GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16702 of Millennium Georgetown Partners, LLC, pursuant to 11 DCMR § 3103.2, for a variance from the height restrictions of subsection 930.1 and the floor area ratio (FAR) limitation of subsection 931.1, to construct mixed-use buildings/structures of residential, hotel, and commercial uses in a W-1 District at premises 3100 South Street, N.W. (Square 1189, Lot 88).

HEARING DATE: April 17, 2001; May 1, 2001; June 19, 2001

DECISION DATES: May 15, 2001; June 26, 2001

DECISION AND ORDER

Millennium Georgetown Partners LLC (Millennium), the owner of Square 1189, Lot 88, and developer of the "Georgetown Incinerator Project," filed an application with the Board of Zoning Adjustment on February 2, 2001, seeking area variances from the maximum height limitations of 11 DCMR § 930.1 and the floor area ratio (FAR) limitations of 11 DCMR § 931.1. The variances would allow Millennium to insert an additional floor plate into both of the project's two residential condominium components and to make use of certain interior space. The application is self-certified. The property that is the subject of this application has a street address of 3100 South Street, N.W., and is located in a W-1 Zone District. Millennium is represented in these proceedings by Robins, Kaplan, Miller & Ciresi LLP. After a public hearing, the Board granted the application.

BZA Case No. 16702 Exhibit No. 86

PRELIMINARY AND PROCEDURAL MATTERS

Notice of Application and Notice of Hearing. By memoranda dated February 7, 2001, the Office of Zoning advised the Zoning Administrator; D.C. Office of Planning; Department of Public Works; Advisory Neighborhood Commission (ANC) 2E, the ANC for the area within which the subject property is located; the ANC commissioner for the affected Single-Member District; and the Ward 2 Councilmember of the application.

The Board scheduled a public hearing on the application for April 17, 2001. Pursuant to 11 DCMR § 3113.13, the Office of Zoning on February 13, 2001, mailed the applicant, the owners of all property within 200 feet of the subject property, and ANC 2E notice of the hearing. Notice of hearing was also published in the *D.C. Register* on February 16, 2001, at 48 DCR 1347. The applicant's affidavit of posting indicates that on March 30, 2001, four zoning posters were placed on the Wisconsin Avenue, K Street, 31st Street, and South Street frontages of the subject property, in plain view of the public.

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Request for Party Status. The Board waived its filing deadline to accept a request for party status from the Citizens Association of Georgetown (CAG). The Board granted CAG party status pursuant to 11 DCMR § 3106.3, as CAG has a long history of involvement in zoning and historic preservation issues, and includes members who would be affected by the project. Barbara Downs, CAG president, and Barbara Zartman, preservation committee member, represented CAG at the hearing.

Applicant's Case. Millennium is in the midst of construction of a mixed-use, matter-of-right project encompassing an entire square that will accommodate residential condominium, hotel, theater, retail, and parking uses in the Georgetown waterfront area. Millennium, which confronts extraordinary and exceptional circumstances in developing the property due to the historic resources located on the property, a steeply sloping topography, geologic conditions, a high water table, the proximity of the Whitehurst Freeway, and development constraints from deed restrictions and historic preservation covenants, was prompted to seek variance relief after the financial difficulties of Loews Cineplex Entertainment Corporation, the theater chain participating in the project, jeopardized project funding.

Millennium presented testimony from Anthony Lanier, on behalf of the developer; Emily Hotaling Eig, architectural historian; Shalom Baranes, Shalom Baranes and Associates, architect; and Carrie Johnson, Gary Edward Handel and Associates, project architect; as well as written and electronic materials and a site model. Ms. Eig and Mr. Baranes were qualified as expert witnesses.

D.C. Office of Planning (OP) Report. OP submitted a report dated April 9, 2001, recommending that the requested variances be granted. OP submitted a second report, dated May 11, 2001, summarizing key facts about the project and again recommending approval of the application. The Board waived its filing deadline to accept OP's third supplemental report dated July 15, 2001, based on a site visit and review of the Millennium's viewshed studies. OP believes that Millennium has met the tests for variance relief, and stated that the project, which it found to be well-designed, would not present any significant adverse impacts on the environment or surrounding neighborhood. OP Director Andrew Altman and Ward 2 Planner John Fondersmith presented the reports at the hearing.

Department of Public Works (DPW) Report. DPW submitted a report dated April 10, 2001, indicating that the additional residential units and parking spaces to be provided as a result of the variance would not cause adverse traffic impacts in the area. In its follow-up report dated May 11, 2001, DPW indicated that the housing, hotel, entertainment, and retail elements of the Georgetown Incinerator Project would generate additional traffic. DPW believes, however, that the additional traffic would not impact peak hour traffic in the Georgetown – Washington Circle area. DPW also stated that the traffic generated by the proposed 28 residential units would not impact traffic congestion or the level of service on lower K Street or at Washington Circle.

