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March 26, 2002

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Mr. Geoffrey Griffis
Chairperson
Board of Zoning Adjustment
441 Fourth Street, N.W., Room 201
Washington, D.C. 20001

Re: BZA Application No. 16854; 315 East Capitol Street, S.E. (the "Property")
Hearing Date: April 9, 2002
REQUEST FOR PARTY STATUS AND STATEMENT IN OPPOSITION TO THE RELIEF REQUESTED

Dear Mr. Griffis and members of the Board of Zoning Adjustment:

On behalf of Mr. and Mrs. James R. Jones and Mr. Jim Warlick we request that the Board of Zoning Adjustment permit Mr. and Mrs. Jones and Mr. Warlick to appear as parties in opposition in the above-referenced application. Additionally, we request that the relief sought by the instant application be denied. In support hereof, we provide the following:

A. STATEMENT IN SUPPORT OF PARTY STATUS.

With regard to the requirements of 11 DCMR § 3106.2(a)-(d), we state as follows:

a. The persons seeking party status are Mr. and Mrs. Jones, who reside at 317 East Capitol Street, S.E., and Mr. Warlick, who resides at 313 East Capitol Street, S.E.;

b. Mr. & Mrs. Jones and Mr. Warlick request to appear as a parties to this matter;

c. The persons will appear in opposition to the application; and

BZA
Case No. 16854
Exhibit No. 37

Board of Zoning Adjustment
District of Columbia
CASE NO.16854
EXHIBIT NO.37

d. The persons will appear through undersigned legal counsel.

In accordance with 11 DCMR § 3106.2(e), we provide the following:

1. Interest in Immediate Neighboring Properties -- 11 DCMR § 3106.2(e)(1)-(3).

Mr. and Mrs. Jones both own and occupy the property located across the public alley to the immediate east of the subject Property.

Mr. Warlick is the tenant and contract purchaser of the property to the immediate west of the subject Property. However, as described in greater detail below, because the proposed structure will block off nineteen (19) windows of his residence, Mr. Warlick has experienced difficulty in securing financing for his purchase of 313 East Capitol Street, S.E.

3. Impact of the Requested Relief -- 11 DCMR § 3106.2(e)(4)&(5).

Based on the close proximity to the Property, Mr. and Mrs. Jones and Mr. Warlick stand to suffer substantial harm if the Board were to grant the requested relief. Both Mr. and Mrs. Jones, as well as Mr. Warlick, will suffer a substantial loss of light and air caused by the proposed construction. This affect is magnified as to Mr. Warlick's property, as nineteen (19) of his windows will be blocked. If the requested variances are granted, Mr. Warlick faces the prospect of losing financing for the purchase of his residence and, consequently, the termination of his tenancy. Moreover, it is estimated that the value of Mr. Warlick's property will be decreased by as much as $300,000.00.

4. Significant Impact -- 11 DCMR § 3106.3.

As the immediate neighboring property owners/occupants, Mr. and Mrs. Jones' and Mr. Warlick's interests will be more significantly, distinctively and uniquely affect by the proposed building. No other property owner in the surrounding neighborhood stands to suffer the loss of light and air, and accompanying reduced property value that will be suffered by Mr. and Mrs. Jones and Mr. Warlick.

B. STATEMENT IN SUPPORT OF DENIAL OF THE RELIEF REQUESTED BY THE APPLICATION.

1. Standards for Area Variances.

The standard for obtaining an area variance is well settled. In the leading case of *Palmer v. Board of Zoning Adjustment*, 287 A.2d 535 (D.C. 1972), the Court interpreted D.C. Code, §§ 5-420,

5-424(g)(3) and the corresponding provision of the Zoning Regulations, 11 DCMR § 3103.2, which permits the Board to grant variances, pursuant to the following:

> 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 this Act 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 from such strict application so as to relieve such difficulties or hardship, provided such relief can be granted without substantial determent to the public good and without substantially impairing the intent, purpose, and integrity of the zoning plan as embodied in the zoning regulations and map.

The above regulation sets up separate statutory requisites to the granting of variances, i.e., a showing of "practical difficulties" or "undue hardship". The court adopted the dichotomy recognized in other jurisdictions between area variances and use variances, applying the statutory requisite of "practical difficulties" to a showing of the former, and applying the separate statutory requisite of "undue hardship" to a showing of the latter. *Id.* at 541. Because "an area variance, relating to restrictions such as side yard, rear yard, frontage, set-back or minimum lot requirements, does not alter the character of the zoned district, whereas a use variance seeks a use ordinarily prohibited in the particular district", the court held that a "more stringent showing is warranted with respect to the more drastic relief inherent in a use variance". *Id.* at 541. In short, the Board is empowered to grant an area variance where it finds three conditions:

(1) The property is unique because, *inter alia*, of its size, shape or topography;

(2) The owner would encounter practical difficulties if the zoning regulations were strictly applied;

(3) The variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zoning plan.

Roumel v. District of Columbia Bd. of Zoning, 417 A.2d 405, 408 (D.C. 1980); *see also Association For The Preservation Of 1700 Block Of N Street, N.W. v. Board of Zoning Adjustment*, 384 A.2d 674, 678 (D.C. 1978)(the applicant must demonstrate that compliance with the area restriction is unduly burdensome and the practical difficulties are unique to the property).

Reviewing the criteria for an area variance, the Court, in *Capital Hill Restoration Society, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939, 941-942 (D.C. 1987), stated that the

> threshold requirement to show that 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* * * * ." *Taylor, supra* note 6, 308 A.2d at 234 (emphasis in original). Where the circumstances that create the hardship or difficulty affect the entire neighborhood rather than merely a specific piece of property, the problem is properly addressed by seeking amendment of the regulations from the Zoning Commission. *Id.* If the BZA were to grant variances where the hardship or difficulty is not peculiar to a particular piece of property, similar requests could follow from property owners similarly situated, "which, as a matter of due process, would have to be granted." *Id.* The effect of such decisions by the BZA would be an amendment of the zoning regulations by that body, an action which the BZA is not empowered to take.

