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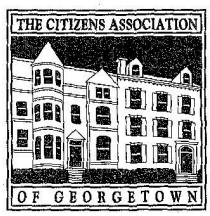
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May 14, 2001

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

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Dear Ms. Reid:

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

Enclosed is our now complete response of the Citizens Association of Georgetown to the May 4, 2001 letter from Richard Nettler on behalf of Millennium Georgetown Partners in connection with the Incinerator Site. (We have reprinted the pages submitted on Friday so that CAG's response will be in a single document.)

Again, we ask the Board to reject the request for height and area variances, inasmuch as the applicant has not met his burden.

As we wrote, the consequence of the precedent that would be set by granting these variances based on the facts of this case would unquestionably cause substantial detriment to the public good and would substantially impair the intent, purpose, and integrity of the zoning plan.

We ask that you deny the application.

Sincerely,

Barbara Downs

Barbara Downs
President

Enclosure

BZA
Case No. 16702
Exhibit No. 75

Board of Zoning Adjustment
District of Columbia
CASE NO.16702
EXHIBIT NO.75

COMMENTARY ON SUBMISSION OF RICHARD NETTLER ON BEHALF OF MILLENNIUM GEORGETOWN PARTNERS, MAY 4, 2001

We take exception with the following elements:

Extraordinary or Exceptional Conditions Affecting the Site

• Historic Buildings. The historic nature of several buildings is cited as a burden; they are also a great asset entrusted to Millennium's care. They add value and character to the project. Their preservation was a given in the sale.

• View Sheds. The importance of being able to see the historic structures was again a known element at the time of purchase. Moreover, the view shed from 31st Street, intended to be preserved, has disappeared; there is no access to the site along this street.

• Topography. The sloping site is of great benefit to Millennium, rather than a hardship. It created a triangle of development below the South Street elevation that would not otherwise have been permissible. It too, obviously, was known at the time of sale (although applicant variously describes it as 20', 30' and 40').

Additionally, the floodplain, which is just 7.5' above K Street's elevation (using the applicant's numbers) actually affects little of the commercial space. According to the architect's own presentation before the Old Georgetown Board, the steps at the movie theater entrance raise the level of the theaters above the floodplain.

• Whitehurst Freeway. Surely this element was known to the developer before sale; it apparently is not such an encumbrance because the developer has purchased another site a block away with the same noise and visual barriers on K Street, and seeks to use it for residential properties.

• Deed restrictions, etc. These are agreements entered into by the developer and conditions accepted by him.

Moreover, the applicant has benefitted significantly from actions of governmental and community groups motivated to protect and further enhance the historic elements. City Council closed a public street in order to facilitate development of the site and the preservation of the historic buildings. This is a benefit of considerable financial worth.

Similarly, the public and private initiative in creating the Georgetown Waterfront Park, a multi-million-dollar asset across the street from this project will benefit the applicant greatly, both for the ambiance that it will give to the streetscape and pedestrian traffic, and to the views it will create for the upper-level residences.

The ANC's letter is mischaracterized by the applicant. The ANC effectively gave a proxy to the Commission of Fine Arts and the Old Georgetown Board to act for them in determining the appropriateness of the massing on the site that would be created by an additional floor. The Commission's statement is unequivocal. The "great weight" must be given to that statement.

Strict Application of the Zoning Regulations ...

The applicant's recitation of what might have been is irrelevant. Millennium did not seek a PUD or an area variance at the time, nor indicate that variances would be sought to complete the project. There is no guarantee that the case for a PUD or for variances would have been successful at that time, nor any guarantee that the applicant would have been the successful bidder were the need for these variances known at the time of the RFP process. Similarly, there is no guarantee that the subsequent approvals from the ANC, the NCPC, and the various other approving bodies would have been granted. given those alternative circumstances. In fact, the NCPC staff report recommending approval of the land transfer specifically cites the protections of W-1 zoning and the Old Georgetown Act as shields against intense development.