Department of Housing and Community Development (DHCD) Report. DHCD submitted a letter dated March 7, 2000, supporting the application. DHCD relayed the history of the project and the economic circumstances of the movie industry that led to the request for variance relief. DHCD indicated that the movie theater complex, which would serve as the major commercial anchor tenant for the project, would benefit the District of Columbia by creating a major destination-type entertainment venue and by creating new jobs. Jim Thackaberry, DHCD project manager, presented the report at the hearing.

The Commission of Fine Arts and Old Georgetown Board Reports. The Commission of Fine Arts, in a letter dated April 11, 2001, stated that it was strongly opposed to the proposed project exceeding the 40-foot height limit. The Commission indicated that the building, without the variance, would limit the views from the C & O Canal down Wisconsin Avenue and 31st Street to the Potomac River, an important aspect of the Old Georgetown Historic District. The Commission stated that to add an additional floor to the Incinerator Project would further diminish these views. According to the Commission, the Old Georgetown Board indicated that from a design standpoint only, the additional floor was acceptable. However, in response to background information on the Waterfront zoning designation, the concerns of the CAG, and various community organizations, as well as the Commission's efforts to lower building heights in the waterfront area, the Old Georgetown Board recommended against the added height. The Commission concluded that it strongly concurred with the Old Georgetown Board.

On April 20, 2001, the Commission of Fine Arts recommended that a building permit for the proposed construction be denied. Millennium has requested that the Mayor's Agent for Historic Preservation reject the Commission of Fine Art's recommendation.

National Park Service Report. The National Park Service submitted a letter dated April 17, 2001, supporting the application. The National Park Service is planning to close the Harbor Parking facilities adjacent to the Potomac River along K Street, N.W., in order to convert the area into the Georgetown Waterfront Park. It indicated that it is relying on the parking to be provided by the project to absorb those cars now parking on the waterfront. The National Park Service also stated that the project and its amenities will help vitalize the new park.

ANC Reports. In its report dated April 6, 2001, ANC 2E indicates that on February 27, 2001, at a regularly scheduled and duly-noticed meeting, with a quorum present, ANC 2E adopted a resolution to not object to the requested variances. The ANC indicated that it was very concerned about the added massing that would result from the height and associated FAR variance, but that it would rely upon the expertise of the Commission of Fine Arts and the Old Georgetown Board with respect to the height and sight lines, especially along Wisconsin Avenue and 31st Street.

In a follow-up letter dated April 20, 2001, ANC 2E reiterated that it accepts the position of the applicant that "'a confluence of factors unique to the site' had created an impediment to realizing the project could be resolved by building the additional housing units and parking proposed in the application." ANC 2E concluded by requesting "that a design be found that resolved the particular issues to the satisfaction of the Commission of Fine Arts and Old Georgetown Board, to ensure that granting the application did not result in any significant adverse impact to the community."

Persons in Support of the Application. The Reverend David Bird, Rector of Grace Episcopal Church, which, along with its school, is located directly across from the subject property on the South Street, testified in support of the application. In its written comments, the Church states that it does not believe that the requested variance will adversely affect the neighborhood or have any adverse visual impacts. It also states that it "is relieved to see that the vacant, rat-infested, litter-strewn Incinerator complex is finally being renovated for the good of the community."

The Board also received written comments in support of the application from Loews Cineplex Entertainment Corporation; the Georgetown Business and Professional Association; and R.B. Associates, Inc., owners of the Waterfront Center office building, located across 31st Street from the subject property; as well as a petition letter signed by a number of Georgetown residents.

The comments received from the Georgetown Business and Professional Association, representing nearly 300 business entities located or doing business in Georgetown, are typical of the letters and public agency reports the Board has received in support of the proposed variance. The Association states:

> The proposed development not only provides entertainment and services for Georgetown residents through the retail and theater components of the development, these components will attract non-residents to the area, which will benefit the surrounding business and retail establishments. Benefits include additional patronage of retail stores and restaurants, as well as higher usage of local parking garages during off-peak hours from theater patrons. Lastly, the residential and hotel components of the development will bring additional life to an area of Georgetown where there is currently little residential use.

Loews noted that the District of Columbia is one of the few major metropolitan areas in the country that does not have a major, modern multiplex theater. According to Loews, "The kind of large, open volumes of space that are required for today's modern stadium seating multiplexes are extremely difficult and expensive to construct in any urban environment but are almost an economic impossibility given Washington's height restrictions."

Party and Persons in Opposition to the Application. CAG has concerns about the views down Wisconsin Avenue and 31st Street to the Potomac River and beyond. It

also argued that the variances should not be justified on the basis of economic hardship alone; and that a height variance for this project would set a precedent for other variances in the Georgetown waterfront area, ultimately impairing the intent, purpose, and integrity of the zone plan. In addition, ANC 2A Commissioner Dorothy Miller expressed a number of concerns at the public hearing relating to traffic congestion in the area.

The Board received several letters opposing the variances. Like CAG, Kirk White opposed the granting of a variance on economic hardship grounds. Nearby resident Seth Blumberg was concerned that with the requested height variance, his views of the Potomac River and Virginia riverside trees would be blocked.