Id.; see also Russell v. Board of Zoning Adjustment, supra, 402 A.2d at 1235)(the requirement that the practical difficulty be caused by the uniqueness of the property "insures relief for problems peculiarly related to the * * * land or structure, and not shared by other property in the neighborhood, thus avoiding a de facto amendment of zoning laws.").

2. The Subject Property is Not Unique.

To support a variance, the practical difficulty caused by the unique circumstances must be "peculiar to the applicant's property and not to the general conditions in the neighborhood." *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990) *citing Palmer v. Bd. of Zoning Adjustment*, 287 A.2d 535, 539 (D.C. 1972). As explained by the Court in *Gilmartin*, the condition which makes the property unique "must affect a *single* property." *Gilmartin*, 579 A.2d at 1168 (emphasis added).

The Applicants attempt to support their argument that the Property is unique by pointing out that no other properties along East Capitol Street, S.E. in Square 787 are as narrow as the Property. However, the basis upon which the Applicants state that there property is unique is not accurate. One does not have to go far to find other Lots that are as narrow, if not narrower, than the subject Property. (Exhibit A.) Nor does one have to go far to find Lots which are under the required eighteen foot (18') lot width. (Exhibit A.) By way of illustration, Lot 28 in Square 787 is only sixteen feet (16') wide and Lots 826, 19, 823, 804 and 21, Square 816, which are located in the north side of the four hundred block East Capitol Street, N.E., are all under sixteen feet (16') wide. Likewise, Lot 17 in Square 817, which is on the south side of the 400 block of East Capitol Street, is less than sixteen feet (16') wide. Lot 825, Square 816 is 16.65 feet wide and Lot 802 is 16.17 feet wide. (Exhibit A.) Lots 15, 16, 17 and 20 in Square 816, which Lots are located on the south side of the 400 block of A Street, N.E., are all under thirteen feet (13') wide. (Exhibit A.) Indeed, there are many more sites in the surrounding neighborhood with lot widths under eighteen feet (18'). (Exhibit B.)

Rather than contribute to any "uniqueness" of the Property, the depth of the Property provides a larger zoning envelop in which the Applicant can construct a matter-of-right residence. That is, the greater depth results in a larger lot, which, in turn, allows for a larger building foot print than that which would be permitted on a more shallow site.

In light of the number of lots which have similar characteristics to the subject lot, any variance provided would amount to an amendment of the zoning map since it would require similar relief for all other lots. In similar circumstances involving an area variance request on Capitol Hill, the Court of Appeals, in *Capitol Hill Restoration Society, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987), has concluded that the Board is without authority to grant the area variance relief requested. *See also Myrick v. District of Columbia Bd. of Zoning Adjustment*, 577 A.2d 757 (D.C. 1990).

In *Capitol Hill*, the applicant attempted to argue uniqueness of his property due to the size of the lot, which the applicant claimed was "unusually large." *Capitol Hill*, 534 A.2d at 942. Because evidence was presented to the Board that similar conditions existed within the same square, as well as throughout the Capitol Hill area, the Court reversed the Board's granting of the requested area variances. *Id.* at 943.

In *Myrick*, as in the instant matter, the applicant attempted to argue that his property was unique due to its narrow width, which was twelve feet (12"). *Myrick*, 577 A.2d at 758 & 760. However, the Court noted that the record indicated that there were other lots of the same size only one block away and that small, nonconforming lots were not uncommon in the Georgetown Historic District, where the property at issue was located. *Id.* at 761. Likewise, there are similar lots to the

subject Property in the same square, as well as in the next block and throughout the Capitol Hill Historic District. (Exhibits A and B.) With regard to the requested variance in *Myrick*, the Court noted that it would have "disproportionate impact on the adjoining properties." *Id.* The same is true with regard to the requested area variances in the instant matter.

Given the prevalence of narrow lots in the surrounding area and throughout the Capitol Hill Historic District, the Property is not unique.

3. There Are No Practical Difficulties In Developing a Matter-of-Right Structure at the Site and Compliance with the Area Requirements Would Not be Unduly Burdensome.

The Applicants have not demonstrated that there is "no feasible alternative" available that would comply with the Zoning Regulations. *Gilmartin*, 579 A.2d at 1170; *see also Myrick*, 577 A.2d at 761 (variance was not warranted where the applicant did not contend that alternatives, although more costly, were unavailable). In doing so, they ignore the fact that the previous structure at 313 East Capitol Street did not adversely affect the neighboring properties. It is clear from the existing east elevation of 313 East Capitol Street, N.E. (Mr. Warlick's property), there previously existed a much shallower, two-story structure at the Property. (Exhibit C.) Unlike the proposed building, this structure did not interfere with the light and air to the neighboring properties.

Contrary to the Applicants' assertion that they have "no choice but to design a residential structure which occupies a greater percentage of the lot" (Applicant's Statement of Reasons at p. 5), the Applicants could scale back the proposed building so that it does not interfere with the light and air of the neighboring properties. This could be accomplished by eliminating such amenities as the apartment, exercise room, study/library/media room and breakfast nook and eliminating or reducing the stair halls. While the Applicants may argue that scaling back the size of the structure and/or setting it back from 313 East Capitol Street, S.E. would result in some loss in the overall utility of the Property, such a loss does not merit an area variance. *Id.*

Finally, with regard to the width of the Property, the Applicants were aware of its nonconformity with the Zoning Regulations when they purchased the Property.[1] Such knowledge, while not determinative in area variance cases like it is in use variance requests, is a factor which may

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[1] In fact, the Applicants attempted to rely on the expired variances granted in BZA Application No. 15476 in obtaining a building permit. In that case, there was no opposition to the variance request and the relief was granted by summary order. In similar circumstances, the Court of Appeals has held that such decisions are not binding on the Board in subsequent application requests. *See Davidson v. District of Columbia Bd. of Zoning Adjustment*, 617 A.2d 977, 983 (D.C. 1992).

be considered by the Board in determining whether the requested relief should be granted. *Gilmartin*, 579 A.2d at 1171.

Based on the foregoing, it is clear that the Applicants have failed to show any uniqueness of the Property or that they are faced with "practical difficulties" in developing the site within the Zoning requirements.

