby buildings properties that are zoned W-2 or were built before the current zoning scheme was adopted are directly in opposition to the established goal for W-1 zoning at this site: to distinguish an important block from its neighbors and protect sightlines and viewsheds.

22. All the conditions described were known at the time of purchase. They cannot now be claimed as hardships that justify variance from zoning protections.

23. See ¶21 comment.

24. See ¶22 comment. Also, the argument that, if the developer could only demolish historic and contributing buildings, he could build more square footage and get a better return on his investment is hardly an attractive basis for granting a variance in a project of special merit.

25. The setbacks provided to the incinerator tower and the southern corners of the residential buildings are insignificant and do not ameliorate the impact of reduced visibility created by a building that, with penthouse, towers 117 above the waterfront parkland. The nature of the sloping site means views northward into Georgetown are further reduced, blocking the small structures above this development.

26. Contemporaneous minutes and e-mail provided to the BZA documents that the rooftop/terrace restaurant was still perceived as part of the project as late as November of 1999. CAG provided the Board will the language concerning the Council goal of enhancing the public space and pedestrian quality of 31st Street; instead, the development now creates a solid wall along this street.

27. It is not clear from the evidence that this is a single building under zoning, raising questions about the entire FAR calculation.

29. See ¶21 comment.

30. This is self-serving evaluation of parking and traffic; ANC 2A Commissioner Dorothy Miller raised questions about the impact of the traffic on evening rush hour.

33. Again, Ms. Miller is an elected ANC Commissioner. Her comments were in opposition

to any additional intensity of development as harmful to her constituents and community.

34. See ¶17 comment.

35. There is NO letter of support from the Waterfront Commission.

36. ANC 2E acknowledged serious concerns about the height and massing of the project, and asked that the Old Georgetown Board and the Commission of Fine Arts represent the best interests of the community with their expertise on these matters. ANC 2E specifically stated that its approval of variances was tempered by the Board/Commission judgment. That judgment was strongly in opposition.

38. CAG repeats its assertion that the relief sought is tantamount to rezoning the site to W-2 height, which would precisely trump the goal of W-1 zoning. The dismissive language proposed does disservice to the advocacy of the Citizens Association of Georgetown, which has long worked to protect Historic Georgetown with abundant volunteer talent and energy. The successful body of case law in which CAG has been involved underscores the importance and seriousness of purpose of this work.

As long ago as 1971, then-President Nixon in his April 7 message to Congress urged immediate action on a plan for the Georgetown Waterfront in order to preserve its unique combination of scenic qualities from overdevelopment. The transcripts of the hearings before the D.C. Zoning Commission for the rezoning of the Waterfront area from Heavy Industrial to Waterfront are filled with references to the inappropriateness of the ninety-foot heights allowed under the old zoning. The rezoning of the Waterfront was specifically meant to prevent a wall of ninety-foot-high buildings lining up behind the Whitehurst Freeway.

CAG's intensive involvement with the Waterfront zoning and development goes back to the 1969 suit to stop the Three Sisters Bridge and "riverside freeway." In 1971 CAG requested that the D.C. Zoning Commission initiate rezoning for the waterfront. CAG requested that the Zoning Commission impose emergency downzoning for the waterfront area until the on-going Area Plan could be completed. CAG went to the D. C. Court of Appeals in 1972 and again in 1973 and 1974 against the Zoning Commission to get it to act to preserve the Waterfront and its historic scale and scenic vistas.

39. These paragraphs misrepresent testimony, which was to provide Board members with the history of the project's approval and its changing elements. Contemporaneous correspondence and minutes provided by CAG speak to the broad perception about the rooftop restaurant, and to the applicant's encouragement of such perception as late as November of 1999. The reference to persons' dislike of what had already been approved was included in a discussion of what the ANC commissioners in 2E had meant by their resolution; Mrs. Zartman was quoting commissioner Birch, not offering an opinion of her own. There is indeed a public space in the center of the project; Mrs. Zartman allowed that it did not meet the express intent of City Council (previously provided language).

40. The Commission of Fine Arts said many things in its letter of April 11, later affirmed in a meeting on April 19, 2001. It specifically cited the importance of zoning this site to the lowest height on the waterfront, of the thirty years of effort to protect this site which it deemed

"especially critical to preserving the views of the Potomac River and the national memorials beyond." It called the project site "one of the most important of these" sites.

42. This discussion of PUD developments is irrelevant. See ¶3 comment.

PROPOSED FINDINGS OF FACT:

We take exception with these paragraphs:

44. The developer agreed to the conditions at purchase; the deed restrictions cannot now be changed, nor should they be the basis for seeking zoning relief.

