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BY HAND

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

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

Dear Ms. Reid:

The following is in response to the Citizen Association of Georgetown's (CAG) submission and the submission requested from Advisory Neighborhood Commission 2E ("ANC 2E") regarding the above-referenced matter.

ANC 2E RESOLUTION

With regard to the submission of ANC 2E, the Chairman's letter to the Board reiterates its "endorsement" of the application for the area variance sought by Millennium. Indeed, ANC 2E explicitly states that it has agreed with Millennium that a "confluence of factors unique to the site" has created the present difficulties in completing a matter of right project. As for the design, ANC 2E also reiterates that it requested that the design, which were at issue, should be addressed by the CFA. In its letter of April 16, 2001 and in the administrative portion of its April 19, 2001 meeting (attached hereto), the CFA clearly said that it did not object to the design. Thus, ANC 2E's "endorsement" of the application before the Board remains.

BZA
Case No. 16702
Exhibit No. 63

Board of Zoning Adjustment
District of Columbia
CASE NO.16702
EXHIBIT NO.63

CAG SUBMISSION

As for CAG's submission, there are two preliminary matters that must be addressed which may negate the need for the Board to consider the material submitted by CAG on April 20, 2001.

The first preliminary matter involves CAG's party-status, which was conditioned upon CAG submitting (1) copies of its bylaws authorizing their board to take action on behalf of the association without a public meeting and (2) a list of its members adjacent to the property. CAG has submitted neither of these items. The "Elements of Barbara Zartman's oral presentation before the BZA" references the bylaws, but such reference is nothing more than what was relayed to the Board at the April 17, 2001 hearing (the "Hearing"). There is no reference in the material regarding any members of CAG who are adjacent to the property. Given the extensive letters and petitions submitted in support from neighboring property owners, including members of CAG's Advisory Committee, it is clear that many individuals who submitted these letters or signed the petitions are members of CAG. Given that the grant of party status to CAG as a representative of persons uniquely affected by the proposed application was conditional and CAG has failed to satisfy the conditions for such party status, CAG's party status should be rejected by the Board.

As a second preliminary matter, the record was left open for the submission of specific items. With regard to CAG, the record was left open for them to submit (1) minutes from the ANC meetings referencing alleged promises by Millennium to include a roof top restaurant in return for project approval, (2) a copy of the City Council's legislation regarding the plaza to be included in the project and (3) a response to Millennium's submissions. Items 1 & 2 were not submitted because, despite CAG's statement, they do not exist. Instead, extraneous materials such as the CAG newsletters and e-mails between CAG members were submitted by CAG. These extraneous materials should not be considered by the Board. CAG had the opportunity to present these items to the Board at the hearing but failed to do so. CAG should not be permitted to, yet again, ignore the ruling of the Board.

To the extent the Board decides to consider this submission, as outlined below the information submitted does not support CAG's position but, rather, supports Millennium's argument for the requested variances and illustrates Millennium's extensive efforts in working with the community in designing and developing its project. In doing so, Millennium again desires to make it clear that what is before the Board is simply approval of variances for (1) an additional ten feet on the residential portions of the project, which encompasses at most 23% of the project area, for the purpose of building six more residential units; and (2) additional FAR within the building to convert unusable space to usable space, which has the effect of, *inter alia*, adding ten more parking spaces. CAG's assertions do not address these issues.

CAG asserts that all of the difficulties, which are associated with the site, were known to Millennium when the land was purchased and that the financial status of its major tenant cannot be the basis for the area variances. This is not the law. In the first place, this is not a self-created hardship and, in any event, self-created hardships serve to preclude only use variances not area

variances. The site is unique. That is a given. The substantial financial situation, which has befallen the project, is an appropriate consideration when evaluating practical difficulties. Here, because of the uniqueness of the site, Millennium is unable to develop it in accordance with the zoning regulations so as to compensate for the substantial financial impact of the theater bankruptcy. The relief sought is relatively *de minimus* and is well within the authority of the Board.

With regard to the quote from the City Council's legislation, CAG had been requested to submit a copy of the actual legislation, which CAG has failed to do. The cite to the legislation in CAG's submissions indicates that it is from an Appendix to the Council legislation. Without the complete legislation, both the Board, as well as Millennium, is deprived of the opportunity to see the full context of the statement. More importantly, the quote cited does not support CAG's position that the open space has been eliminated. The site plan and photograph of the model submitted by Millennium illustrate that extensive open space has been incorporated into the project. Additionally, Millennium's expert architect, Shalom Baranes, testified that open space provided in the project had been increased since the original plans. The testimony stands uncontroverted. In addition, the City Council understood that there would be two public access points. There are still two access points, from South Street and Wisconsin Avenue. Furthermore, the hotel lobby in the Incinerator is a public space, like all hotels, and was understood as such by the Council. An open entrance to the courtyard lobby does not make it private. Lastly, the fact that the access from Wisconsin Avenue is closed at night for security reasons does not diminish that fact that its is an access point for the public. Many public areas, including parks, are closed at night for security reasons.