4. The Proposed Variances Will Adversely Affect the Neighboring Properties.

In considering whether the requested relief should be granted, the Board must consider the harm to the surrounding neighborhood. In the instant matter, the harm to the immediate surrounding properties is significant and outweighs the need for the requested variances.

The proposed construction will significantly diminish the light and air to the neighboring properties. Both the height of the proposed building, as well as the depth of the building, contribute to this condition. (See Exhibit D.) Mr. Warlick's property is most significantly affected, as nineteen (19) windows will be blocked off by the new construction. (Exhibit E.) Because of the potential negative affect on his property, Mr. Warlick's efforts in obtaining financing to close on the purchase of his property have been hindered. It was not until the ANC voted to deny the requested relief that Mr. Warlick was able to get a commitment from a lender. However, closing has not occurred due in part to the fact that Mr. Warlick's property stands to loose $300,000 in value if the requested relief is granted and the proposed building constructed.

5. Reliance on the Order in BZA Case No. 15476 is Misplaced.

In support of their application, the Applicants rely on the granting of area variances for the Property in BZA Case No. 15476. However, the Board's decision to grant similar variances in the previous matter cannot support the current application, as there was no opposition in the prior matter. *See, e.g. Davidson v. District of Columbia Bd. of Zoning Adjustment*, 617 A.2d 977, 983 (D.C. 1992)(no opposition to the size of the structures in the cases relied on by the applicant and therefore not binding on the Court). Notably, Advisory Neighborhood Commission ("ANC") 6B did not take a position in BZA Case No. 15476. In contrast, ANC 6B voted to oppose the instant application. Because there was no opposition, it does not appear from the record in BZA Case No. 15476 that the Board considered the fact that the Property is not unique, as there are similarly sized lots in the immediate neighborhood and throughout the Capitol Hill Historic District. Nor did the Board consider the loss of light and air to the immediately adjacent properties.

Because each request for a variance must be decided on its own facts, 3 Yokley, *Zoning Law and Practice* § 21-11 at p. 355 (1979), the Board is not bound by its decision in BZA Case No.

15476. Rather, the Board must consider the facts raised in the instant opposition, which facts had not been presented to and, therefore, not considered by the Board in BZA Case No. 15476.

CONCLUSION

For the foregoing reasons, we request that the Mr. and Mrs. James R. ones and Mr. Jim Warlick be allowed to appear as parties in opposition at the hearing scheduled for April 9, 2002, in the above-referenced matter. Additionally, we further request that the Board deny the relief requested.

We appreciate your consideration.

Sincerely,

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

Richard B. Nettler
Jeannine Rustad Zigner

Enclosures
cc: Jacques B. DePuy, Esquire
Mr. Jim Warlick
Mr. and Mrs. James R. Jones
Ms. Sherri M. Pruitt, Board of Zoning Adjustment (by hand)
Kenan P. Jarboe, Chairperson, ANC 6B
Mr. John Moore, Office of Planning (by hand)

Exhibit List

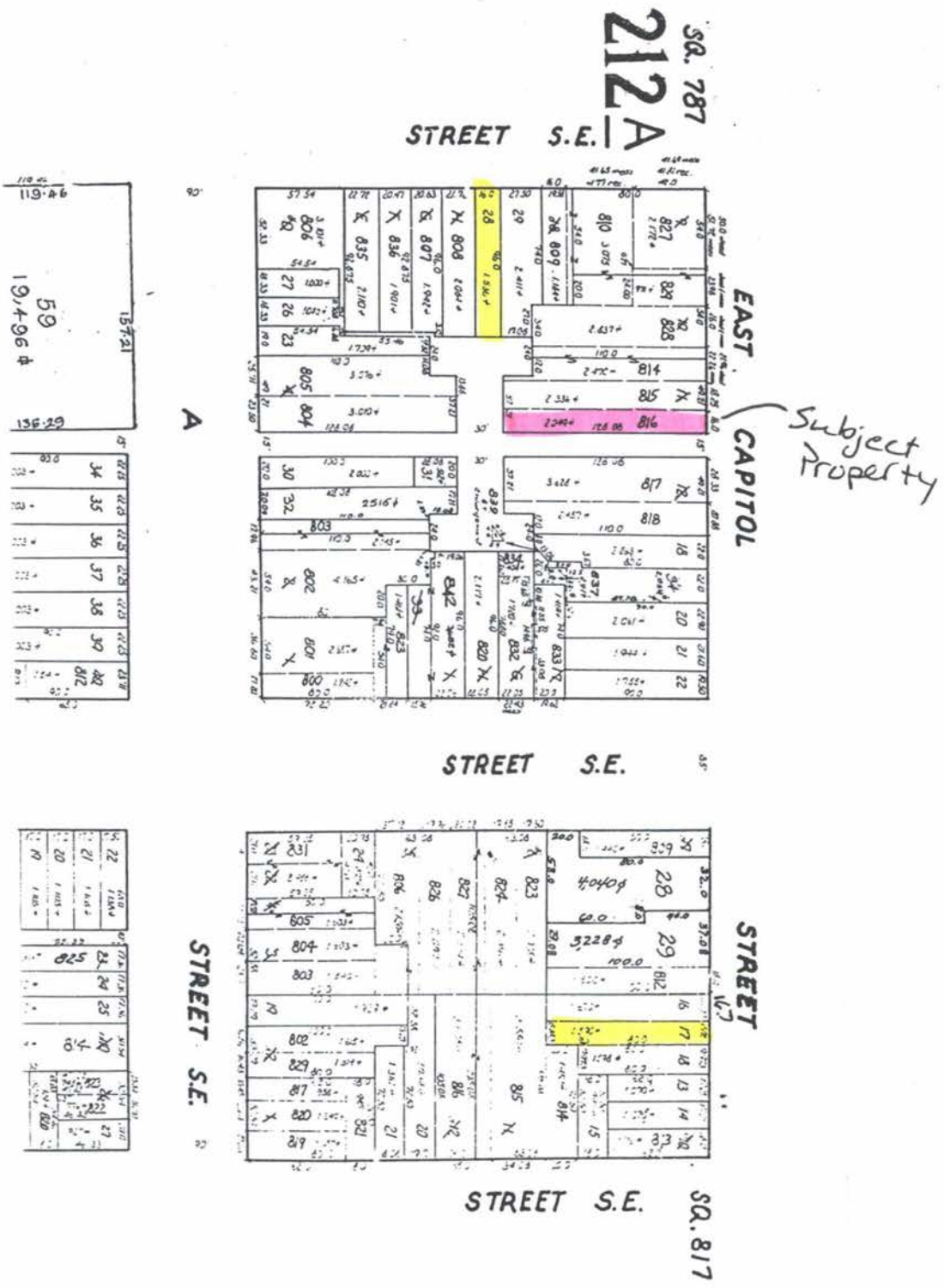
A. Sanborne Atlas Map for Squares 787 (Book 1, Vol, 2, page 212A) and 816 (Book 1, Vol. 4, page 402)(Lots with width under 16' highlighted in yellow; lots with width greater than 16' but less than 18' highlighted in green.).