45. See comments ¶22, 24.

46. By taking advantage of an elevation change that is variously described as between 20 and 40 feet, the developer has been granted the "right" to build to 90 feet where the zoning goal was to keep a small height scale. This constitutes major flexibility to the benefit of the developer. Contemplating still higher roof lines would represent rezoning of the site.

47. See comments ¶22.

48. The Board has no expertise or evidence to assess the economic well-being of the cinema industry; nor was it given information about new revenue streams that will accrue to MGP when it retains ownership of this business operation. Moreover, economic change is not a basis for granting area or height variances.

50. The Board finds that the conditions affecting the site were fully described and well known by the developer at the time he sought to purchase the property from the District. The developer is now estopped from raising those conditions as hardships affecting his ability to build on the site.

Further, the developer previously was successful in obtaining final approvals for a plan for the site, including all the elements described now as preventing successful development.

51. The blocking of sightlines and street views is an established basis for determining harm to neighborhoods. The arguments included in the letter from Fine Arts Chairman J. Carter Brown on behalf of the nationally respected, Presidentially appointed Commission, provide further expert assessment of the harm to be done.

52. The modest changes proposed by Millennium do not mitigate the harmful impact.

53. The additional height affects virtually the entire blockfront on K Street, except for the incinerator tower (itself, of course, higher than the rest of the project).

54. The proposed height of the project makes it consistent with W-2 buildings or projects that predate the carefully considered protections for important waterfront property precisely fashioned in the Zoning Regulations and Map.

55. The Waterfront Commission does NOT recommend approval.

56. See comment ¶55.

ADD: The Commission of Fine Arts and the Old Georgetown Board specifically and strongly oppose the amended design for this project.

ADD: ANC 2E expressed serious concerns about the height and massing of the proposed change and asked that the expert judgment of the Commission of Fine Arts and the Old Georgetown Board be relied upon in assessing the impact of the variances.

57. There is no evidence on the record before the Board that without the requested relief, the project cannot be completed.

CONCLUSIONS OF LAW AND OPINION:

Under Sections 930.1 and 931.1 of the Zoning Regulations, the Applicant has the burden of proving that compliance with the area restrictions is unduly burdensome and that the practical difficulties are unique to the site. The evidence before the Board indicates that a viable development program was created that received full approvals at all levels, including permit approval by the Commission of Fine Arts. This development design accommodated all of the elements of topography, geography, and historicity.

The evidence further indicates that the Applicant actually benefited from the slope of the site, gaining fifty feet of building height and associated FAR at the K Street elevation, beyond what would be allowed as a matter of right in the W-1 zone.

The covenants and conditions complained of by the Applicant were all factors known to and accepted by MGP and formed key elements of approvals at local and Federal levels. Acceptance of these covenants and conditions was critical to many of these approvals. According to evidence, none of those conditions changed over the period of time the project has been in development. By the Applicant's own testimony, the only factor that has changed has been the economic status of a principal tenant. Justifying a height variance exclusively on economic grounds is not permissible.

The Applicant seeks relief from the consequences of these conditions and covenants to which he agreed when seeking approvals, yet he wishes at the same time to retain the approvals conditionally given to a matter-of-right development. The Citizens Association of Georgetown argued that the Applicant should be estopped from seeking such relief while benefitting from the prior conditional approvals.

The zoning envelope for this site is intended to be smaller than that for nearby sites, owing to a thoughtful determination that the setting with its sightlines and viewsheds was especially worthy of protection with a lower building height for matter-of-right development. There is no evidence before the Board that a PUD filing was ever considered for this site or that approval for such development would have been granted at all levels; hence, the allowable height for PUDs in W-1 is irrelevant in determining whether to grant the variances requested here.

Similarly, the existence of taller buildings on nearby sites reflects their construction under more intensive C-M or W-2 zoning and is irrelevant to the intended uses on W-1 sites. Indeed, the fact that this particular block was specifically chosen for protective W-1 designation is indicative of the intent, purpose, and integrity of the Zoning Regulations and Map. The zoning distinction offers clear evidence that the site was not intended for development as intense as that which occurred on adjacent sites. Both the Citizens Association of Georgetown, a party to this case, and the Commission of Fine Arts gave evidence of the genesis and importance of this special waterfront zoning designation, asking the Board to deny the variance as unjustified and harmful to the intent of the Zoning Regulations and Map.

The Advisory Neighborhood Commission, to which the Board gave great weight, expressed its concerns about the height and massing of the proposed addition, deferring to the judgment of the Old Georgetown Board and the Commission of Fine Arts, for decisions about the impact of the proposed additions.

The Board concludes that the Applicant has not met its burden. It is hereby ORDERED that the application be DENIED.

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

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

FINAL DATE OF ORDER: