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June 23, 2003

BY HAND
Mr. Geoffrey Griffis
Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Room 210
Washington, DC 20001

Re: BZA Application No. 17014 of EastBanc, Inc.
2110 M Street, N.W.
Our File No. 091852.00000

Dear Mr. Griffis:

The following is submitted in response to the Board's request at the conclusion of the June 10, 2003 hearing. As presented in detail below, the requested variances, including the height variance, are appropriately before the Board. The additional height sought through the instant application is not an appropriate matter for the PUD process, as the PUD process would only allow for a height of 94.5 feet, short of what is needed to make this project feasible. EastBanc would have to obtain a variance for the additional height or obtain a map change, which, as explained below, is not a viable choice since it would render the Exxon gas station a nonconforming use

The need for the additional height requested in this case arises from a confluence of factors, including the location of the existing Exxon station and the challenges and requirements associated with the inclusion of the Exxon station in the project; the small size, narrow width and odd shape of the property available for development; the requirement of either moving the existing sewer pipes or building around them so as to provide for the required parking; and the necessary remediation of the property. These confluence of factors give rise to practical difficulties requiring resort to relief from the strict application of the zoning regulations. As is clear from the exhibits included with this statement, if the gas station did not exist, EastBanc would be able to develop the site with an economically competitive residential condominium, including 10-foot high ceilings on each floor, without the need for any density or height variances because it would be able to spread the development over a larger site. That is not possible given existing constraints and the combination of the gas station, the other site constraints detailed below and the need to provide nine (9) floors of residential uses utilizing 6.0 FAR for a merely feasible project requires the height variance sought in

BZA
Case No. 17014
Exhibit No. 36

Board of Zoning Adjustment
District of Columbia
CASE NO. 17014
EXHIBIT NO. 36

this application. Otherwise, the residential project is not economically feasible.

A. The PUD Process is Not Appropriate for the Requested Relief Because There Would Still Be A Need For A Height Variance.

Whatever merits the PUD process may have for any development, it is not one which will resolve the issues which provide the basis for the request for a height variance in this matter. As the Board knows, the purpose of the PUD process is to encourage "high quality developments that provide *public benefits*." 11 D.C.M.R. § 2400.1 (emphasis added). While the PUD process allows for increased building density and height, such increases are granted in consideration for the project offering "a *commendable number or quality of public benefits*, and that the [project] protects and advances the public health, safety, welfare and convenience." 11 D.C.M.R. § 2400.2 (emphasis added).

The history of PUDs in the District of Columbia is instructive. As the Court has recognized,

> The PUD scheme is to be used as a tool of land use development which supports the objectives of the community by permitting the development of large areas as a unit. This package approach to land use is an antidote to the ill effects of traditional Euclidean zoning where limitation on location, lot size, use, square footage, and building height may frustrate the type of growth intended by the community.

Dupont Circle Citizens Association v. Zoning Commission, 426 A.2d 327, 332 (D.C. 1981) (citation omitted). In exchange for the flexibility permitted under a PUD, the developer "must provide a synchronized amalgam of living, institutional, and commercial facilities with diversity in buildings and structures." *Id.* Thus, most PUD's , traditionally in residential communities, provide a mix of uses so as to facilitate the type of growth that is an objective of zoning regulations or to facilitate growth on difficult sites. *See* Rathkopf, 5 *The Law of Zoning & Planning*, § 63.01 (1986); Patrick J. Rohan, 6 *Home Owner Associations and Planned Unit Developments Law and Practice*, '3.01 at 3-3 to 3-8 (1993); Colleen Grogan Moore, *PUDs in Practice*, at pp. 10-11, 36 (Urban Land Institute, 1985). Even in the District of Columbia where the use of PUDs as a tool of development has been far different than other jurisdictions, PUDs were typically characterized by a variety of building types and uses. *See* Mark Andrich, *Planned Unit Development in the District of Columbia, 1958-1990: A Mechanizm for Enlightening Flexibility, Or a Zoning Loophole for Overdevelopment?*, at pp. 104-108 (Masters Thesis, George Washington University, 1991).

In approving PUDs, height and density incentives are permitted as an exception to the zoning that will remain in effect in the area of the PUD after it is completed where applicants demonstrate and justify the public benefit of such incentives. The public benefits and the contours of a PUD generally

> requires a compromise of interests among developers, business, citizens and municipality. The rigidity of zoning regulations bespeaks one result of this compromise on a city-wide basis. On the other hand, the provisions for a PUD contained in the regulations bespeak the willingness of the community to negotiate anew on an *ad hoc* basis to create a greater good for a smaller sacrifice of desires. It is a powerful tool which provides a forum for various interests which might be competing in order to provide controlled development where none might otherwise take place.

Dupont Circle Citizens Association v. Zoning Commission, supra, 426 A.2d at 336.

In the late 1980's community organizations started to challenge the manner in which the Zoning Commission was utilizing PUDs because it seemed that a significant departure had been taken from the purpose of the PUD process and that the PUD process had become simply a means for obtaining more dense development.[1] The Court of Appeals reviewed that practice in *Blagden Alley Association v. Zoning Commission*, 590 A.2d 139 (D.C. 1991) (involving the PUD approved for 1212 Massachusetts Avenue, N.W.), and, in response to the proliferation of PUDs in this area, the Zoning Commission, in 1992, adopted the Dupont Circle Overlay (11 D.C.M.R. §§ 1501-1505) which placed severe restrictions on the use of PUDs in the immediately adjacent area and Squares. *See 11 D.C.M.R. §1501.3.*

As stated by the applicant at the hearing in this case, the proposed project does not lend itself to the purposes for which the PUD process was adopted and intended to be utilized in the District of Columbia. In any event and more importantly, while this particular application and development project does not fit within the historical understanding of the purpose for PUDs, even if this application was pursued as a PUD, it would not accomplish the result sought because of the limitations of the PUD regulations. In that regard, the applicant would still need a variance for the height sought in this case. Under § 2405.1 of the zoning regulations the maximum permitted height

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[1] One of the original intentions of the District of Columbia PUD Ordinance, long known as Article 75 of the Zoning Code, was to encourage the construction of low- and moderate-income housing and to respond to the dimensional controls of Euclidean zoning. *See* Andrich, *Planned Unit Development, supra* at pp. 6 & 11.

for a PUD in a C-2-C district is 90 feet. In the absence of a rezoning of the site, in the context of an application for approval of a PUD, the Zoning Commission may authorize an increase of the height of a project by five percent (5%). 11 D.C.M.R. § 2405.3. In the instant matter, such increase would result in a height of 94.5 feet, falling short of the requested height of 110 feet. Consequently, EastBanc would be compelled to seek an area variance for the additional height needed for this project.

