GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16770 of Capital Park Associates, Inc., pursuant to 11 DCMR § 3103.2 for a variance from the height provisions under Section 400 to allow the construction of a roof mounted antenna equipment shelter, and a variance to allow said equipment shelter to be located on an apartment building that is nonconforming as to height under subsection 2001.3 in the R-5-C District at premises 301 G Street, S.W. (Square 540, Lot 110).

HEARING DATE: October 23, 2001
DECISION DATE: October 23, 2001 (Bench Decision)

DECISION AND ORDER

SUMMARY OF EVIDENCE:

The premises, known as the Capital Park Towers apartment building, is located in Square 540 in the southwest quadrant of the District, at the northwest corner of 3rd and G streets. The building is located in the R-5-C District. The area immediately surrounding the property is zoned R-4 and R-5-C, and is developed with apartments and row houses. The Southwest Expressway is immediately north of the site.

The Applicant proposed to place one 12-foot by 20-foot by 10-foot equipment shelter on the roof at 301 G Street, S.W.[1] The equipment shelter would be constructed of materials similar to the main building and existing mechanical penthouse. The Applicant presented a roof plan depicting the placement of its proposed equipment shelter and antennas relative to existing roof structures and the edges of the building's roof. A line of sight drawing demonstrated that views of the roof-mounted installations from ground level in the vicinity of the Capital Park Towers would be minimal. The Applicant explained that the height of the building would help to mitigate the visibility of its installation.

As proposed, the equipment shelter would be placed in the center of the eastern half of the roof and set back a minimum of 31-feet from the north and south edges of the roof. The Applicant also described the locations and installation methods for 12 panel antennas that would be installed in groups of four on the north and south walls of the equipment shelter and on a sled mount near the western end of the main roof. No zoning relief was needed for placement of the Applicant's antennas as such antenna installations are permitted by right in the R-5-C District. The Applicant's proposed equipment shelter would be consistent with the height of existing

[1] **The property owner is Capitol Park Associates, Inc. The property owner intends to enter into an arrangement with Nextel Communications of the Mid-Atlantic, Inc. to install and operate a wireless telecommunications base station at the site.**

BZA
Case No.
Exhibit No. 16770 31

Board of Zoning Adjustment
District of Columbia
CASE NO.16770
EXHIBIT NO.31

penthouse on the building's roof so it will not appear as a prominent or solitary feature on the roof.

The site is zoned R-5-C. The R-5-C District permits antennas of the class proposed by the Applicant as matter-of-right uses. Equipment shelters are a necessary functional element for the operation of such antennas. Such antennas and their related equipment shelters are permitted installations on building rooftops in the R-5-C District so long as they are placed on roofs at least 50-feet in height and steps are taken to mitigate their visibility. The Applicant's proposal demonstrated compliance with the District's antenna regulations and presented a design that would not detract from the landscape, skyline and scenic beauty of the city.

The Applicant presented testimony explaining that this particular location was selected in order to allow the proposed facility to function efficiently as a part of its network of antenna sites throughout the city.

The Capital Park Towers apartment building received a Certificate of Occupancy from the District in January 1985 for its full eight floors and basement. The building was originally constructed under an Urban Renewal classification, which allowed the 86.5-foot height specific to the building. The Urban Renewal classification expired and the property was zoned R-5-C, which has a height limit of 60-feet, thereby causing the building to become a non-conforming structure with a conforming use. The intended placement of the equipment shelter and antennas will have no impact on the residential use of the building.

The Applicant's presentation to the Board included testimony by Nextel Communications' construction supervisor who explained why a roof-mounted, rather than ground level equipment shelter, was the only viable design at this location. The Board also heard testimony by a Nextel radio frequency engineer who explained why the Capital Park Towers building was uniquely situated to serve as an antenna installation site as part of that wireless service provider's network in the District of Columbia.