B. Portions of Sanborne Atlas Map, Book 1, Vol., 2, pages 213-218; Book 1, Vol. 4, page 403 (Lots with width under 16' highlighted in yellow; lots with width greater than 16' but less than 18' highlighted in green.).

C. (1) Photograph of 315 East Capitol Alley View showing original structure.
(2) Photograph with computer image of size of original structure for 313 East Capitol Street.

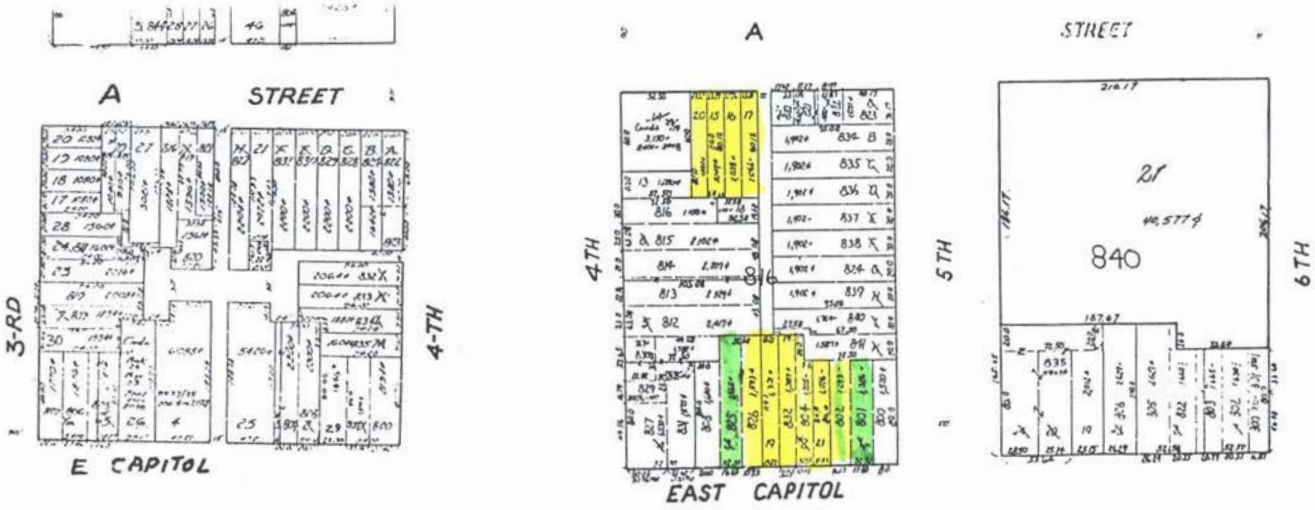
D. (1) Photograph of 317, 315 and 313 East Capitol Street (existing).
(2) Photograph with computer generated image depicting size of proposed new construction at 313 East Capitol Street.

E. Photographs depicting windows at 313 East Capitol Street which will be blocked by proposed new construction.



Yellow: Lots with width under 16'

Green: Lots with width greater than 16' but less than 18'

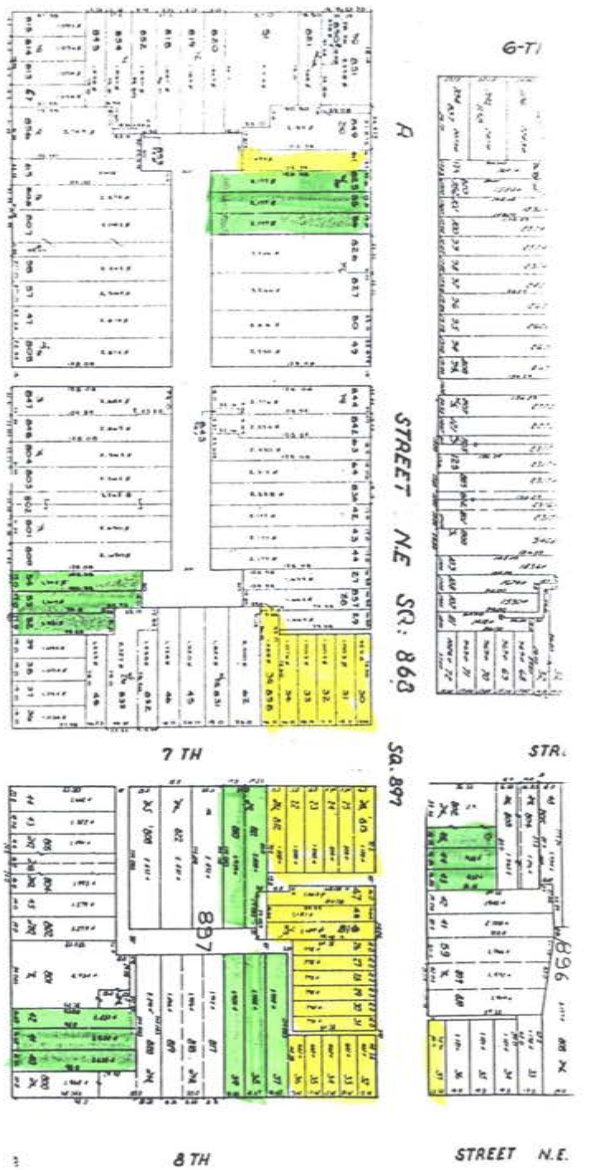


402

EXHIBIT A (2 of 2)