In the alternative, in addition to filing for a PUD, EastBanc would have to apply to rezone the property.[2] However, a rezoning to a C-R zone, the same designation as that of the Ritz Carlton on the lot to the west of the site, would face difficulties since it would engender significant opposition from Exxon since it would transform the gas station use into a nonconforming use. In addition to opposition from Exxon, the creation of a nonconforming use would necessitate the need to apply to the Board for a use variance, as opposed to an area variance.

In short the only way this project, which is unanimously supported by the community, can be constructed is by seeking a height variance. The need for the variance cannot be eliminated in any other fashion.

It is precisely because of the types of difficulties arising from the location of the existing gas station that warrants the modest area variance relief sought in this case and which has garnered unanimous support from the community, Advisory Neighborhood Commission 2A and the Office of Planning, as well as support from The Downtown Cluster of Congregations (Exhibit 9) and Jack Evans, Councilmember, Ward 2 (Exhibit 10). In light of the fact that the benefits of the additional height adhere to the building, rather than to the public, and the additional variance relief that would be needed with the PUD process, the PUD process is not appropriate for this project.

B. Similarities with the Incinerator Project and Consideration of Economic Factors in Both Projects.

At the hearing before the Board, members of the Board recognized that EastBanc had to increase the height of the second floor of its building to accommodate the location of the Exxon station and the required canopy above that station. However, the Board asked EastBanc to elaborate on the need to then build a residential structure in excess of the height limit with 9 floors at 110 feet and a 6.0 FAR, instead of a project that is only 7 floors at 90 feet and utilizing significantly less FAR than permitted as a matter of right or, instead of having 10-foot ceiling heights, reduce the ceiling

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[2] For instance, the Ritz project at 2200 M Street, N.W., required rezoning the property to C-R to allow for additional height. The rezoning, in that case, did not cause any existing uses in the Square to become nonconforming uses.

heights to 8-feet. As explained below, a 90-foot residential project is simply not feasible, whether with 8 or 10-foot ceiling heights, on the narrow lot remaining for construction, whether the ceiling heights are reduced or floors are simply eliminated.

The additional height is needed for two interrelated reasons. Briefly, EastBanc seeks to develop a competitive residential condominium. Such a project has been demanded by the community and is responsive to the additional costs of development that arise from the need to remediate the site and either move or construct around a sewer line on a narrow and oddly configured site. If EastBanc did not have to start the project at approximately 20 feet higher than otherwise, given the gas station and the canopy, and was able to use the Exxon site for development, then a feasible project could be built without the need for variances and the need to sacrifice two floors of units.[3]

As with the developments in other comparable zoning matters (*see e.g.* the Georgetown Incinerator Project – BZA Application No. 16702; and 2200 M Street, N.W. – Z.C. Case No. 01-33TA), EastBanc is providing for ten foot (10') ceiling heights. This ceiling height allows for greater light, openness and airiness to the units, as well as the provision of recessed lighting, amenities demanded from purchasers of high-end units. Providing high-end units is necessary in order to make the project financially (*i.e.,* economically) feasible. That is, the higher sales price for the types of units EastBanc is providing is required to make this project possible to respond to the added costs and perceived limitations arising from the existence of the gas station. At the hearing on it's application, EastBanc noted that area variance relief had been utilized in the past to obtain variances from height restrictions in similar cases and referenced the approval, in 2001, of the height variance for the mixed-use project at the Incinerator site in Georgetown. *BZA Application No. 16702.*

As indicated at the outset, without the requested relief, the entire project is not feasible due to the confluence of factors present in the Property. As described below, this project is similar to the Georgetown Incinerator project approved by the Board in BZA Application 16702. Both projects present a confluence of factors giving rise to practical difficulties. The challenge in both projects is overcoming the obstacles inherent in the property, as well as the economic impediments, to provide residential condominiums which compete with the market in the suburbs and respond to added costs of development from existing conditions on the site.

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[3] The narrow site results in a building that is comparable to an un-expanded accordion. The FAR is compressed into a narrow building that must start at a height taller than would otherwise be required and push up to a height in excess of the applicable height limit to accommodate the additional site cost constraints.

1. As in the Incinerator Project, Due to Site Constraints and Economic Considerations, Feasibility of the Proposed Project is Dependent on the Approval of the Requested Variances.

Economic considerations contributed to the need for variance relief in the Georgetown Incinerator case, which pushed the total height need for the entire project over the applicable height requirement, just as they do in the instant matter. With regard to the Incinerator matter, the applicant initially proposed a matter-of-right project that included the elements required by the Department of Housing and Community Development ("DHCD") in selling the property to the applicant. However, after construction was underway, the collapse of the cinema industry required the applicant to come up with a way to subsidize the required theater use. The confluence of factors in that case made it impossible to relocate any of the proposed uses within the project. The only viable solution was to insert an additional floor plate in the residential component, resulting in the provision of eight (8) additional residential units. Again, because of the confluence of factors (in this instance, namely the location of the Whitehurst Freeway and the need to setback and above the Freeway), the applicant could not provide for this additional area within the height limitations of the zoning regulations. The Board agreed that the applicant met the standard for the requested area variances, including a variance from the height restrictions.

Likewise, the confluence of factors in the instant case, as well as economic considerations, result in practical difficulties in complying with the zoning regulations. As set forth in EastBanc's prehearing statement, economic considerations can be factored in when assessing practical difficulties.

As testified, the proposed project will be a high-end condominium project. By agreement with the ANC, it will be required that eighty percent (80%) of the residential portion of the project be "owner occupied". The costs associated with the stepping-back from the Exxon gas station, the remediation of the site and the need to relocate or build around the sewer line require that EastBanc utilize the full FAR available on the site for development. The only way in which the full FAR can be utilized and the units remain marketable, under these conditions, is to construct residential units that have higher ceilings. The necessity of higher ceilings (*i.e.*, ceiling heights of ten feet) for marketability of units was relied upon by the applicant in *BZA Application No. 16809 of AvalonBay Communities, Inc.* Similarly, both the 2200 M Street and Incinerator projects, also high-end condominiums, provide ceiling heights of ten feet (10').

In the Georgetown Incinerator project, the need for the additional height and FAR arose from the applicant's need to subsidize the required move theater in the project and overcome unexpected difficulties encountered during construction. The additional height and FAR allowed for an

additional eight (8) high-end residential units. In the instant matter, development of the site faces similar economic challenges imposed by the need to drastically move (or build around) the sewer tunnel and the cost of remediation (which is estimated at in excess of $1.3 million). Reducing the ceiling heights to eight feet (8') will reduce the quality of the residential units, which will no longer qualify as "high-end" residential units. The higher ceilings create greater light to the units, by way of larger windows, and greater feeling of airiness and spaciousness. As noted in the prehearing submissions, EastBanc is noted for its high-end mixed use developments and has great success in the District with such projects. While ceiling heights cannot be reduced without resulting in a loss of a feasible return on the units, even if they were reduced to eight feet (8'), a variance would still be required. Given the projects location near the Central Business District, it is projected that these condominiums will be attractive to business people seeking to live close to their work-place. Reducing the ceiling height will reduce the marketability of the units to this demographic and, because of the high costs of remediation and the costs related to the movement of, or construction around, the sewer line, preclude a project that would be economically feasible, without resolving the need for a variance.