The Theaters

Much has been said about the theaters and the importance that the Office of Planning places on their inclusion in this project. The community supported a few small, art cinemas to replace the closed Biograph and Key theaters. The project has grown to include a massive series of seats and screens. The financial reverses of the tenant do not change any of these elements: the project is proposed to still have 3,000 seats and 14 screens, but they will be owned by Millennium, not Loew's. Presumably the rent that had been negotiated ($1.7 million a year) was lower than it otherwise would have been if the tenant hd asked the developer to front the build-out costs. The tenant, presumably, intended to make money on the project, suggesting it expected gross revenues sufficiently above the rental figure, in order to cover amortization of the $25 million in capital costs, operating expense, and profit.

Since Millennium will now own the theaters and will merely pay Loew's a fee for operating them, it can be assumed that something very substantially in excess of $1.7 million a year will be the net income for MGP. With such a revenue stream, alternate corporate structures - perhaps supported by District economic development incentives to reflect the Office of Planning's high priority for the project - would seem viable options. Additionally, since the theaters are above the floodplain, alternate commercial uses should be viable as well. The applicant has offered assertions to the contrary, but not evidence.

Old Georgetown Board/Commission of Fine Arts

Since 1948, the Commission of Fine Arts has been empowered to regulate the height, exterior design, and construction of private and semipublic buildings in the Georgetown area of the District of Columbia" (Public Law 808, 81st Congress; D. C. Code 5-801, 64 Stat. 902).

For nearly thirty years, the Commission and the Old Georgetown Board have fought to preserve the waterfront from excessive development, from buildings that damage important streetscapes and view sheds. If at its first meeting to consider this redesigned project, the Old Georgetown Board ignored the question of height (deferring to the separate responsibility of District boards to deal with height in a zoning context), it does not make the subsequent actions of the Board and the Commission any less important or relevant. The reasons cited by the Commission in Chairman Brown's letter are strong and critical to a waterfront that belongs to all the citizens of the District, and the nation.

(It should be noted that the transcript provided by the applicant is not an official document of the

Commission of Fine Arts. It was prepared by the applicant from an audio tape copy and has not, to our knowledge, been authenticated as to its accuracy or completeness by the Commission.)

Economic Considerations

The applicant Millennium Georgetown Partnership presented financial information in its submissions of Mary 4, 2001 and made representations therein.

At the core of the financial representation are two facts. First, the project is said to be facing a $35 million shortfall due to the $25 million that is no longer available and the loss of a $1.7 million creditworthy rental stream per year for approximately $10 million. Second, the applicant represents that the unique site conditions and historic structures have caused them to incur approximately $23.5 million in additional construction costs.

The applicant asks that the Board grant FAR and height variances so that the additional space might allow them to recoup the extraordinary costs of approximately $23.5 million that they incurred dealing with the conditions and historic structures. The applicant contends that the property is unique because of its size, shape, topography, a condition inherent in the structures built, or other conditions that uniquely affects the site that caused them to incur these costs.

It is unclear from Millennium Georgetown Partnership's application whether they are attempting to recoup:

a. $23.5 million in construction costs due to the unique character of the property,
b. $25 million in construction funding presumably for tenant build out of theaters,
c. $1.7 million per year in rents for a period of time representing $10 million, or
d. A combination of b. and c. amounting to $35 million.

First, please consider that this is a project with design approval and permits, and it is under construction. No developer knowingly begins construction of a project that is not financially viable. Rather the applicant has included design solutions and uses approaching $23,700,000 in cost of their choice and only $4,512,000 more than their comparable new box structure. These solutions were viable when construction began.

Second, the applicant Millennium Georgetown Partnership has not presented the Board with any information exhibiting where the costs of this project have varied from budget due to the historic district, their proposed design, topology and floodplain issues, or geology and rock issues which now place the applicant at risk.

Third, in the testimony and community presentations, the applicant has indicated that it will continue with the theater use and will provide the capital for the theater improvements itself. Hence while citing the loss of rents, this revenue stream would apparently continue at an equal or greater level. The only issue would appear to be its predictability and hence creditworthiness. The applicant is unclear as to how they can now provide theater space build-out capital totaling $25 million while now requiring $23.7 million for site and preservation issues that now place the applicant at risk.