By correspondence to the Board, Advisory Neighborhood Commission (ANC) 2D indicated that at its October 15, 2001 public meeting, the ANC voted to oppose the application. Exhibit No. 27. The ANC's letter was read into the Board's record and stated that the Commission's opposition is based on:

a) The application does not meet the hardship test for a variance.

b) The Applicant and Nextel have not exhausted alternative possibilities for an equipment shelter at 301 G Street, or at other locations in the area.

c) Granting the variance would not only set a policy precedent for similar structures on other buildings in Southwest, but it would also establish a legal and competitive precedent for all other carriers to place equipment shelters and antennas on this building.

d) The roof-mounted equipment would not benefit residents of the building, or those of neighboring buildings (unless they are Nextel subscribers).

e) The proliferation of such shelters and equipment constitute an environmental and aesthetic blight on the neighborhood.

f) The claim of the Applicant that the health threats of the equipment are minimal begs the question of the impact of cumulative exposure from multiple sources.

g) No evidence was presented at the ANC meeting that the community wanted the variance approved.

The Board considered the views of the ANC 2D however, noted the following:

- The Applicant demonstrated that it sought only a height variance and not a use variance, its burden was not to demonstrate "hardship," as suggested by the ANC, but rather to demonstrate exceptional practical difficulty in accommodating its proposed roof top equipment shelter without a variance on the height limit. The Applicant demonstrated that an extraordinary or exceptional situation or condition existed with respect to this property in that but for the building's non-conforming height, which resulted from its rezoning to the R-5-C District, the Applicant's proposed equipment shelter would be permitted as a matter-of-right.

- The Applicant indicated that alternative locations were reviewed to place the facility. However, because of constraints with those properties, the subject site is the better-suited location.

- The Applicant submitted a letter to the file that addresses the Radio Frequency health and safety concerns at the site (Exhibit No. 26). The conclusion was the facility would operate well within and below permitted minimums adopted by guidelines of the Federal Communications Commission.

- The Applicant stated that public access would not be available on the rooftop, and the appropriate signage for workers would be installed.

- The Applicant asserted that the tenants of the building rent apartment space; they do not have an ownership interest or a lessee interest in the roof. Rooftops of buildings are now valuable assets.

- Each BZA application presented to the Board must stand on its own merit. If similar types of applications are presented to the Board, they will be reviewed individually.

The Board also noted its receipt of a single written comment by a resident of Capital Park Towers who stated her opposition to the application because of concerns about airplane safety. It was noted by the Applicant that its equipment shelter would not extend more than a few inches higher than the penthouse structure already in place on the roof.

The Board received the October 10, 2001 report of the District of Columbia Office of Planning, which included a recommendation of approval of the Applicant's variance request. Exhibit No. 24.

FINDINGS OF FACTS:

Based on the evidence of record, the Board finds as follows:

1. The Capital Park Towers apartment building at 301 G Street, S.W. was constructed under an Urban Renewal classification, which allowed it to be constructed to its present height of 86.5 feet.

2. Subsequently, the property was re-zoned to R-5-C residential. The R-5-C District limits structures to no more than 60 feet in height.

3. Antenna siting regulations adopted by the city direct that antennas and their related equipment shelters be designed and located so as not to detract from the landscape, skyline and scenic beauty of the city.

4. The placement of antennas and related equipment shelters on rooftops of existing buildings is one way to minimize the visual impact of such facilities.

5. Roof top installations such as that proposed by the Applicant are permitted by right in the R-5-C district provided they are placed on rooftops at least 50 feet in height.

6. The non-conforming height of the subject building is an advantage in screening a roof top equipment shelter from sight. The equipment shelter's placement among existing roof structures on the building will not detract from the skyline or scenic beauty of the city.

7. The Applicant's equipment shelter would be permitted under the city's zoning regulations if the subject building were constructed to its permitted height in the R-5-C district.

8. The Applicant's equipment shelter is necessary for the operation of its antennas, which are permitted installations on the roof of the building.

9. The Applicant has demonstrated that no suitable alternative location for its equipment shelter exists.

10. There will be no noise generated by the Applicant's facility. The Board did receive evidence to demonstrate that there will be no harmful radio frequency emissions or interference from the equipment shelter or antennas.

11. The subject building's non-conformity as to height, within the context of the Applicant's proposal, and which derives from the building's construction under an

Urban Renewal classification and subsequent re-zoning resulting in a lowered permitted structure height, presents an extraordinary or exceptional situation or condition unique to the property.

12. This variance will not result in substantial determinant to the public good and will not substantially impair the intent, purpose and integrity of the zone plan.