As stated, reducing the ceiling heights of each floor is not a viable option since the height would still be in excess of the height limit, with the added consequence that the project would not be competitive. The only alternative is to reduce the total height of the building, thereby precluding EastBanc from utilizing the full FAR and resulting in a loss of twenty-eight (28) or more units or two floors. The loss of twenty-eight (28) or more units would have such a drastic affect on the income from the sale of the units so as to render the project economically infeasible (*i.e.*, development of the project would result in a loss to EastBanc).[4]

As set forth in the prehearing submissions of EastBanc, economic use of a property has been considered as a factor in deciding the question of what constitutes a practical difficulty. *See Gilmartin v. Board of Zoning Adjustment*, 579 A.2d 1164, 1171 (D.C. 1990). The court in *Gilmartin* noted that "at some point[,] economic harm becomes sufficient, at least when coupled with a significant limitation on the utility of the structure". This is precisely the situation presented to the Board in the instant matter. That is, in considering the economic impact on the practical difficulties of developing this project that, the Board must keep in mind that, if it weren't for the need to maintain the existing Exxon Station and/or the unique shape of the site, EastBanc could provide for the additional ceiling height without the need to resort to relief from the Board. Thus, it is not the economic considerations, alone, that give rise to practical difficulties; it is the confluence of factors contributing to the uniqueness of this site that give rise to the practical difficulties and make the project economically infeasible without the requested relief.

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[4] A reduction of one floor would still require an area variance.

Clearly, each variance case must be considered on its own facts. But, as recognized by the Board, there are striking similarities between the Georgetown Incinerator matter and the instant matter. These similarities include: (1) the need to setback (and up) the first floor of residential use for a negative impact on the residential use; (2) a confluence of factors contributing to the uniqueness of the properties; (3) practical difficulties, including the economic impacts of the development of marketable projects on these challenging sites; and (4) the provision of high-end residential condominium, requiring ceiling heights of ten feet (10'). Thus, the Board can find comfort in the granting of the variances in the instant matter, just as it did in granting the variances for the Georgetown Incinerator project.

2. Similarities Between the Georgetown Incinerator and the Proposed Project with Respect to Setbacks of the First Floor of Residential Use.

The Incinerator faced a similar challenge as the current project in the need to raise the first level of residential use. Exhibit 5. As was testified to in the instant matter and as illustrated by the attached documents, EastBanc must raise the first level of its residential floor a certain height above the Exxon Canopy, resulting in the need for a height variance to merely utilize the matter-of-right density permitted on the site. Exhibits 1, 2 and 4. Similarly, in the Incinerator project, for the residential units to be marketable from the standpoint of the proximity to the Whitehurst Freeway, the applicant needed to set back the residential floors ten feet (10') from the south property line and approximately seven feet (7') above the Whitehurst Freeway roadbed. Exhibit 5. As a result, a strip of the property adjacent to the highway was rendered unusable. *See* BZA Order No. 16702 Finding of Fact No. 43; *see also* Exhibit 5. Additionally, the first three (3) floors along K Street, N.W. were inappropriate for either residential or hotel use due to the traffic noise from the highway and the reduced natural light. *Id.*

As with the present application, the Board noted that a "confluence of factors unique to the property" gave rise to a practical difficulty if the zoning regulations are strictly applied. In the Incinerator matter, the confluence of factors included the presence of historic resources; topography; geology; development requirements for the project imposed by DHCD in the sale of the property to the applicant, including the inclusion of a movie theater; and the proximity of the Whitehurst freeway. *Id.* at 46. In the instant case, this confluence of factors includes:

(1) The location of the existing Exxon station on the Property (Exhibits 1-4).

(2) The requirement of building a canopy over the Exxon station,

which canopy must have a clearance of eighteen feet (18') and the concomitant restriction on the ability to construct any residential use above the gas station. Exhibits 1, 2 & 4.

(3) The need to setback the residential units from the gas station. This need is based on the application of the provisions of BOCA by the Code Official responsible for certifying the plans. In a matter of right building providing a set back of a minimum of fifteen to twenty feet (15'-20'), only a total of twenty-five percent (25%) of openings (*i.e.*, windows) would be allowed on the first and second floors facing the Exxon station. Exhibit 4. In contrast, the proposed building provides an improved distance of separation of twenty to twenty-five feet (20'-25'), which will allow for forty-five percent (45%) openings on the first and second floor. Exhibit 4. This increase of the ceiling of the first floor allows for an additional twenty percent (20%) of openings on the second floor. Moreover, this additional height allows a percentage of openings on the second floor that is consistent with the average residential building, which average is between forty and sixty percent (40 & 60%). Exhibit 4.

(4) The need to relocate sewer lines. Exhibit 3.

(5) The need to remediate environmental conditions on the site from a prior Exxon fire and leak. Exhibit 3.

(6) The narrowness and odd shape of the vacant land available for development. Exhibit 3.

The true effect of the Exxon station on the proposed development is clearly illustrated in Exhibits 1-4. As set forth in these exhibits, without the Exxon station, EastBanc would be able to create a matter of right building containing the same number of residential units and same amount of retail space. Similarly, the odd shape and size of the Property make inclusion of the Exxon station without resorting to relief of the zoning regulations impossible. In contrast, if this were a rectangular lot containing the same amount of square footage, EastBanc would be able to incorporate the Exxon station in a matter of right project.

C. The Proposed Relief is the Least Burdensome Option Available for the Development of the Subject Property.

Unlike use variances, an applicant for area variances need not show it would be deprived of all beneficial use of its property to prove its practical difficulties,[5] or that the property cannot be "put to any conforming use with a fair and reasonable return arising out of the ownership thereof." *Palmer v. Board of Zoning Adjustment*, 287 A.2d 535, 542 (D.C. 1972). Furthermore, this is not a case where EastBanc is seeking a greater return by use of the area variances. *Id.* Nor is this a case where the EastBanc is seeking to avoid added expense or inconvenience inherent in alternative methods of development. *Russell v. Board of Zoning Adjustment*, 402 A.2d 1231, (D.C. 1979). Simply put, the proposed project cannot be developed without resort to the requested relief.

Exhibits

Pursuant to the Board's request at the conclusion of the June 10, 2003 hearing, enclosed you will find the original and twenty (20) copies of the following:

Exhibit 1. Matter of Right Comparison plans prepared by Shalom Baranes Associates dated June 23, 2003. Plans compare a matter of right development without the Exxon Station as opposed to the proposed development. Both plans incorporate ten foot (10') ceiling heights.

Exhibit 2. Site "Shape" Comparison plans prepared by Shalom Baranes Associates dated June 23, 2003. Plans compare a matter of right development on a hypothetical rectangular site containing the same square footage of the subject property and improvements with a 6.0 FAR, 90 foot height and incorporation of the Exxon Station as opposed to the proposed development. Both plans incorporate ten foot (10') ceiling heights.