EXHIBIT B (1 of 7)

403



Yellow: Lots with width under 16'

Green: Lots with width greater than 16' but less than 18'

EXHIBIT B (2 of 7)



213

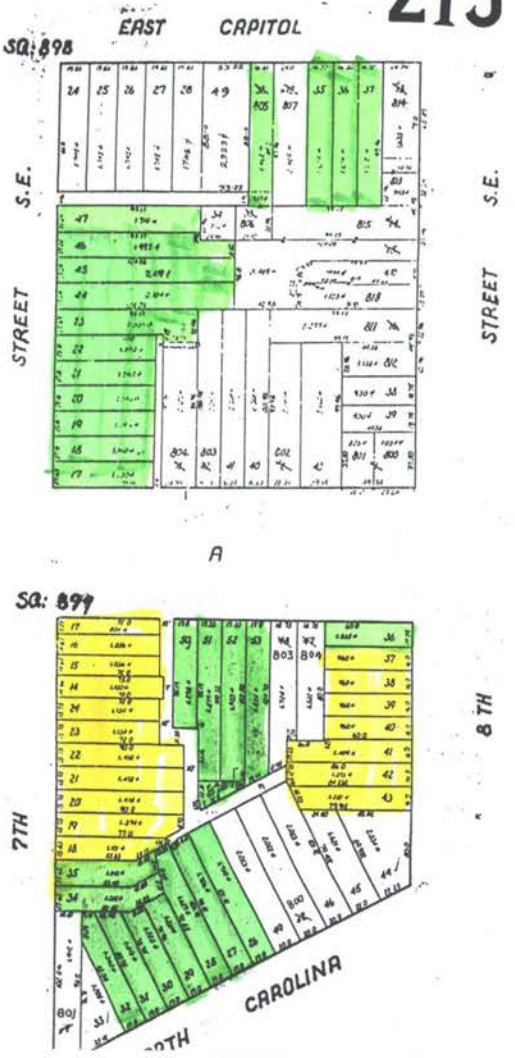


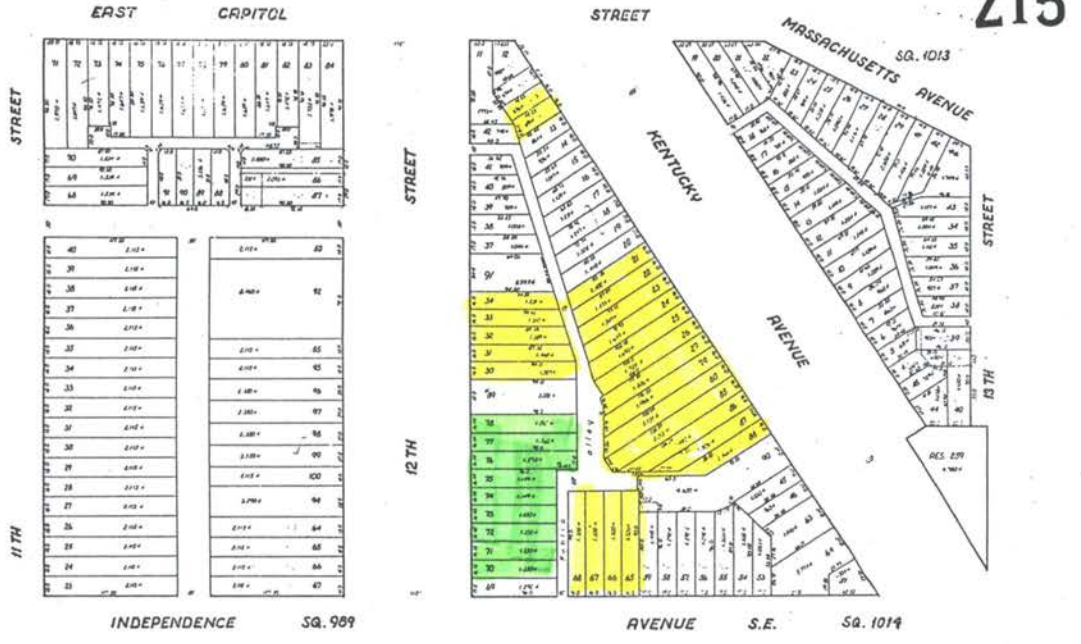
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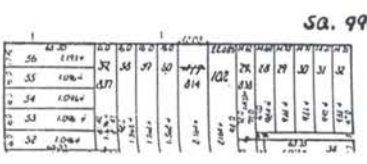
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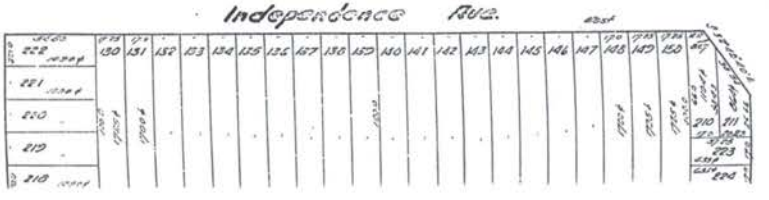


EXHIBIT B (4 of 7)