Closing of the Record. At the conclusion of its public hearing on April 17, 2001, the Board requested Millennium to provide copies of reports or other documentation from the Commission of Fine Arts; CAG to submit information relating to the organization and how its members would be affected by the proposed variances as well as copies of legislation relating to the project; DPW to provide a traffic study; and ANC 2E to clarify its position on the application. At the conclusion of its May 1, 2001, public meeting, the Board requested Millennium to provide additional information relating to its practical difficulties in complying with the Zoning Regulations, additional information from Old Georgetown Board proceedings, and a copy of the historic preservation memorandum of agreement; DPW to take a more extensive look on the project's traffic and parking impact; and CAG to provide copies of the organizational materials previously requested. At the conclusion of its public meeting on May 15, 2001, the Board requested sight line and viewshed studies on both Wisconsin Avenue and 31st Street, N.W., from M Street, N.W., to K Street, N.W., to compare the views of the Potomac River and waterfront with the matter-of-right building and the building with the proposed height and related FAR variance, as well as responsive materials from the parties and OP. Millennium presented these studies at the June 19, 2001, hearing.

Decision Meetings. At its May 1, 2001, public meeting, the Board determined that it did not have an adequate record on which to base a decision on the requested variances. On May 15, 2001, the Board voted 4 – 0 – 1, with one member not voting, not having heard the case or reviewed the record prior to the meeting, to approve the FAR variance to allow an increase in gross floor area within the mass of the existing matter-of-right building. After reviewing the viewshed studies, the Board held a meeting on June 26, 2001, and voted 4 – 1 – 0 to grant the application to permit the increase in height and associated FAR.

FINDINGS OF FACT

The Subject Property and Surrounding Area

1. The subject property, Lot 88, comprises an entire city block, Square 1189, in the Georgetown waterfront area. It has a street address of 3100 South Street, N.W., and is located in a W-1 Zone District and within the Old Georgetown Historic District.

2. The property, which consists of 99,661 square feet (2.10 acres) of land, is rectangular in shape. It is bounded by Wisconsin Avenue, N.W., to the west; South Street, N.W., to the north; 31st Street, N.W., to the east; and K (Water) Street, N.W., and the Whitehurst Freeway to the south. The property overlooks the Potomac River.

3. Immediately to the north of the property, across South Street, is Grace Episcopal Church, and beyond that, the C & O Canal. The area to the north of the property is predominantly characterized by low-scale, federal style residential townhouses.

4. The waterfront area to the east, south, and west of the property is characterized by modern, large-scale commercial structures. The Whitehurst Freeway and the site of the new Georgetown Waterfront Park are located along the southern edge of the property.

5. Until recently, there were nine buildings spanning two centuries in age on the western portion of the property. The property is the site of the Brickyard Hill House, two Copperthwaite Lane houses, and the Georgetown Incinerator and its smokestack.

6. The Brickyard Hill House, constructed around 1800, is an historic landmark. In a decision dated October 6, 1998, the Mayor's Agent for Historic Preservation found that it is "one of the most important structures in the Old Georgetown Historic District." Millennium has undertaken to preserve as part of the development the house, as well as two Copperthwaite Lane Houses (the Red House and a stone stable, 3133 Copperthwaite Lane). These structures have been moved off-site and will be relocated on the site, on the South Street side of the property, when construction is complete.

7. The Georgetown Incinerator is located on the eastern portion of the property, toward the center of the property. Erected in 1932, the Incinerator is an Art Deco-style building that was in operation until 1971. Since then, it has remained unoccupied and, prior to the commencement of construction, unattended, overgrown, and in poor condition. The Incinerator is a contributing structure to the Old Georgetown Historic District.

8. The Georgetown Incinerator Project has undergone an extensive process of community consultation and design refinement.

9. In 1996, after numerous failed attempts to re-use the Incinerator property, the DHCD issued a request for proposals seeking a private developer for the site. DHCD selected the Millennium proposal in early 1997 because of its housing, theater, retail, and parking components. During the summer of 1997, the District of Columbia Financial Responsibility and Management Assistance Authority, the Council of the District of Columbia, and the National Capital Planning Commission (NCPC) reviewed the sale of the surplus Incinerator site. Because the sale involved a contributing building to the Old Georgetown Historic District, NCPC referred the matter to the Advisory Council on Historic Preservation for review under § 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C.A. § 470f (2000). This review resulted in the imposition of

an architectural preservation covenant on the rehabilitation of the Incinerator and redevelopment of the site.

10. Since the District of Columbia had decided to close the parking facilities adjacent to the Potomac River along K Street, N.W., and turn the area into a park, DHCD asked Millennium to provide additional public parking on the site. In order to provide for the construction of underground parking facilities and to meet other DHCD programmatic requirements, Millennium purchased the remaining portion of Square 1189 from private property owners.

11. In May 1999, the District of Columbia, acting by and through DHCD, sold the Incinerator building and property, approximately 56,564 square feet of the 99,661 square-foot site, to Millennium.