Exhibit 3. "Exceptional & Extraordinary" Existing Site Situation plans prepared by Shalom Baranes Associates dated June 23, 2003. Plans illustrate the area in need of remediation, location of the existing sewer tunnel, proposed location for sewer tunnel and location of Exxon Station.

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[5] See *Russell v. Board of Zoning Adjustment*, 402 A.2d 1231 (D.C. 1979) *citing Clerics of Saint Viator, Inc. v. Board of Zoning Adjustment*, 320 A.2d 291, 294 (D.C. 1974); *see cases collected in Monaco v. Board of Zoning Adjustment*, 407 A.2d 1091 (D.C. 1979).

Exhibit 4. Fire Separation Distance Diagram prepared by Shalom Baranes Associates dated June 23, 2003. Plans compare separation distance in a matter of right development, which results in a recommended maximum allowable openings of twenty-five percent (25%) on the first residential floor (2nd floor of the building), as opposed to an allowable forty-five percent (45%) openings with the additional height.

Exhibit 5. Plan showing additional height granted by BZA for the Georgetown Incinerator Project in BZA Application No. 16702.

Exhibit 6. Arial View of the Property and Surrounding Neighborhood.

Exhibit 7. Rendering of the Project.

Exhibit 8. Subdivision plat signed by Exxon and EastBanc and Assignment of Developments Rights by Exxon;

Exhibit 9. Letter of support submitted by The Downtown Cluster of Congregations dated June 9, 2003;

Exhibit 10. Letter of support submitted by Jack Evans, Councilmember, Ward 2; and

Exhibit 11. Proposed Findings of Fact and Conclusions of Law.

Conclusion

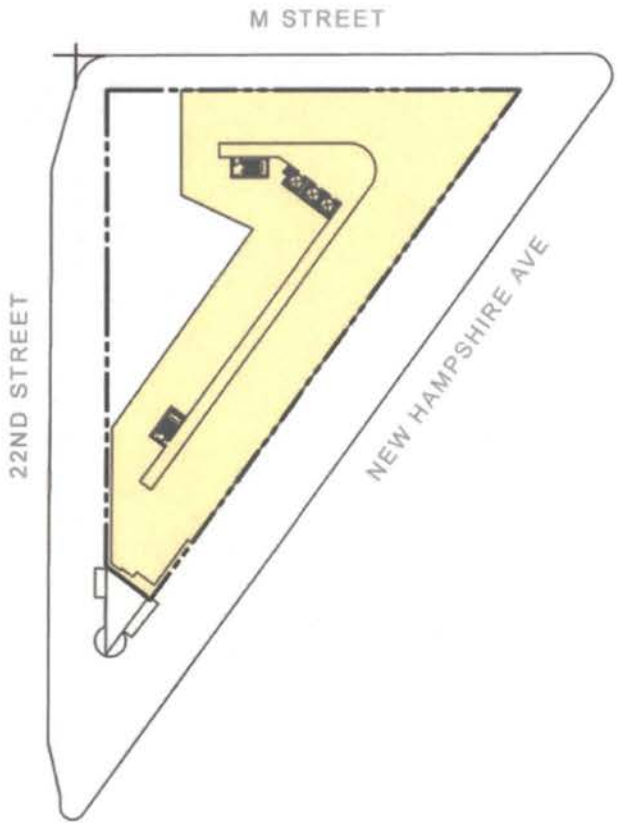
In light of the foregoing and the attached documentation, EastBanc, Inc. submits that this application is appropriately before the Board as an application for area variance relief as the only effective solution and that it has met its burden of proof with regard to the requirements for the requested area variances. Accordingly, EastBanc respectfully requests that the Board grant the area variances from the height, FAR and residential recreation space requirements of the zoning regulations at its July 1, 2003 public meeting.

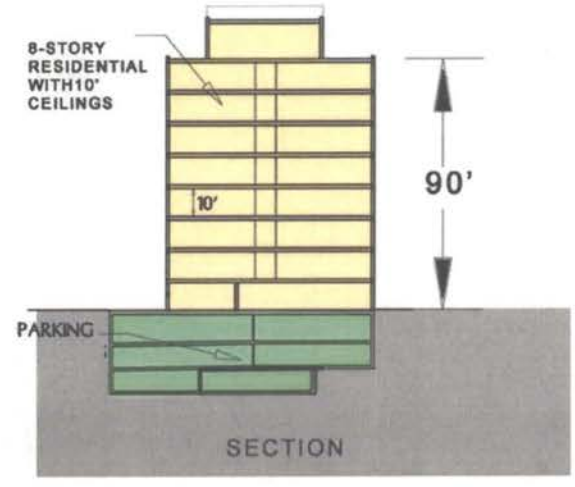
Sincerely,

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

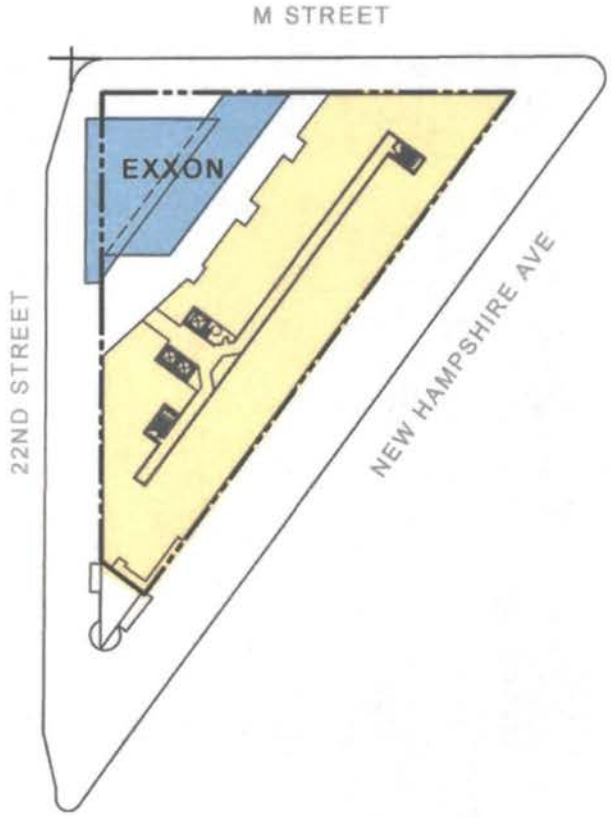
Richard B. Nettler
Jeannine Rustad Zigner

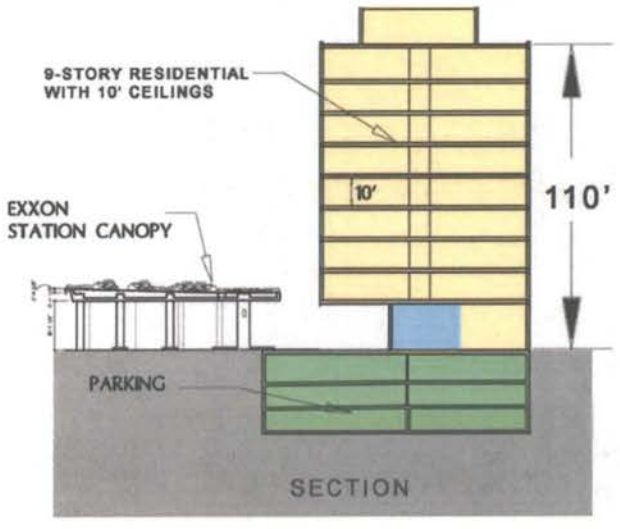
Enclosures (as stated)
cc: Mary Mottershead (by hand; w/encl.)
Arthur Jackson, Office of Planning (by hand; w/encl.)
ANC 2A (w/encl.)





