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June 13, 2001

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
MOTION TO STRIKE THE CITIZENS ASSOCIATION OF GEORGETOWN'S ("CAG") JUNE 12, 2001 SUMBISSION AND/OR EXCLUDE TESTIMONY FROM CAG'S PROPOSED "EXPERT" WITNESSES

Dear Ms. Reid:

At the Board's May 15, 2001 meeting, the Board unanimously approved the area variance related to the FAR contained within the matter-of-right portion of the building. May 15, 2001 Transcript ("Transcript") at 13-14. With regard to the height area variance and the additional FAR attributable to the height variance, the Board found that the Millennium had met its burden of proof regarding the (1) uniqueness of the subject property and (2) the practical difficulties resulting form the strict application of the Zoning Regulations. Transcript at 14-17. With regard to the third prong of the area variance test – whether the granting of the variance will substantially impair the intent, purpose, or integrity of the Zoning Regulations and Map or result in an adverse impact on the community – the Board stated it was not prepared to make a decision as to this factor until they could visualize the impact of the additional floor on the surrounding community. Transcript at 20-21. Consequently, the Board held the record open as to the third prong of the variance test as it applied to the additional floor and additional FAR contained therein *only*. Transcript at 22, 47 (indicating record held open only to issue of the impact on the viewsheds) and 52-53. Furthermore, after much discussion, the record was left open only as to the parties and a hearing was scheduled for the limited purpose of considering

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the effect of the proposed additional floor on the viewshed of the waterfront. Transcript at 35-41 and 53.

CAG's June 12, 2001 submission goes beyond the specific purpose for which the record was left open (that is, CAG's submissions go beyond the issue of the third prong of the variance test, namely the effect of the additional floor on the viewshed of the waterfront) and, instead presents argument on the first two prongs of the area variance inquiry. As such, the portions of the submission that go beyond the Board's order should be stricken from the record. Additionally, for the reasons stated below, testimony from CAG's proposed experts should be excluded.

CAG'S SUBMISSIONS SHOULD BE STRICKEN FROM THE RECORD

As stated above, the record has been left open for the sole purpose of considering evidence relating to the impact of the additional floor on the viewshed of the waterfront and the intent and purposes of the Zoning Regulations and Map. Despite this limitation, CAG's submission focuses on the previously decided issues of the uniqueness of the site and the practical difficulties presented by the strict application of the Zoning Regulations. *See e.g.* CAG's submissions at p. 2 (focusing on the economic factors of the practical difficulty), 3 and 4 (focusing entirely on these two issues in arguing for denial of the requested variances). Additionally, CAG continues to argue against the use of the measuring point at South Street, as well as against the Board's finding that the proposed project is a single building. These arguments exceed the purpose for which the record has been left open.[1]

With regard to the third prong of the area variance test, the court has recognized that the "variance procedure is 'designed to provide relief from the strict letter' of the zoning regulations". *Draude v. District of Columbia Board of Zoning Adjustment*, 582 A.2d 949, 957 (D.C. 1990). In those instances where the court has considered Board action predicated on the third prong of the area variance test, the court has focused on whether the grant of a variance will permit a use wholly out of character with a zoning district or a development that substantially exceeds the applicable requirements. *See French v. District of Columbia Board of Zoning Adjustment*, 658 A.2d 1023 (D.C. 1995)(no public harm found where the variance "negligible"); *Gilmartin v. District of Columbia Board of Zoning Adjustment*, 579 A.2d 1164 (D.C. 1990)(area variance upheld where deviation was minor); *Roumel v. District of Columbia Board of Zoning Adjustment*, 417 A.2d 405 (D.C. 1980)(variance denied due to finding of harm to the public good and impairment of the Zone Plan where the variances were substantial – 24.68% below the minimum area and 68% below the minimum backyard requirements – and wholly inconsistent with the surrounding neighborhood); *see also Downtown Cluster of Congregations v. District of Columbia Board of Zoning Adjustment*, 675 A.2d 484 (D.C. 1996); *Gladden v. District of Columbia Board of Zoning Adjustment*, 659 A.2d 249 (D.C. 1995). The court has recognized that where the purposes of the zone plan are not substantially impaired and the applicant has met

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[1] Additionally, CAG, in relying on these arguments, erroneously concludes that the building as originally proposed (i.e., without the additional floor) exceeds the height restrictions. This conclusion is inconsistent with the fact that CAG supported the current building and never appealed the building permit issued for the present building.

its burden of with regard to the other two prongs of the variance test, then area variance relief is appropriate. *See Draude*, *supra* 582 A.2d at 957. On the other hand, the court has also recognized that the third prong of the variance test can not be used to deny every variance sought in a district since that would deprive the Board of the discretion it is empowered to exercise in individual circumstances.

As with the opposition presented in *Draude*, CAG fails to offer any evidence as to how the requested variance harms the public good or impairs the intent and purpose of the zoning plan. Indeed, CAG argues that a height variance should not be allowed because a height variance has never been sought before in the waterfront or commercial zones in Georgetown and thus none have ever been granted. If none have ever been sought and this is the first time, then CAG should not be concerned about the impact of this unique situation. Furthermore, the fact that none have been sought since the waterfront area was built out at heights exceeding the Incinerator site does not provide a basis for failing to address the specific issues raised by the need for a variance at this site.