215







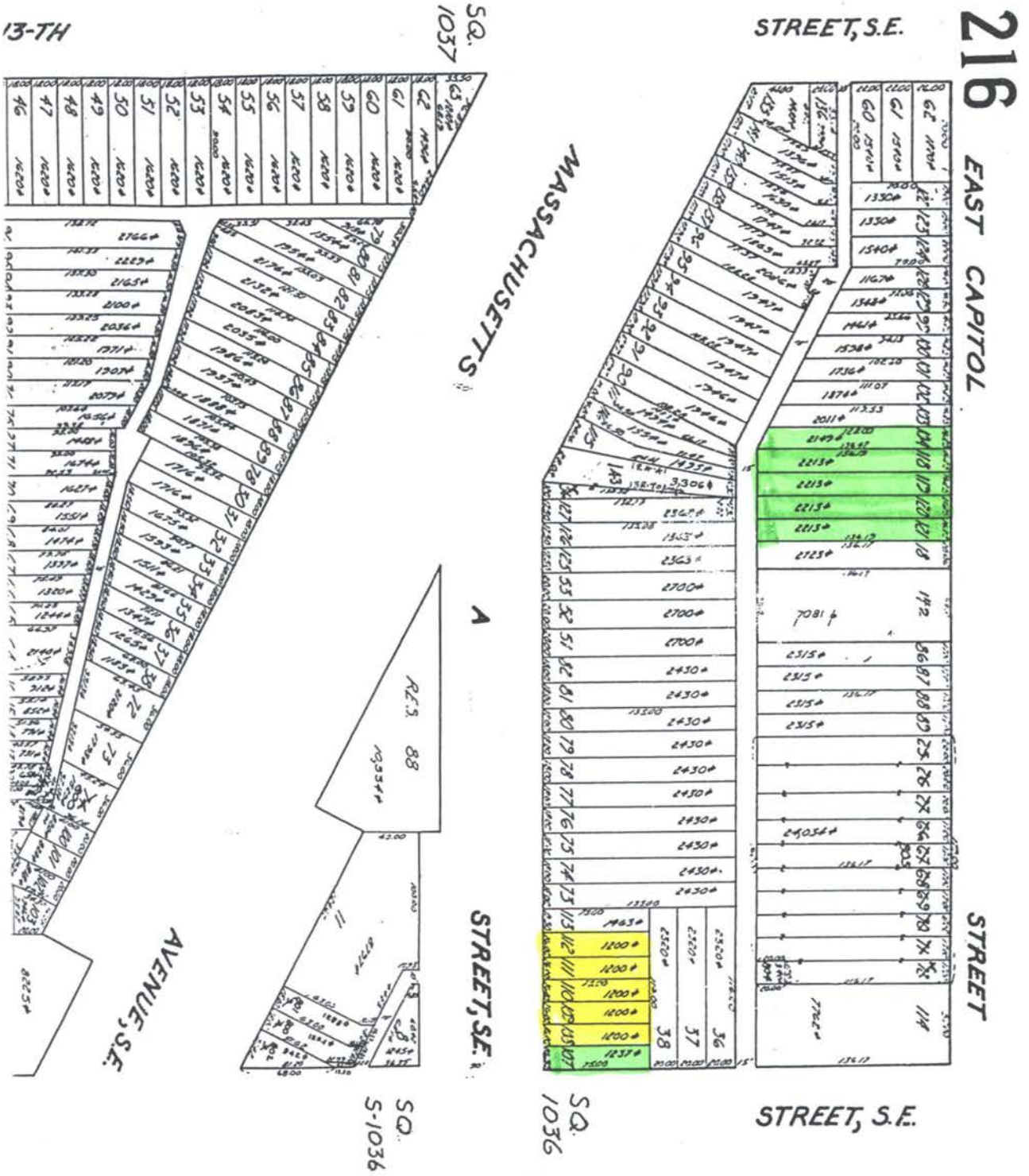
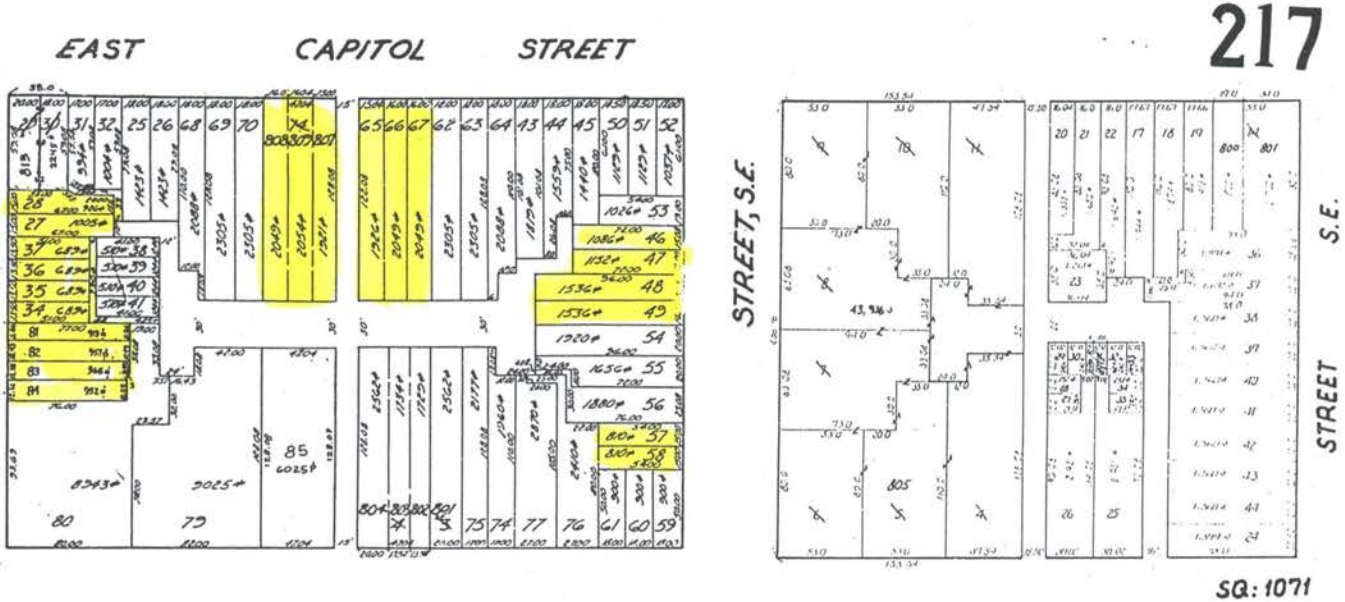

216
EAST CAPITOL
STREET, S.E.
STREET
STREET, S.E.
MASSACHUSETTS
AVENUE, S.E.
13-TH
STREET, S.E.
SQ. 1037
SQ. 1036
SQ. S-1036
A
RES. 88