- 8 STORIES AT 90'
- MATTER OF RIGHT BUILDING
- 6.0 FAR

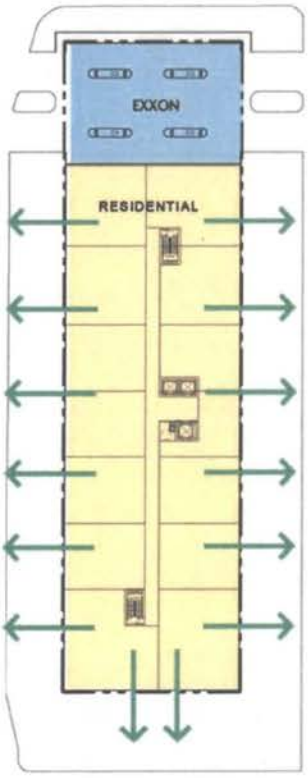




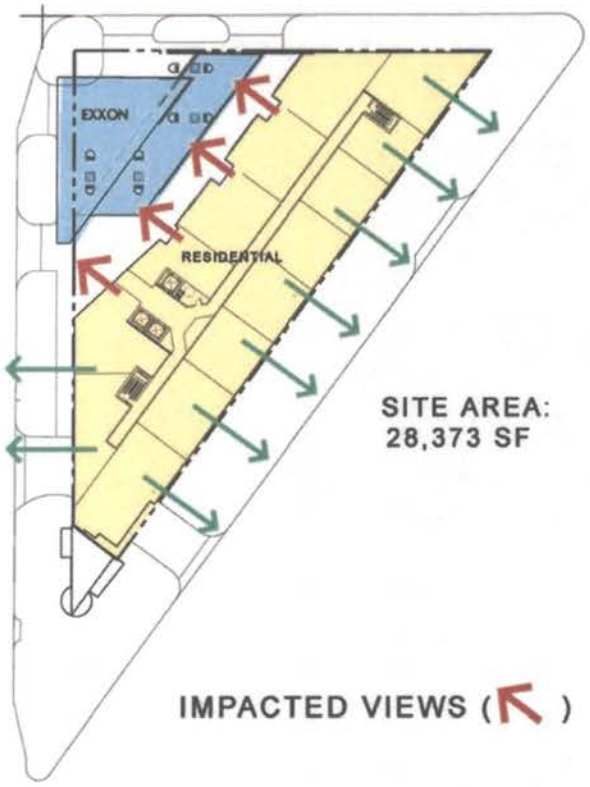
- 9 STORIES AT 110'
- BZA
- 6.0 FAR PLUS EXXON CANOPY (.26 FAR)

EXHIBIT 2 - SITE "SHAPE" COMPARISON

SHALOM BARANES ASSOCIATES

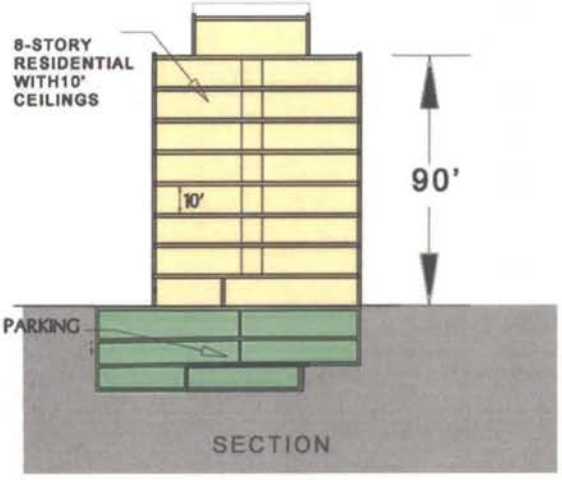


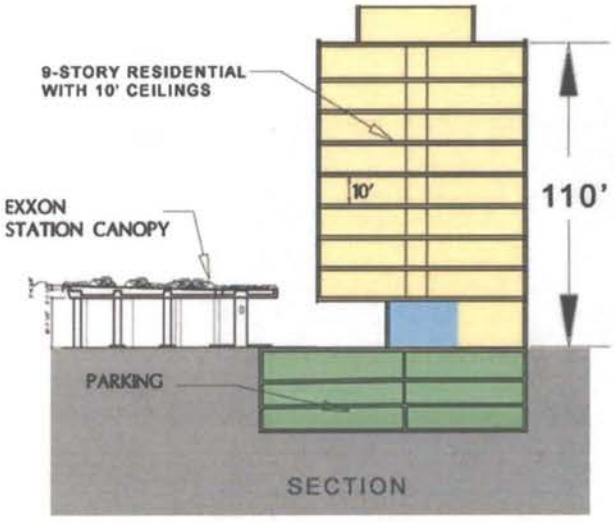
SITE AREA:
28,373 SF



SITE AREA:
28,373 SF

IMPACTED VIEWS ( )





- HYPOTHETICAL RECTANGULAR SITE
- 8 STORIES AT 90'
- MATTER OF RIGHT BUILDING
- 6.0 FAR

- EXISTING TRIANGULAR SITE
- 9 STORIES AT 110'
- BZA
- 6.0 FAR PLUS EXXON CANOPY (.26 FAR)