CAG's argument is similar to the argument rejected in *Draude*. In *Draude*, the applicant proposed an addition to a nonconforming structure. To support their argument that the requested variance would impair the intent and purpose of the Zone Plan, the opposition pointed out that a widely recognized purpose of zoning regulations is the elimination of nonconforming structures. Similarly CAG, in support of its opposition to the area variances related to the additional floor, points out that one of the purposes of the W-1 zone district is to protect the vistas of the waterfront (CAG submission at p. 1-2). However, CAG fails to articulate or demonstrate how the proposed addition would impair this intent.[2] Rather, CAG would have the Board deny any height variance that allows deviation from the Zoning Regulations without regard to the minimal impact it might have. CAG's arguments, taken to their logical conclusion, would result in a blanket prohibition against the granting of area variances in the W-1 zone district.[3] Such a blanket denial ignores the purpose of the variance procedures.

As to CAG's argument regarding additional sites which may benefit from the grant of the variances at issue, this evidence has no bearing on the effect, if any, of the additional floor on the viewshed of the waterfront and must therefore be excluded.

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[2] CAG further fails to offer any evidence that the additional floor will adversely affect the light and air, traffic patterns, and real estate values of neighboring properties. *See Draude*, 582 A.2d at 957.

[3] This is of particular concern in this case because, as pointed out in the initial hearing on this matter by both the Office of Planning and Millennium, and as is reflected in the zoning regulations, when the Zoning Commission adopted the waterfront zone, it provided for an increase in height to 60 feet for W-1 projects under the planned unit development regulations. A similar increase in height was not provided for the other waterfront districts, and the Zoning Commission specifically recognized that it expected property owners to take advantage of the differences in grade on sites like the Incinerator site.

SUBMISSIONS AND TESTIMONY FROM CAG'S EXPERTS SHOULD BE EXCLUDED IN PART

As with CAG's submissions, the testimony of CAG's proposed experts does not address how the additional floor harms the viewsheds or substantially impairs the zone plan. Outerbridge Horsey, an architect, simply states that Millennium has not met the first two criteria for an area variance and that the project, even without the additional floor, and the variance should, therefore, not be permitted. As such, his testimony is nothing more than an end-run around the Board's order that the record be held open for submissions by parties only.[4] It is not proposed that Mr. Horsey will suggest or offer any testimony on any viable alternatives to Millennium's proposal. *See e.g.* Transcript at 33. Rather, Mr. Horsey's letter focuses on the hardship factor of the variance test which, as stated above, has been decided by the Board. Finally, with regard to any expertise Mr. Horsey may have in interpreting the Zoning Regulations and plans, Mr. Horsey incorrectly interprets the Zoning Regulations with regard to the measuring point of the building and the size of the building in relation to the zoning envelope.

The letter of Richard Wolf and Mr. Wolf's testimony should likewise be excluded. Mr. Wolf's letter makes absolutely no reference to the third prong of the variance test. Rather, Mr. Wolf's letter focuses entirely on the practical difficulty aspect of the test. As to Mr. Wolf's qualifications as an expert, there is no evidence that Mr. Wolf has any specialized knowledge which will assist the Board in understanding how the modest increase in height over a small portion of the entire project will affect the viewsheds or impair the intent of the zoning regulations. The mere fact that one is an attorney specializing in ethics, procurement and personnel issues (and self-proclaims oneself as an expert) does not qualify the person as an expert in zoning or planning issues.

CONCLUSION

As illustrated above, CAG's submissions do not address the third prong of the variance test, namely, whether the proposed additional floor will substantially impair the intent and purposes of the Zoning Regulations and Zone Plan by having a negative impact on the viewsheds of the Waterfront. Similarly, the expert testimony proposed by CAG does not address this issue and CAG has not submitted any evidence that the proposed experts have any specialized knowledge that will assist the Board in understanding the issue to be decided. Given that the record was held open and a hearing scheduled for the sole purpose of addressing this issue, CAG's submissions should be stricken as outlined above from the record and testimony from CAG's proposed witnesses, as outlined in their letters, should be excluded at the June 19, 2001 hearing.

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[4] Similarly, although the Board explicitly held that the record would not be held open for further submissions from the Commission on Fine Arts ("CFA") or the Old Georgetown Board ("OGB"), both CAG, Mr. Horsey and Mr. Wolf attempt to circumvent this ruling by setting forth their interpretations of CFA's and OGB's position on the requested variances.

Thank you for your consideration.

Very truly yours,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

Richard B. Nettler
Jeannine Rustad Zigner

cc: Mr. Andrew Altman, Office of Planning (By Hand)
Ms. Barbara Downs, Citizens Association of Georgetown (By Hand)
Advisory Neighborhood Commission 2E (By Hand)
Mr. Anthony Lanier (By Hand)