EXHIBIT B (6 OF 7)

217



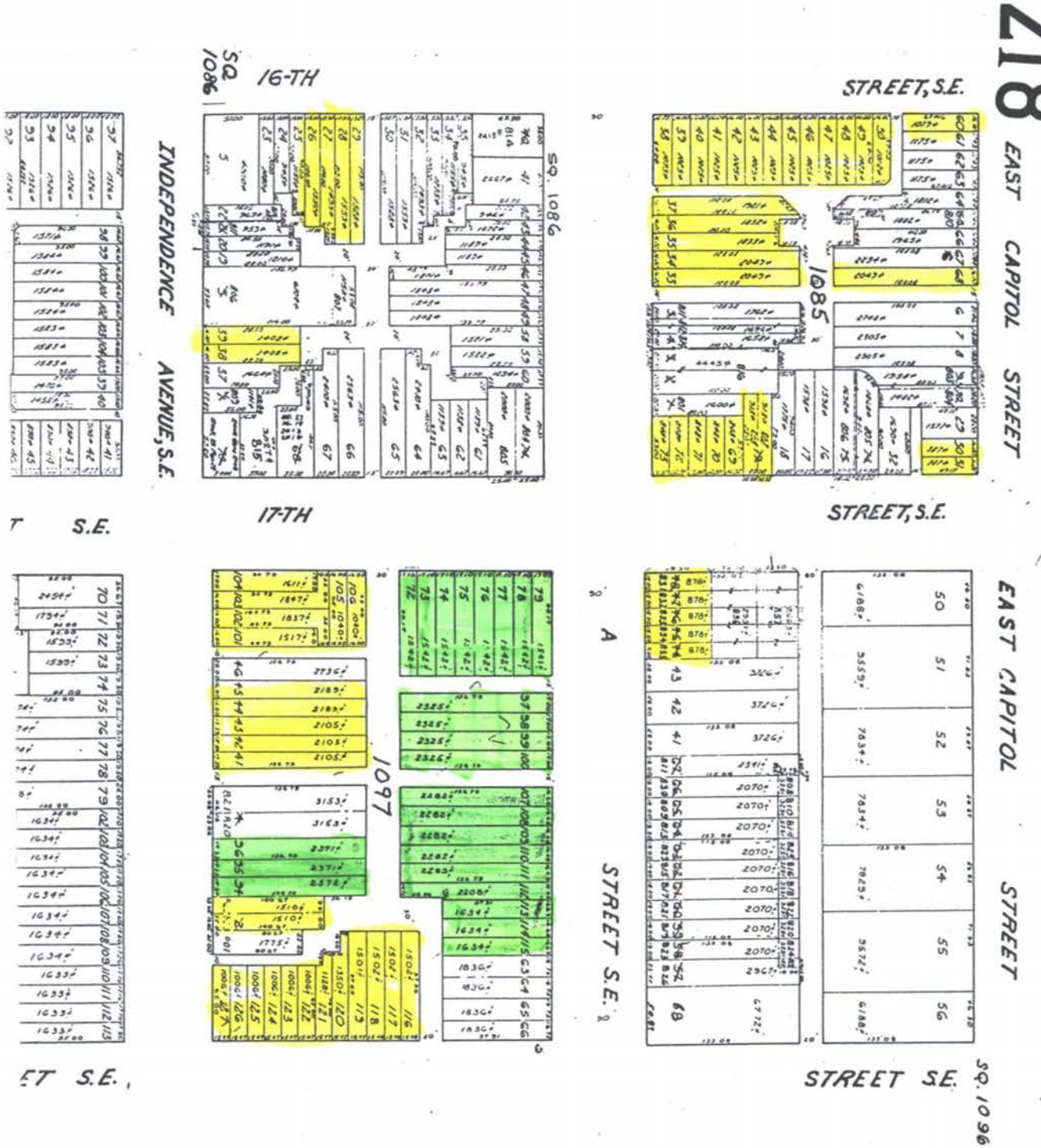
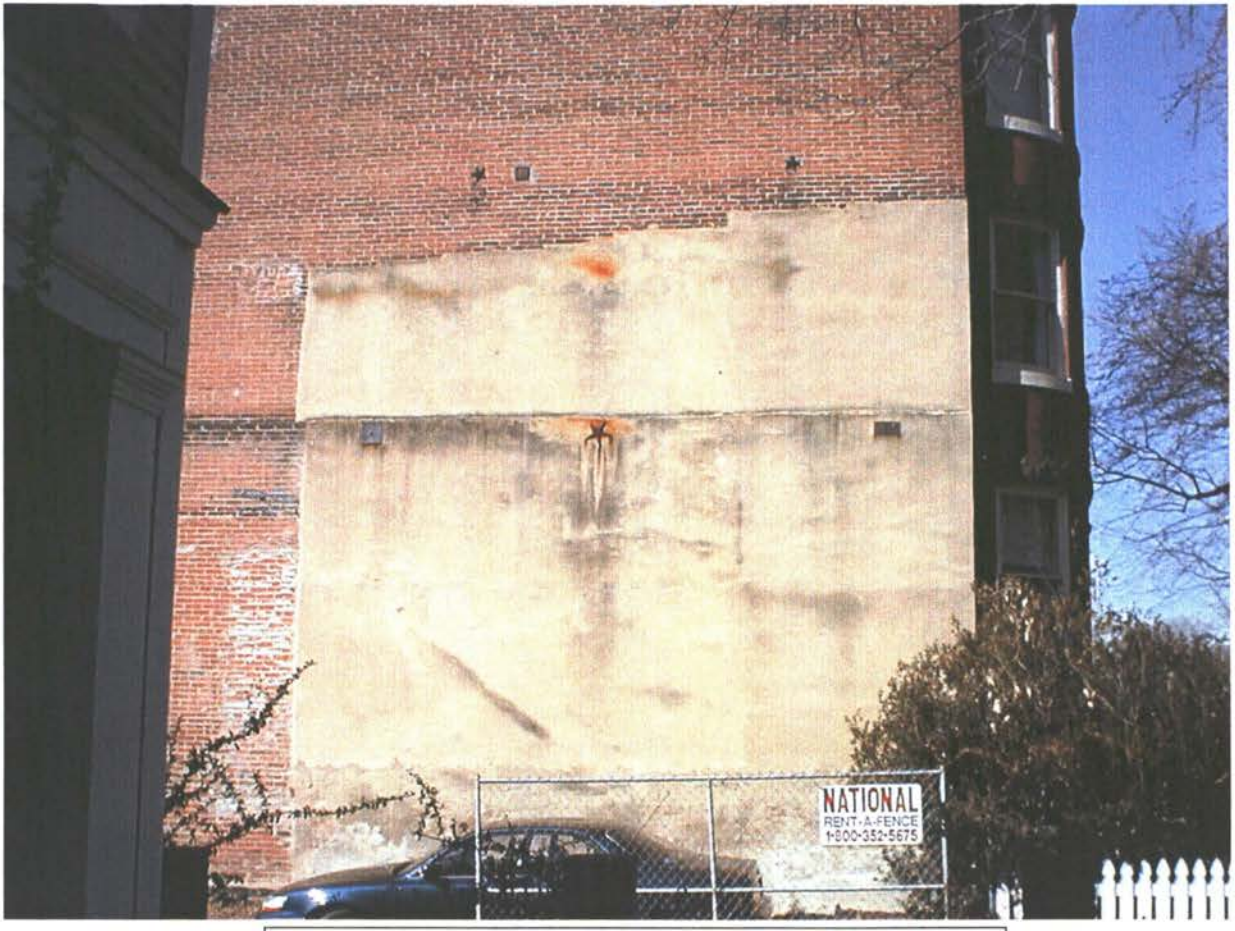