Fourth, the topography of the site allows at the southern K Street façade an additional 40 to 45 feet of building height of which 33 to 38 feet is above the 100-year floodplain. This places all of

the 40 feet of height authorized by zoning of right above the Whitehurst Freeway. Millennium looks at this added height as a site problem. It is in fact space above and beyond that normally available to a developer, which they chose to develop as theaters, a planned profit making activity providing $1.7 million per year or more. Hence, the topography provides additional revenue approaching $10 million and places the matter-of-right space above an obstruction.

Fifth, further consider the financial hardships due to the characteristics of the site. Georgetown Millennium Partnership acquired this site in a series of purchases. Approximately half of the site including the historic Incinerator Building and Smokestack was acquired from the District of Columbia for $4.5 million less environmental clean up costs. Per their submission, the clean-up costs were between $145,000 and $972,300, the lower representing just those costs attributed to the Incinerator Building, a historic structure, and the higher, those of the total project.

The total site was acquired for $20,062,615. The adjacent and second half of the site included the Brickyard Hill House; the two adjacent historic structures and properties surrounding Copperthwaite Alley were thus acquired for $15.6 million at most. Subsequently, Copperthwaite Alley was vacated but the architectural requirements for sight lines in lieu of the alley remained. Another Millennium partnership vacated an alley at 2200 M Street, N.W. The value of that vacated alley was placed at $2.5 million. The costs of historic preservation and restoration relating to this portion of the site are $1,829,058. Hence the alley's vacation paid for more than the costs of preserving the Brickyard Hill House and two adjacent structures.

The District Government in recognition of the site's difficulty and the Incinerator's historic limitations appears to have sold the Incinerator parcel at between $11.2 million and $14.7 million below the market rate to address the Incinerator's restrictions. The applicant has reported the Incinerator costs at $2,171,451 or less. Therefore a minimum of $9,027,549 to $12.5 million was provided to cover $11,324,823 for view sheds and campus plan. Additionally some portion of the cost is directly attributable to rental space. The costs of both the historic district, and view sheds and campus plan are therefore fully funded through accommodations in purchase price and via vacation of public space. Be abandoning a view corridor from 31st Street as was originally required, the developer has added a substantial cube of additional development space, a considerable benefit both financially and in terms of convenience.

Sixth, of the $23.5 million, $895,000 represents site conditions such as topology and flood plain mitigation. Both were evident prior to Millennium Georgetown acquiring any part of the site. For its depth and proximity to the river and floodplain, the site has been very dry during foundation construction. Sheeting and shoring are in direct relationship to the excavation size and are a direct function of the developer's project density based upon design and use. Please note that the cost of sheeting and shoring the Incinerator Building equals that of the entire site. If this is not in error, the District's discount in purchase price paid one half the shoring costs. Also note that this is a function of lineal feet and depth rather than square footage of the project as is apparently used in the applicant's presentation.

Seventh and lastly, the review of geology and rock is misleading. Based upon location, and as addressed in the conservative positions herein, these were funded by the discount in the Incinerator purchase price. The subcontractors also sold the rock removed from this site. Therefore while rock excavating is more expensive than earth, the factor was known prior to consideration of any project and the rock sale proceeds should be reflected in lowered excavation

and footing costs. Hence these costs have not been extraordinary and those of geology and rock should have been self-liquidating.

In summary, all costs involved in the $23.5 million relating to the special site conditions and historic preservation and restoration issues were funded, with the possible exception of rock. The sheeting and shoring costs are suspect and in direct relationship to the scope of the developer's project. The rock was a revenue-producing and cost-saving item as much as an additional cost item. There are no identifiable costs above or beyond budget and all outlined costs were known and funded in the building as approved.

Moreover, the applicant has failed to show that other financing options, including sub-market-rate funding through District economic development programs, are unavailable. Claims about other commercial uses of the theater space being unavailable because of the floodplain are moot, inasmuch as the architect testified before the Old Georgetown Board that the entrance steps on K Street raised the theaters above the floodplain.