EXHIBIT 3 - "EXCEPTIONAL & EXTRAODINARY" SHALOM BARANES ASSOCIATES
EXISTING SITE SITUATION

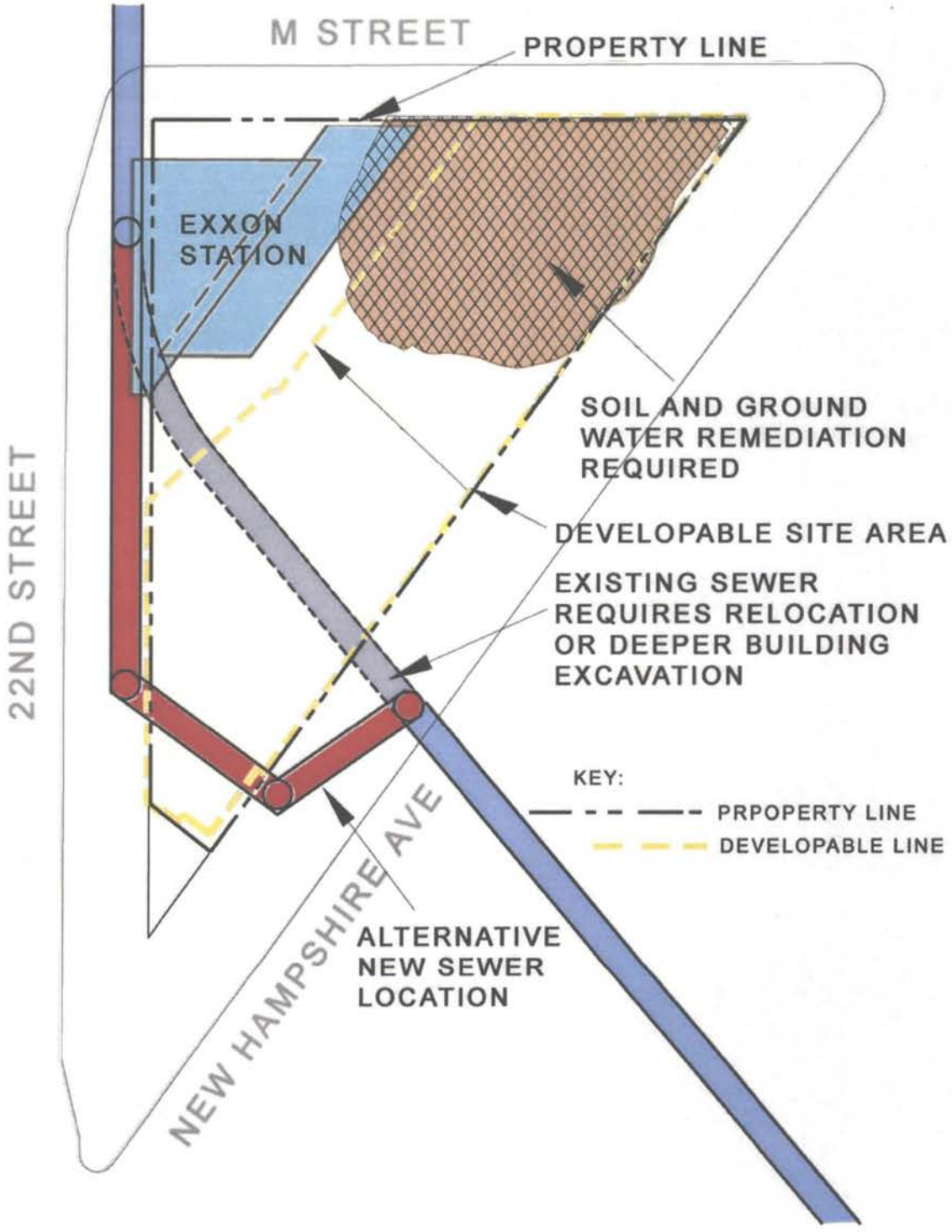


EXHIBIT 4 - FIRE SEPARATION DIAGRAM: RECOMMENDED ALLOWABLE PERCENTAGE OF OPENINGS IN ADJACENT EXTERIOR WALL CONSTRUCTION BASED ON SEPARATION DISTANCE

SHALOM BARANES ASSOCIATES

DISTANCE FROM THE WALL SECTION TO THE NEAREST FUEL DISPENSER (FT)	ALLOWABLE PERCENTAGE OF OPENINGS ON THE FIRST AND SECOND FLOOR (%)
0-13	0
13-15	15
15-20	25
20-25	45
25-30	75
ABOVE 30	100

NOTES:
THE ADDITIONAL SEPARATION DISTANCE ACHIEVED THROUGH ADDED HEIGHT ALLOWS GREATER AREA OF FENESTRATION FOR THE RESIDENTIAL UNITS. TYPICAL RESIDENTIAL BUILDING GLAZING VARIES BETWEEN 40~60% OF THE EXTERIOR WALL.

- SEPARATION DISTANCE WITHOUT ADDITIONAL HEIGHT.

- SEPARATION DISTANCE WITH ADDITIONAL HEIGHT.