218
EAST CAPITOL STREET
STREET, S.E.
SQ. 1086
16-TH
17-TH
INDEPENDENCE AVENUE, S.E.
SQ. 1085
SQ. 1097
SQ. 1096
STREET S.E.

EXHIBIT C(1)



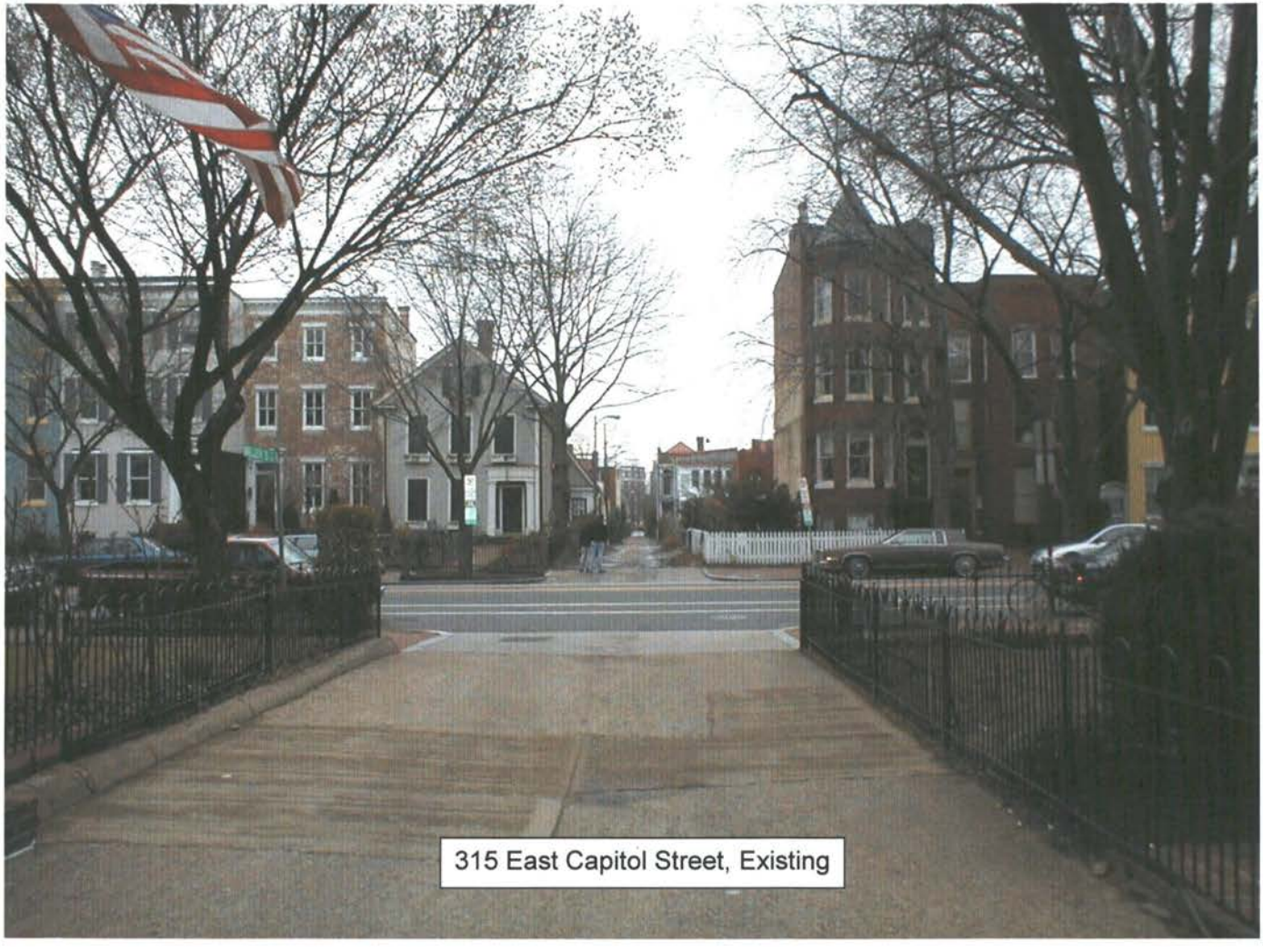
315 East Capitol alley view, showing original structure

EXHIBIT C(2)



315 East Capitol Street, Original Size (Now Demolished)

EXHIBIT D(1)



315 East Capitol Street, Existing

EXHIBIT D(2)



315 East Capitol Street, Proposed new construction