The documents submitted with regard to the ANC meetings similarly do not support CAG's position. Rather, they illustrate the extensive efforts Millennium made in cooperating with the ANC. Additionally, they support Millennium's position regarding the practical difficulties in developing the sight. For example, the April 28, 1998 minutes state that "the key site challengers were massing, height and its historic requirements." The minutes go on to explain the slope of the sight and the historic preservation impacts on the development. Although the September 1, 1998 minutes reference the rooftop of the Incinerator, this reference merely states that "several commissioners said they *hoped* that the architects would find a way to make use of the roof of the incinerator because of the wonderful views." (Emphasis added.) There is no reference that any use of the rooftop was promised by Millennium, the extent of any discussions of such use or that it was offered in exchange for "trade-offs" from the ANC, as alleged by CAG. The resolution by the ANC on this date regarding the issue was that the ANC would "urge the architects to . . . continue exploring means of making the incinerator roof, with its spectacular vista, a major public destination for Georgetown." Clearly, there was nothing more than an expressed desire (i.e., hope), that such use could be made. It is not evident that a restaurant was the use inquired about by the ANC. No mention of the use of the rooftop of the Incinerator is made during the November 2, 1999 meeting. On December 2, 1999, there is mention that Commissioner McFarlane "inquired about the roof terrace . . ." and that Mr. Lanier responded that "code issues were making this problematic." This is consistent with the evidence presented to the Board by Millennium at the April 17, 2001 hearing. Finally, in the email

messages between Anthony Lanier and Jonda McFarlane, Ms. McFarlane acknowledged that, although Millennium, at the request of the ANC, agreed to explore the idea of a roof top restaurant, "it wasn't long before" Millennium was forced to remove it from their plans because of code and egress issues.

Aside from the fact that the documents offered by CAG do not support Ms. Zartman's testimony or statements regarding the issue of the roof top restaurant, the documents are evidence of the extensive efforts Millennium has made in meeting with the many community organizations and the extreme undertaking involved in developing the project. With regard to the roof top terrace, the documents support a hope expressed by Commission McFarlane that use could be made of the terrace, that Millennium looked into such a possibility but that it was not feasible. This supports the testimony offered by Millennium at the April 17, 2001 hearing. Finally, the ANC minutes submitted illustrate the practical difficulties that are unique to the property and Millennium's applications and support the application for the variances.

CAG's unsupported assertion regarding presentations to the ANC in 1999 and 2000 are belied by the ANC minutes. Presentations were made to the ANC on a regular basis and the ANC, as well as the community, were kept informed of developments in the project through a monthly newsletter. The use of a monthly newsletter was part of the community participation plan submitted to, and accepted by, the Department of Housing & Community Development when Millennium was selected as the developer of the Incinerator.

Finally, CAG's comment that "[i]t was never envisioned that the entire block would be assembled as a single lot," is also unsupported. There is nothing in the statement of reasons prepared by the Zoning Commission concerning the adoption of the Waterfront Zone that would lend any credence to such a statement. Rather, since the Zoning Commission had before it at the time "entire block" development adjacent to the site it must have been aware of such an opportunity for any site. The fact is, the present design, at 50 feet on K Street, as measured under the zoning regulations, provides for setbacks along Wisconsin Avenue and 31st Street which keeps the height at 40 feet.

Based on the foregoing, Millennium requests that the Board reconsider the grant of party status to CAG due to CAG's failure to submit the information upon which such status was conditioned. Millennium further requests that the Board find that the material submitted by CAG does not support CAG's opposition and, given the overwhelming evidence in support of the application and the support of the ANC to the application, find that Millennium has met its burden of proof with regard to the requested variances.

The Incinerator project has been supported by every public agency that has reviewed the project and a vast majority of the public. That is in large part because this project does what could not be done over the last thirty years. Millennium has taken the dilapidated and abandoned Incinerator and come up with uses that have been characterized as going "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 to provide vitality for a neglected area." In order to comply with its obligations to the city and the community and to address the consequences of the wholesale bankruptcy of theater chains, Millennium has taken upon itself the least objectionable means of maintaining the theater use through a minimal increase in height and density. This proposal is supported by those most directly affected by it, Grace Church, neighbors, the Park Service and the District government because, as each has acknowledged Millennium clearly meets the requirements for an area variance and has demonstrated a continued willingness to work with its community to resolve any issue which threatens the successful completion of this project. Accordingly, Millennium seeks this Board's support as well.

Thank you for your consideration.

Sincerely,

ROBINS, KAPLAN, MILLER & CIRESI LLC

Richard B. Nettler
Jeannine Rustad Zigner

cc: Advisory Neighborhood Commission 2E
Office of Planning
Citizens Association of Georgetown

Commission of Fine Arts Hearing

Administrative Portion

April 19, 2001

Charles Atherton: The final item on the Administrative Board Hearing is a confirmation on the action on the Georgetown Incinerator project. As you will recall and the decision was made to return the recommendation to the Georgetown Board for further consideration. That the Commission at the time also noted that it really did not have any particular questions about the design details as the Board. The Board also felt that the design was very reasonable, but the Commission, as you recall, felt that there was some very good reasons that were the basis for making those zoning changes 25 or 30 years ago, whatever they were and that it was important to adhere to those regulations. The Board I think also appreciated being reminded that the Georgetown Act is an act to regulate the height of the buildings in Georgetown. And that is something that is often overlooked. So, as a result of that further consideration, they have reiterated their support for the architectural design, but also feel that they are opposed to the granting of a variance to the BZA. This letter was sent to the BZA last week, the hearing was held yesterday, and I expect there will be a decision probably in another two or three weeks.

Vice Chairman: Charles, it would be helpful if you could just briefly go through the other reason for an exception. That may sort of clarify where we are on this, and our relationship to it.

Atherton: Yes, the regulations regarding the BZA operations, before exceptions are granted they have to meet several test. By reason of exception on narrowness, shallowness or shape of a specific piece of property at the time of the original adoption of the regulations, or by reason of exceptional topographical conditions or other extraordinary exceptional situations or condition of a specific piece of property. * * * So, it's on the agenda for confirmation, it's also on the agenda, listed on the appendix and it's up to you to either confirm this position now or to defer until the time when we consider the appendix at the latter part of the meeting.

Vice Chairman: It will be deferred for consideration until we consider the appendix.