CONCLUSIONS OF LAW:

The Board is authorized to grant variances where "by reason of exceptional narrowness, shallowness, or shape of a specific property . . . or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or conditions of the property, the strict application of any zoning regulation would result in peculiar and exceptional practical difficulties to . . . the Owner of the property . . ." D.C. Code § 5-424(g)(3), 11 DCMR § 3103.2. Where, as here, an Applicant seeks an area variance, the "practical difficulties" standard applies, with the "undue hardship" standard applying only when an Applicant seeks a use variance. *Palmer v. Board of Zoning Adjustment*, 287 A.2d 535, 542 (D.C. App. 1972).

11 DCMR § 3103.2 sets out the criteria for an area variance. The Applicant must demonstrate that (1) the property is unique because of its size, shape, or topography or other extraordinary or exceptional situation or condition connected with the property; (2) the Applicant would encounter practical difficulties if the Zoning Regulations were strictly applied; and (3) granting the variance 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.

Based on the summary of evidence and findings of fact, the Board finds that the building located on the site was lawfully constructed under the Urban Renewal plan to its existing height of 86.5 feet. Subsequent to the building's completion, the site was zoned R-5-C which carries a building height limit of just 60 feet. Consequently, the building is non-conforming as to the height.

The evidence presented demonstrates the anomaly that confronts the Applicant. The R-5-C District allows buildings constructed to a height of no more than 60 feet. If the Capital Park Towers apartment building had been constructed after its site had been re-zoned to R-5-C, it could have been constructed to a height of 60 feet and the Applicant's equipment shelter would have been permitted as a matter-of-right on the building's roof under the City's Zoning Code and its antenna regulations. Because the building was legally constructed to a height permitted before it's re-zoning to R-5-C, its extra height makes it non-conforming. Consequently, the Applicant requires a variance in order to do what it could otherwise do by right. As explained by the Applicant, it is the building's non-conforming feature - - its added height - - that makes it an attractive location for an antenna site. The Applicant's proposal is also consistent with the city's antenna siting policies because the building's additional height presents a better opportunity to screen the shelter's visibility from ground level in the vicinity of the building.

The past zoning history of a property can be taken into account in the uniqueness facet of the variance test. See *Monaco v. D.C. Board of Zoning Adjustment*, 407 A. 2d 1091, 1098 (D.C. App. 1979). In this instance, the zoning history of the property is the single reason why the height variance is required. The lowering of the building's permitted height by its re-zoning to the R-5-C District is the "subsequent event" that causes this property's roof top development to be uniquely hindered in comparison to other structures within that zoning district and creates the extraordinary or exceptional condition that warrants a variance in this instance.

The practical difficulty that confronts the Applicant is obvious. If the building were only 60 feet high, the Applicant could install its roof top equipment shelter as a matter-of-right. The building's height cannot be reduced by 26 feet. This physical impossibility creates another exceptional condition at the site and inhibits the property owner's ability to reasonably use its rooftop in a manner that is allowed owners of property in the same zoning district whose properties are constructed to the 60 foot limit permitted in the R-5-C District.

The Applicant has adequately demonstrated that the visibility of its roof top equipment shelter from the ground in the vicinity of the building will be minimal, that it will not be out of character or out of scale which existing penthouse structures on the roof, that it will not hinder the development of other property in the area, and that the variance 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.

The Board considered the objections expressed by Advisory Neighborhood Commission 2D and accorded great weight to the views of the ANC. However, the Board did not find the reasons stated by the ANC for its opposition to this application to be persuasive.

The Board was persuaded that the Applicant has met the burden of proof for the height variance to allow installation of a roof top equipment shelter with related antennas. Therefore, it is hereby **ORDERED** that the application be **APPROVED.**

VOTE: 3-0-2 (Geoffrey H. Griffis, David W. Levy and John G. Parsons to approve; Anne Mohnkern Renshaw not hearing the case, not voting; the third mayoral appointee not sitting on the Board, not voting.)

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

Each concurring Board member approved the issuance of this Order.

JERRILY R. KRESS, FAIA
Director

FINAL DATE OF ORDER: NOV 29 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 STRUCTURE 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 25 IN TITLE 1 OF THE D.C. CODE. *SEE* D.C. CODE § 1-2531 (1999). 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.

BAB/11.21.01

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 16770

As Director of the Office of Zoning, I hereby certify and attest that on NOV 2 9 2001 a copy of the order entered on that date in this matter 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 concerning the matter, and who is listed below:

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