12. On February 19, 1998, Millennium filed with the Commission of Fine Arts for conceptual design review of its proposed development project and the demolition of certain buildings necessary for the construction of the project. The proposal was supported, among others, by DHCD, OP, the affected ANC, CAG, the Georgetown Business and Professional Association, and neighboring property owners, including Grace Episcopal Church. On May 21, 1998, the Old Georgetown Board gave conceptual approval to the proposed development, and on June 22, 1998, the Commission of Fine Arts did as well, recommending approval of the demolition of the buildings determined to be non-contributing to the historic district. The Commission of Fine Arts also directed the applicant to re-submit a new concept application for design development review. Preliminary demolition permits were filed on June 1998 and the Old Georgetown Board formally approved the demolitions on July 9, 1998.

13. The project was also reviewed by the DHCD Architectural Review Panel, the Mayor's Agent for D.C. Law 2-144, and the Historic Preservation Review Board. The Council of the District of Columbia closed an alley that bisected the project site. In addition, because of the size of the project site, OP completed a Large Tract Review of the project in June 1998, recommending approval.

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 an open competition provide the greatest benefits to the community and the city; (c) other than the existing Convention Center, the project benefits far exceed 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 residential, arts, theater, retail, and parking issues, which have high priority in Georgetown; and (e) the project will provide vitality for a neglected area.

15. The Commission of Fine Arts approved the concept design on January 21, 1999, with suggestions for further study of some elements. The project architect presented revisions to the Old Georgetown Board on five separate occasions (June 3, July 1,

September 2, November 4, and December 2, 1999). Working drawings were presented to the Old Georgetown Board at three public meetings (February 3, April 6, and June 1, 2000). The Old Georgetown Board reported to the Commission of Fine Arts in a report dated June 15, 2000, and recommended approval of the project. The Commission of Fine Arts also recommended approval on June 15, 2000.

16. Millennium submitted its proposed design changes relating to the variance request to the Old Georgetown Board on March 1, 2001, and to the Commission of Fine Arts on March 13, 2001. Millennium returned to the Old Georgetown Board on April 5, 2001, with revisions to respond to community requests for setbacks of the proposed additional residential floors along the Wisconsin Avenue and 31st Street frontages. The Old Georgetown Board recommended against the added floor. The Commission of Fine Arts, in its April 11, 2001, letter to the Board recommended denial of the height and associated FAR variance.

The Matter-of-Right Project

17. The project is a mid-rise development consisting of two residential components providing 22 condominium units; a 91-suite Ritz Carlton hotel; a multiplex movie theater that will accommodate 3,000 patrons; 2,700 square feet of retail space; and an underground parking garage that will contain 345 marked parking spaces and that is designed to accommodate valet parking for 500 to 600 cars. OP describes the project as a significant mixed-use project with 247,886 square feet of above ground space.

18. With the requested variances, the project would have 28 condominium units and ten more parking spaces, for a total of 355 marked parking spaces.

19. Because all of its components are connected, the project is considered one building for zoning purposes. *See* 11 DCMR § 199.1 (definition of "building"). The project, however, is designed to appear as several separate buildings so as to be compatible with the surrounding historic district.

20. The residential and hotel components will be grouped around a plaza, with the Incinerator and smokestack in the center. The plaza is designed to maintain the three-dimensional sense of the Incinerator and to provide maximum visual access from several directions, all focusing on the smokestack.

21. The building plans 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. The heights of the new project components are consistent with the heights of the roofs of the buildings surrounding the property.

22. The massing of the project is designed to provide an architectural transition from the church and townhouse properties on the north side of the property to the contemporary, large-scale commercial structures on the waterfront.

23. The two residential components of the project that are the subject of the height and associated FAR variance request are located on the southern edge of the property, above the K Street theater and retail space. They will overlook the Whitehurst Freeway and offer views of the Potomac River.

24. The theater is a state-of-the-art multiplex cinema with stadium seating, digital surround sound, and enhanced projection capabilities. There will be 14 theaters of varying seating capabilities to allow a wide range of motion pictures, from independent art films to major Hollywood studio releases. The theater also affords Millennium the opportunity to provide a large number of parking spaces for business and residential use during daytime hours.

25. The retail portion will be built on the corners of Wisconsin Avenue and K Street and 31st and K Streets, with the theater fronting mid-block along K Street, with parking in the inner core.

26. The hotel components, which are also accessed through the Incinerator, are on South Street, Wisconsin Avenue, and 31st Street.

27. The exterior of the Incinerator will be restored to its original condition and renovated and adapted for hotel common areas. A five-story glass atrium will enclose and surround the smokestack and act as the entrance to the theater below along K Street.

28. Pedestrian and automobile access to the hotel and condominium components will be from South Street. The entrances to the cinemas, commercial parking, and loading docks will be from K Street. The project has been developed to create major pedestrian access to the south side along K Street.

The Requested Variances

29. Millennium is seeking a FAR variance (1) to fill in certain interior voids in the structure, which would otherwise be left unconstructed and vacant, shown on the plans (Ex. 48) as "additional FAR slab area"; and (2) to insert additional floor plates into each of the two residential condominium components. The additional floor plates would increase the height of the building and also necessitate a height variance.