SEPARATION DISTANCE
SECTION DIAGRAM AT CANOPY

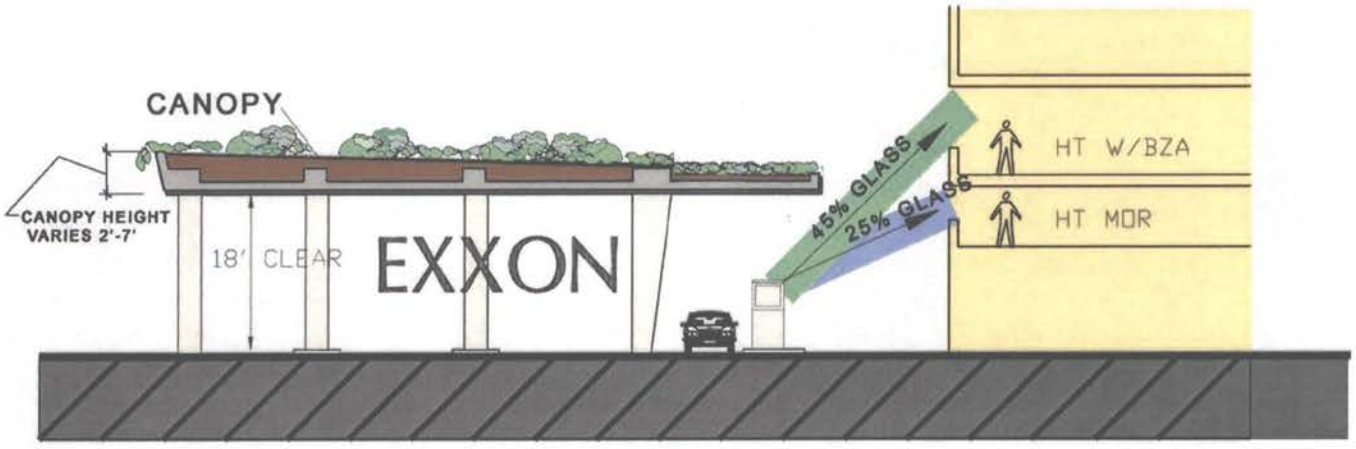
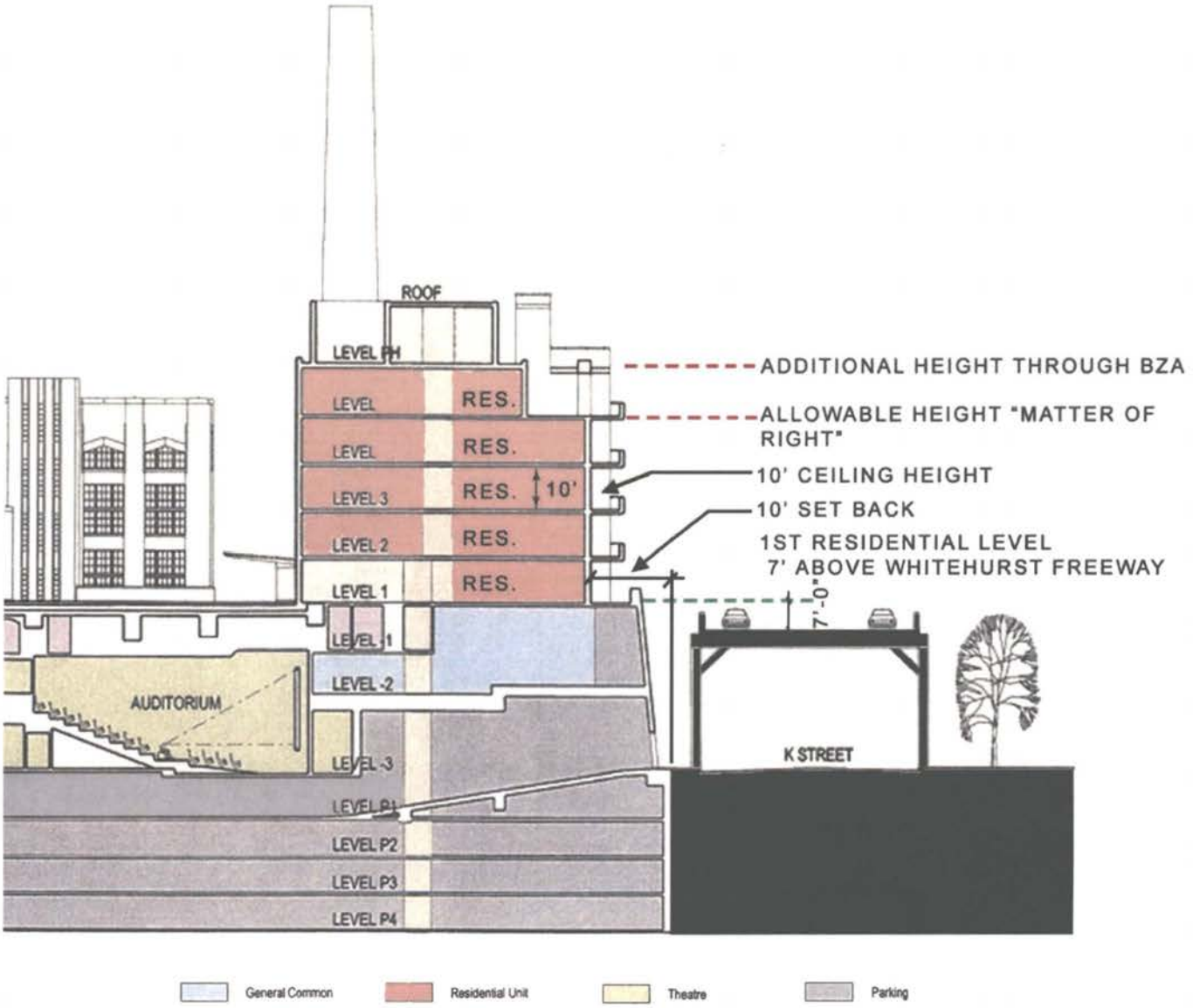


EXHIBIT 5 - BZA PRECEDENCE CASE: ADDITIONAL HEIGHT GRANTED BY BZA FOR GEORGETOWN INCINERATOR PROJECT (BZA CASE NO. 16702)

SHALOM BARANES ASSOCIATES




M St.
SITE
New Hampshire Ave.
Washington Circle

EXHIBIT 7 - RENDERING OF PROPOSED PROJECT AND BALCONY PLANTER DETAILS

SHALOM BARANES ASSOCIATES



RENDERING OF PROPOSED PROJECT



TYPICAL BALCONY PLAN



TYPICAL BALCONY ELEVATION

EXHIBIT 8

SUBDIVISION
SQUARE 71

The undersigned certify that they are owners in fee simple of the property to be subdivided and are in peaceful occupation thereof; that there are no pending suits or actions that affect title to the property; that parties to any deeds of trust have hereon indicated their assent; and that there are no lisbenents or claims affecting title to the property other than such deeds of trust. The undersigned hereby combine Lots 5 thru 8 (Book RLH Page 169 a & b), Lots 10 thru 12, 19 thru 23 (Book 13 Page 182), Lots 26, 27 and part of 25 (Book 14 Page 1), Lot 28 (Book 18 Page 108), Lot 34 and remainder of Lots 1, 4, 18, 31, 32 and 33 (Book 175 Page 118) all in Squares 71, into one Lot and request that this subdivision be recorded in the Office of the Surveyor of the District of Columbia.

WITNESSES

OWNERS

SQUARE 71 LLC
BY: EASTBANC, INC., MANAGER

ANTHONY M. LANIER, PRESIDENT

KENNETH K. SHIU, EXECUTIVE VICE PRESIDENT

EXXON MOBIL CORPORATION

HAROLD RICHARD CRAMER, VICE PRESIDENT

O. L. KOHLENBERGER, VICE PRESIDENT

Subscribed and sworn before me this 16th day of June 2003
Notary Public My Commission Expires 4-30-2007
as to H.R. Cramer V.P.

Subscribed and sworn before me this 16th day of June 2003
Notary Public My Commission Expires 4-30-2007
as to O. L. Kohlenberger, V.P.

Subscribed and sworn before me this 17th day of June 2003
Notary Public My Commission Expires 7/31/2007
as to Anthony Lanier and Kenneth Shiu

NUMBER OF TRUSTS: 1

ASSENT BY TRUSTEES:

Lisa Klein, Trustee for the benefit of 22nd + M Streets Associates LTD.

SURVEYOR'S OFFICE, D.C.

Made for: BF LOCRAFT
Drawn by: L.E.S. Checked by: ES
Record and computations by: F. SLEEM
Recorded at:
Recorded in Book ____ Page ____ B.O. 04294
Scale: 1 inch = 30 feet File No. 03-1834

OFFICE OF TAX AND REVENUE

_____, 2003

I certify that the following statements relating to this subdivision are correct.

1. Ownership agrees with our records: _____
2. Real estate taxes are paid to: _____
3. There are no unpaid assessments: _____

Chief Assessor, Assessment Division

I acknowledge for the owners that this is not a tax certificate as intended by D.C. Code Section 47-405.

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

_____, 2003

I certify that this subdivision complies with all applicable provisions of DCMR11, Zoning Regulation of the District of Columbia.