In conclusion, the public through the variances requested is asked to fund the tenant build-out of the theaters due to the financial uncertainty in the movie industry relating to theaters. The loss of a tenant's lease is not a financial hardship or a practical difficulty related to the site, as outlined in the zoning regulations.

Traffic Issues

We support the Board's concerns about the cumulative effect of multiple projects on traffic. We join in expressing the need for the Department of Public Works to study the harm such cumulative effects can have, even when an individual project may not make a critical difference.

Legal Issues

Petitioner has failed to carry his burden of establishing any of the factors that need to be shown for this Board to grant the variances sought. Petitioner seeks variances under D. C. Code §5-424(g)(3) which provides in pertinent part:

> Where, by reason of exceptional 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 or exceptional situation or condition of a specific piece of property, the strict application of any regulation adopted under §§5-413 to 5-432 would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, to authorize, upon an appeal relating to such property, a variance ... *provided such relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations and map ... (emphasis added).*

The District of Columbia Court of Appeals in *Gilmartin v. District of Columbia Board of Zoning Adjustment*, 579 A.2d 1164, 1166 (1990) held that an applicant seeking a variance under this provision must show first, that the property is unique because of some physical aspect or "other extraordinary or exceptional situation or condition" inherent in the property; second, that strict application of the zoning regulations will cause undue hardship or practical difficulty, and third,

that granting the variance will do no harm to the public good or to the zone plan. Petitioner has failed to establish that the variances sought meet any of the statutory factors required to be present .

First, the fact that Georgetown slopes down sharply to the river is hardly a unique aspect of this property. It is shared by all nearby properties and far from creating a challenge to development has permitted the applicant to build a 90' building on the site as measured from K Street. While the site does present the challenge of preserving certain historic properties, that is also not a unique situation in the Old Georgetown Historic District. The difficulties the applicant faces are not significantly different from those facing any landowner in Georgetown. As the Court explained in *Capitol Hill Restoration Society v. District of Columbia Board of Zoning Adjustment,* 534 A.2d 939, 942 (D. C. 1987), "difficulties that are common to or affect an entire neighborhood, or to a substantial portion thereof, are properly addressed by seeking amendment of the regulations themselves from the Zoning Commission." The Court noted that if such problems were addressed through individual variances the effect would be *de facto* amendment of the zoning regulations because requests by others similarly situated would have to be granted. However, it is the Zoning Commission not this Board that is empowered to make such amendments.

Second, the petitioner has not shown that compliance with zoning will cause undue hardship or create practical difficulties. As the Court noted in *Tyler v. District of Columbia Board of Zoning Adjustment,* 606 A.2d 1362, 1367 (D. C. 1992); "a substantial increase in the cost of an intended improvement coupled with some loss in the overall utility of the property was not a practical difficulty that merited an area variance." In *Gilmartin* the Court held that even where costs would be fifty to ninety percent more without an area variance, the burden for obtaining the variance would not be met. See also *Barbour v. District of Columbia Board of Zoning Adjustment,* 358 A.2d 326 (D. C. 1976). Further, *Gilmartin* reaffirmed that "prior knowledge or self-imposition of the difficulty ... [is] but one of the many factors that BZA [may] consider in making its decision," quoting *Russell v. District of Columbia Board of Zoning Adjustment,* 402 A.2d 1231, 1236 (D. C. 1979).

Third, the proposed variances would clearly do harm to the public good and substantially impair the zoning plan for this part of Georgetown. The impairment of the view sheds of the waterfront looking down Wisconsin Avenue and 31 Street and the impact of the height and mass of the proposed structure on the views from the waterfront park are the reasons this Association and the Commission of Fine Arts oppose the variances sought. As noted earlier approval of this variance would also amount to a rezoning of the Georgetown waterfront in a manner detrimental to the zoning for the Georgetown and would thus be clearly improper under *Gilmartin,* supra. By establishing a new and far more lenient basis for granting area variances – to wit, financial reverses – the Board would open the floodgates for appeals that would undermine all FAR and height standards, not just for Georgetown, but for all District properties.