30. The matter-of-right project has a total FAR of 2.48. With the requested variance, the total FAR would equal 2.9, approximately half of which would be attributable to the additional FAR slab area and would not be visible from the exterior of the building. The other half would result from the additional floor plates and would be visible as increased building mass.

31. The FAR variance that would allow the reconfiguration of certain interior space would not impact the building height. It would allow for ten additional parking spaces, additional space for mechanical equipment, and the construction of slabs to help support the historic houses.

32. With respect to the height variance, the property slopes moderately steeply to steeply from the northwest to southeast, falling from 20 to 30 feet between South Street and K Street.

33. The 40-foot height limit for the project has been measured from South Street, which is the customary in developing a property with the maximum allowable density. *See* 11 DCMR § 199.1 (definition of "building, height of").

34. The proposed height variance adds ten feet, eight inches, of height to the two residential components.

35. The added floor would be the fifth residential floor. It would be set back from 12 to 20 feet along the Wisconsin Avenue frontage and 12 feet along the 31st Street frontage, to address community concerns about view lines on these streets. Ex. 47.

36. In addition, to address Old Georgetown Board concerns relating to the views of the Incinerator, the top floor would have a ten-foot setback to the east and west of the Incinerator viewshed. Ex. 47.

Extraordinary or Exceptional Conditions of the Property

37. Historic Resources. The most significant condition of the site involves the preservation of the historic resources that are on the site, as well as the open space around them. An adequate amount of open space is necessary to protect the context and character of the historic structures.

38. One of the buildings, the Incinerator, has a large interior volume that, relative to the size of its footprint, consumes a significant portion of the zoning envelope. Its preservation precludes construction underneath the building. In addition, Millennium has agreed to maintain the interior open space. The smokestack, one of the most visible landmarks on the Georgetown skyline, requires open space around it to retain its legibility.

39. To preserve these historic structures, Millennium has created a preservation precinct in the northeast quadrant of the site. In addition, Millennium is providing viewsheds to preserve certain views of these historic resources from public vantage points.

40. The historic structures, open space, and viewsheds render a substantial portion of the site, approximately 33 percent of the site according to OP's calculations, undevelopable.

41. Topography. Much of the deep space on the downward slope of the site counts against the allowable FAR. The theater component of the project, with a volume equivalent of three stories, will be located in this area, which is under the Whitehurst

Freeway and under the water table. The 100-year floodplain in Georgetown is at elevation 17.5 feet. The elevation of K Street is 10 feet. Floodplain regulations prohibit the placement of habitable rooms within the 100-year floodplain. As a result of the topography and floodplain elevation, the lower levels of the project cannot be used for the residential condominium units, hotel rooms, and most retail uses.

42. Geology. The subsurface conditions are composed primarily of rock, making the excavation of the hotel support areas, theater, and parking facilities unusually difficult.

43. Whitehurst Freeway. Located approximately three stories above K Street, the Whitehurst Freeway renders the first three floors of the project along K Street unusable for either residential or hotel uses. This is primarily due to the traffic noise emanating from the highway and the reduced natural light. In response to these conditions, Millennium has set all residential floors back ten feet from the south property line and close to ten feet above the Whitehurst Freeway roadbed. This has made a strip of the property adjacent to the highway unusable.

Practical Difficulties

44. The preservation of the historic resources, the associated open spaces, and the viewsheds presents a practical difficulty, since Millennium cannot construct in these areas. If Millennium could use these areas for the project components, it would not require the additional height and associated FAR for the residential components.

45. As a result of the elevation of the high water table, the 100-year floodplain elevation, and the proximity of the Whitehurst Freeway, Millennium is precluded from placing the residential condominium units, hotel rooms, and most retail uses in the area below the level of the Whitehurst Freeway. These conditions preclude Millennium from converting the theater component to any other viable use that might obviate the need for variance relief.

46. The Board finds that due to "a confluence of factors unique to the property," including the presence of historic resources, topography, geology, and the proximity of the Whitehurst Freeway, Millennium would encounter practical difficulties if the Zoning Regulations are strictly applied.

The Requested Variances Will Not Result in Substantial Detriment to the Public Good or Substantially Impair the Zone Plan

47. The Comprehensive Plan Generalized Land Use Map designates the site for "mixed-use moderate density residential and commercial land use."

48. The Georgetown Incinerator Project contributes substantially to the objectives of the Comprehensive Plan in a variety of elements, including housing, transportation, public facilities, urban design, preservation of historic features, as well as economic development. The project will enhance the area of Wisconsin Avenue and K Street

adjacent to the Whitehurst Freeway by contributing to the residential character of the area. Additionally, the project will help to animate an area that has been somewhat foreboding because of the elevated freeway and derelict streetscape along K Street. The project will also preserve and adaptively reuse historic structures on the site, and will help connect the rest of Georgetown with the new waterfront park. The public parking to be provided by the project will benefit the area, while the residential and hotel uses bring additional life to the area and provide among the highest tax revenue per square foot of any use. OP therefore advises that the project is compatible with the Comprehensive Plan Generalized Land Use Map and the Ward 2 Waterfront Objective.

49. As stated in the Zoning Regulations, the purpose of the Waterfront Districts is to encourage a diversity of compatible land uses at various densities, including combinations of residential, office, retail, and other miscellaneous uses. 11 DCMR § 900.4.

50. The Zoning Regulations divide the Waterfront Districts into three districts, the W-1, W-2, and W-3 Districts, with W-1 permitting only a low height and density. 11 DCMR §§ 900.2 – 900.3.

51. The Zoning Regulations in 11 DCMR § 930.1 prescribe a maximum height of 40 feet in the W-1 District.

52. Subsection 931.1 prescribes a density or maximum FAR in a W-1 District of 2.5, not more than 1.0 of which may be used for other than residential purposes.

53. Matter-of-right uses in the W-1 District include multiple dwellings, hotel, theater, and retail uses. 11 DCMR § 901.1.

54. The Board finds that the Zoning Commission, in rezoning the area to W-1 in 1973, did not intend to divest the Board its authority to grant variances in appropriate circumstances, including height and FAR variances, in the Waterfront Districts.

55. Millennium is requesting a total increase in FAR of 0.42.

56. Approximately one-half of the requested increase in gross floor area would be within the mass of the existing matter-of-right building (the "additional FAR slab area") and would not be visible from outside of the building. This increase in gross floor area would not have any adverse effect on the public or the zone plan.

57. Millennium is requesting a height variance of ten feet, eight inches, and the associated FAR to add a floor plate to each of the projects two residential components.

58. Millennium proposes to set the added floor (fifth floor residential) back 12 to 20 feet on Wisconsin Avenue frontage and 12 feet on 31st Street frontage to address community concerns about the view lines on those streets. In addition, the top floor would be set back ten feet to address Old Georgetown Board concerns about the

Incinerator viewshed. The project as a whole is designed to nestle into the hillside, reducing its impact on the views of the Potomac River from the north.

59. The Board credits the opinion testimony of architectural historian Emily Hotaling Eig that the proposed increase in height will not harm the integrity of the historic resources on the site or the historic district. Rather, it will help to retain, enhance, and adapt the landmark Brickyard hill house and the Incinerator, by helping to provide for its restoration.

60. The Board also credits Ms. Eig's testimony that the proposed additional height does not detract from the unique character of the site, but rather improves the project's architectural integrity. The change in design better distributes the building mass, allowing for a more articulated volume, including modulation of the roof-scape forms and setbacks, as well as varied heights as viewed from the street.

61. Millennium submitted drawings of the viewsheds along both Wisconsin Avenue and 31st Street, from M Street, to K Street. These drawings show the matter-of right building and the proposed building with the height variance and setbacks provided at Wisconsin Avenue and 31st Street. Millennium also presented a computerized, continuous animation of the viewsheds at the June 19, 2001, public hearing, which showed the views as a pedestrian walks from M Street to K Street, down both Wisconsin Avenue and 31st Streets.

62. These view studies were not available at the time the Old Georgetown Board and the Commission of Fine Arts were conducting their review of the proposed variances. Also, the affected ANC, which relied upon the Old Georgetown Board and the Commission of Fine Arts to assess the visual impacts of the requested variances, did not have these studies available at the time of the ANC's review.

63. The drawings and computerized animation of the views from Wisconsin Avenue and 31st Street show that the additional visible building mass that would result from the increased height and FAR is negligible from anywhere along the public streets.

64. The drawings and animation also show that that the proposed added height would not adversely affect views of the waterfront or the Potomac River or the views across the River.

65. The Board finds that it is the matter-of-right building mass that is defining the view corridor along the public streets and that would block certain views, not the proposed addition.

66. With the additional height, slightly less sky would be visible from certain vantage points along Wisconsin Avenue and 31st Street. However, with the setback, the additional height at the top of the building would not protrude into the view corridor or adversely affect the adjacent properties' light or air.

67. Moreover, there is commercial office use across both Wisconsin Avenue and 31st Street, in the area where Millennium is proposing the additional floor. The additional floor therefore would not affect residential uses with respect to light and air.

68. There will also be trees lining both streets, which will help to screen the building.

69. The Waterfront District in Georgetown is sufficiently large in size that granting a variance for the subject property will not impair the intent of § 900.4, which is to encourage a diversity of compatible land uses at various densities. Further, the Zoning Regulations in 11 DCMR § 2405.1 allow for a height of 60 feet and a FAR of 3.0 in the W-1 District pursuant to a planned unit development. The proposed variances, which are below that amount, would not therefore substantially change the character of the W-1 District.

70. Based on DPW's reports, the Board finds that the requested height and FAR variances, which would result in six additional condominium units and ten additional parking spaces, would not adversely affect traffic or parking conditions.

71. CAG raised a number of concerns that the matter-of-right project presently under construction departs from plans previously reviewed and approved. In response, the applicant's architect, Shalom Baranes explained first that the open spaces surrounding the historic buildings had not been eliminated, but rather had increased in size. Second, Mr. Baranes explained that Millennium never proposed to place a restaurant on the roof of the Incinerator building and that the restaurant contemplated for the top mezzanine of the building was moved to a lower location in order to preserve the open space within the Incinerator. Mr. Baranes explained that Millennium never included a rooftop restaurant in any plans due to safety requirements, which would require the construction of a large stairwell for emergency egress. This testimony was supported by a letter from Jonda McFarlane, former ANC 2E Commissioner. Lastly, Mr. Baranes testified that contrary to CAG's statement that the setback from the adjoining streets had been reduced, the setbacks had actually been increased. Based on Mr. Baranes' testimony, the Board finds that to the extent the changes described by Mr. Baranes have been made, they will not adversely affect the public or the zone plan.

72. Based upon the above findings, the Board finds that the additional residential floor plates, with the setbacks as proposed by Millennium, and the resulting height and FAR variances will not result in substantial detriment to the public good or substantially impair the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799, as amended; D.C. Code § 6-641.07(g)(3) (2001)), to grant variances from the strict application of the Zoning Regulations. Millennium Georgetown Partners LLC is seeking area variances from the provisions of 11 DCMR §§ 930.1 and 931.1 relating respectively to maximum height and FAR restrictions in a W-1 District to construct a mid-rise, mixed-use development consisting of residential condominium, hotel, theater, retail, and parking uses. The notice requirements of 11 DCMR § 3113 for the public hearing on the application have been met.

Subsection 930.1 prescribes a maximum height of 40 feet, while § 931.1 prescribes a density or maximum FAR of 2.5, not more than 1.0 of which may be used for other than residential purposes. The applicant proposes adding a floor plate to each of the project's two residential components, with the result that the building would exceed the height limit by ten feet, eight inches. The top floor on both residential components would be set back ten feet along the west and east side of the Incinerator smokestack, while the added residential floors would be set back 12 – 20 feet along the Wisconsin Avenue frontage and 12 feet along the 31st Street frontage. Approximately one-half of the FAR increase is associated with the additional floor plate and would be visible as increased building mass, while the other half, the additional interior slab area, would have no visual impact from the exterior of the building.

Under the three-prong test for area variances set out in 11 DCMR § 3103.2, an applicant must demonstrate that (1) the property is unique because of its size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property; (2) the applicant will encounter practical difficulty if the Zoning Regulations are strictly applied; and (3) the requested variances will not result in substantial detriment to the public good or the zone plan. *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990).

In reviewing a proposed variance to determine whether it meets the three-prong test, the Board is required under D.C. Code § 6-623.04 (2001) to give "great weight" to OP recommendations. The Board has carefully considered OP's reports, and for the reasons stated in this decision, agrees with its recommendations that the requested variances should be granted.

The Board is also required under D.C. Code § 1-309(d) (2001) to give "great weight" to the affected ANC's recommendations and to articulate with particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances and to make specific findings and conclusions with respect to each of the ANC's issues and concerns. Like the ANC, the Board concludes that the applicant has encountered practical difficulties in realizing its project in strict compliance with the Zoning Regulations. The Board has not, however, accepted the recommendations of the Commission of Fine Arts and the Old Georgetown Board that the height and associated FAR variance should be denied. The Board's conclusions that the variances would not

result in substantial detriment to the public or the zone plan are based upon its review of the applicant's viewshed and sightline studies, studies that were not available to the Commission of Fine Arts, the Old Georgetown Board, or the ANC at the time of their review.

Extraordinary or Exceptional Circumstances of the Property

Reviewing the criteria for an area variance, the District of Columbia Court of Appeals in *Capitol Hill Restoration Society v. District of Columbia Board of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987), stated that:

> The threshold requirement to show 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* . . . ."

Id at 941-42, *quoting Taylor v. District of Columbia Bd. of Zoning Adjustment,* 308 A.2d 230, 234 (D.C. 1973) (emphasis in original)*; see also Russell v. Board of Zoning Adjustment,* 402 A.2d 1231, 1235 (D.C. 1979) (the requirement that the practical difficulty be caused by the uniqueness of the property "insures relief for problems peculiarly related to the applicant's land or structure, and not shared by other property in the neighborhood, thus avoiding a de facto amendment of the zoning laws.").

Millennium must demonstrate that compliance with the area restrictions is unduly burdensome and that the practical difficulties it confronts are unique to the site. In finding an extraordinary or exceptional condition, the Board may rely upon a confluence of factors relating to the property. *Gilmartin*, 579 A.2d at 1168. As recognized in *Capitol Hill Restoration Society,*

> A condition inherent in the structures built upon the land, rather than in the land itself, may also serve to satisfy the applicant's burden of demonstrating uniqueness. In addition, the extraordinary or exceptional conditions which justify a finding of uniqueness may be caused by subsequent events extraneous to the land at issue. However, the extraordinary or exceptional conditions must uniquely affect a single piece of property.

534 A.2d at 942 (citations omitted). The Board concludes Millennium's property is unique for the following reasons.

First, the property is improved by the landmark Brickyard Hill House, the two related Copperthwaite Lane houses, and the Georgetown Incinerator, a contributing building to the Old Georgetown Historic District. These historic resources, and the measures the applicant must take to provide for their preservation, are unique to the subject property. 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 that 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. District of Columbia Bd. 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.* The same is true of Millennium's property. Furthermore, there is no other structure in the historic district that has the Incinerator's qualities and that presents the challenges of developing a project around it.

The Incinerator, which was previously abandoned and has suffered deterioration, is being preserved and the project designed so as to respect the qualities that make it worthy of preservation. Its preservation precludes construction of any portion of the project underneath it. In addition, Millennium has agreed to preserve the open space within the Incinerator building. Similarly, the preservation of the Brickyard Hill House and Copperthwaite Lane houses requires Millennium to forego the development of the available FAR attributable to those buildings.

In addition, the preservation of these historic resources requires Millennium to maintain open spaces around them to provide an appropriate context and to preserve their character, and to provide viewsheds from public vantage points. The preservation of these resources and the associated open space and viewsheds present extraordinary and exceptional conditions unique to the subject property, sufficient to satisfy the first prong of the variance test.

Moreover, the topography and geologic conditions of the property create a practical difficulty. The slope of the property between South and K Streets is between 20 and 30 feet. Further complicating matters is the nature of the site, which is predominantly rock, as well as the need to construct within the 100-year floodplain and under the water table. The site is also adjacent to the Whitehurst Freeway, which limits the uses that may be made of the property adjacent to and below the Freeway. *Gilmartin,* 579 A.2d at 1168. Based on the above, the Board concludes that property is unique.

Practical Difficulties

The Board also concludes that, as a result of the unique conditions of the property, Millennium will encounter practical difficulties if the Zoning Regulations are strictly applied. Millennium is precluded from using a substantial portion of its property as a result of the extraordinary and exceptional conditions described above. These conditions result in certain constraints upon where and how Millennium may locate the various components of the project upon the property, such that Millennium will encounter practical difficulties if the Zoning Regulations are strictly applied. If Millennium were not constrained by these conditions, a height and FAR variance would not be required.

The Requested Variances Will Not Detrimentally Affect the Public Good or the Zone Plan

The Board concludes that the variances, which will allow Millennium to construct six additional condominium units, ten additional parking spaces, and make use of certain interior areas, will not result in substantial detriment to the public good or the zone plan.

As determined above in Findings Nos. 58 - 68, the variances will not adversely affect the historic resources on the site, the integrity of the historic district, or the architectural integrity of the project. The applicant's view studies demonstrated that the proposed added height will not adversely affect views of the waterfront or the Potomac River or the views across the River. The added height will not affect the light and air of nearby residential uses.

Further, the variances will not substantially impair the zone plan as embodied in the Zoning Regulations and Map. The variances will not undermine the purpose of the Waterfront zoning, which is to encourage a diversity of uses at various densities, since there will still be a diversity of heights and densities among the buildings in the Waterfront area. Nor will the granting of variance relief in this case set a precedent that will undermine the Waterfront zoning, as feared by CAG and others, because the variances are based on practical difficulties that are unique to the property. Each variance application must be evaluated on its own merits, and depends upon the threshold showing of uniqueness of the property. Finally, since Millennium is not responsible for creating the unique conditions of the property, the fact that Millennium knew of the conditions when it acquired the property does not preclude area variance relief. *See Association for the Preservation of 1700 Block of N Street v. District of Columbia Bd. of Zoning Adjustment,* 384 A.2d 674, 678 (D.C. 1978).

For the reasons stated above, the Board concludes that the applicant has met its burden of proof. It is hereby **ORDERED** that the application is **GRANTED.**

Vote taken May 15, 2001, to approve the variance to allow an increase in FAR, to be fully contained within the matter-of-right building (the "additional FAR slab area"):

VOTE: 4 - 0 - 1 (Anthony J. Hood, Anne M. Renshaw, Sheila Cross Reid, Susan Morgan Hinton, to approve; Geoffrey H. Griffis not voting, not having heard the case or reviewed the record prior to the May 15, 2001, decision meeting).

Vote taken June 26, 2001, to approve the variances to allow an additional ten foot, eight inches, in height for the two residential condominium buildings and the associated FAR, with setbacks as shown on Ex. 47 along the Wisconsin Avenue and 31st Street frontages and on the west and east side of the Incinerator smokestack:

VOTE: 4 - 1 - 0 (Anthony J. Hood, Susan Morgan Hinton, Sheila Cross Reid, and Geoffrey H. Griffis, to approve; Anne M. Renshaw, opposed.)

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

Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: AUG 2 2 2001

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED ADDITION WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

THE APPLICANT SHALL COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, CODIFIED AS CHAPTER 14 IN TITLE 2 OF THE D.C. CODE. *SEE* D.C. CODE § 2-1402.67 (2001). THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THE HUMAN RIGHTS ACT. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

MS

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 16702

As Director of the Office of Zoning, I hereby certify and attest that on AUG 2 2 2001, a copy of the foregoing Decision and Order in BZA Application No. 16702 was mailed first class, postage prepaid, or delivered via inter-agency mail to each party and public agency who appeared and participated in the public hearing and who is listed below:

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ATTESTED BY: Jerrily R. Kress

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Director, Office of Zoning