Zoning District: _____

Zoning Administrator

_____, 2003

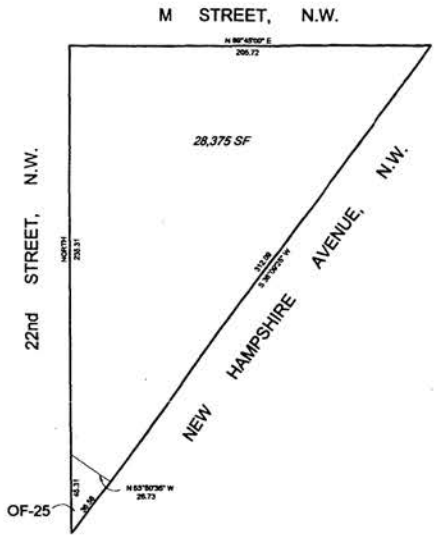
HISTORIC PRESERVATION

OFFICE OF THE SURVEYOR

_____, 2003

I certify that this plat is correct and is hereby recorded.

Surveyor, D.C.



2003/SUBS/SO-04294-SQ.71.DWG

This Deed, Dated this 1st day of October in the year one thousand nine hundred and eighty-four, by and between

EXXON CORPORATION, New Jersey Corporation, successor by various mergers to Standard Oil Company of New Jersey, a Delaware Corporation party of the first part, and

22nd and M Street Associates, a District of Columbia Limited Partnership party of the second part:

Witnesseth, That in consideration of "TEN" Dollars, the party of the first part doth hereby grant unto the party of the second part, in fee simple all that piece or parcel of land, together with the improvements, rights, privileges and appurtenances to the same belonging, situate in the described as follows, to wit:

SEE ATTACHED Exhibit A for Legal Description and Exhibit B for further Terms and Agreements

RECS AUG 25 [illegible]

34587

And, the said party of the first part covenant that they will warrant specially the property hereby conveyed; and that they will execute such further assurances of said land as may be requisite.

In Witness Whereof, the said Exxon Corporation has caused these presents to be signed with its corporate name by W. E. Gattis, its Agent and Attorney in fact, President, attested by J. J. Moore, its Assistant Secretary, and its corporate seal to be hereto attached, and does hereby appoint W. E. Gattis, its attorney in fact to acknowledge and deliver these presents as its act and deed.

Signed, sealed and delivered in presence of Rie Jackson

By W. E. Gattis
AGENT AND ATTORNEY IN FACT

Attest: J. J. Moore
ASSISTANT SECRETARY

#34587
8/25/86

13/0000054?

State of Texas
County of Harris } TO-WIT:

I, CYNTHIA M. BASS, a Notary Public in and for the said County, DO HEREBY CERTIFY that [illegible] L. Gattis, Agent and Attorney In Fact for Exxon Corporation, a corporation grantor in the aforegoing and annexed Deed bearing date on the 1st day of October, 1984, personally appeared before me in said county and by virtue of the authority thereby conferred upon [illegible] acknowledged the same to be the act and deed of the said

Given under my hand and seal this 1st day of October, A.D. 1984

Cynthia M. Bass
CYNTHIA M. BASS Notary Public, D. C.

Commission Expires on 12/22/87

Deed

TO

Recorded for Record on the [illegible] day of [illegible], A. D. 19[illegible] at [illegible] o'clock M., and recorded in Liber No. [illegible] at Folio [illegible] one of the Land Records for [illegible] and examined by

Recorder.

After Recording Return to:
Lawyers Title Service Corp.
7501 Wisconsin Ave., #1200
Bethesda, MD 20814
Case No. [illegible]

After Recording
Mail to: [illegible]
Address [illegible]

CERTIFICATE

THIS IS TO CERTIFY that the foregoing and annexed Deed was duly executed and delivered pursuant to, and in strict conformity with, the provisions of a resolution of the Board of Directors and of the Stockholders of [illegible] passed at a regularly called meeting of said Board of Directors and of the Stockholders and at which a quorum was present at said meeting

Schedule "A"
Legal Description

Lot numbered Eight (8) in George W. Stickney, Trustee's subdivision of part of Lot numbered One (1) in Square numbered Seventy-one (71), as per plat recorded in Liber R.L.M. at folio 165 in the Surveyor's Office of the District of Columbia.

Part of original Lot One (1) in Square Seventy-one (71); also parts of Lots Four (4), Five (5) and Six (6) in Stickney, Trustee's subdivision of part of said Lot One (1), in Square Seventy-one (71), as per plat recorded in Liber R.D.M. folio 165 of the Records of the Office of the Surveyor of the District of Columbia; said parts of lots being together contained within the following metes and bounds, viz: Beginning on "M" Street Two and seventy-one hundredths (2.71) feet West of the Northeast corner of said Lot Four (4) and running thence South parallel with the East line of said Lot Four (4), Thirty-nine (39) feet, thence East Three and fifty-six hundredths (3.56) feet to intersect the Southerly line of said Lot Five (5), thence Southeasterly along the the Southerly line of said Lot Five (5), Ten and sixty-eight hundredths (10.68) feet, thence Northeasterly parallel with New Hampshire Avenue Fifteen and sixteen hundredths (15.16) feet, thence East parallel with "M" Street Eight and ninety-six hundredths (8.96) feet, thence North parallel with the East line of said Lot Five (5), Thirty-two and seventy one hundredths (32.71) feet to "M" Street, thence West Thirty and ten hundredths (30.10) feet to the place of beginning.

Part of Lots numbered Six (6), and Seven (7), in Stickney's subdivision of part of Lot numbered One (1), in Square numbered Seventy-one (71), as per plat recorded in Liber R.L.M. at folio 165 in the Surveyor's Office of the District of Columbia, described as follows: Beginning at the Northeast corner of said Lot 7, and running thence South along the East line of said lot 47.5 feet to the Southeast corner of said lot on New Hampshire Avenue, thence Northwesterly at right angles to said Avenue 25.69 feet; thence West parallel to M Street, 9.86 feet; thence North at right angles to M Street 32.71 feet; thence East along said Street, 30.61 feet to the beginning.

NOTE: All of above described land known for assessment and taxation purposes as Lot numbered 812 in Square numbered 71.

SEP 13 1984

71
41 8
812
N 14

Exhibit B 13 / 3 3 3 0 0 5 1 1

It is understood and agreed by the party of the second part and the party of the first part that the following terms, conditions, and provisions of the Agreement and Exchange dated November 1, 1982, by and between said parties shall survive the delivery of this Deed:

1. Upon request by party of the second part, party of the first part agrees to join and assist party of the second part in having lots 34 and 812 in square 71 in the District of Columbia platted into one legal lot of record provided that for purposes of assessment and taxation, lots 34 and 812 shall continue to be treated separately; and the buildings on each lot may be membered together and remain so membered together in the future. Party of the first part agrees to enter into, with the party of the second part, a multiple building covenant to be filed with the District of Columbia.

2. Party of the second part may require party of the first part to incorporate in its building plans such foundations as party of the second part may request on the property when party of the first part constructs it structures thereon. All additional costs for such work which are in excess of the costs for the standard foundation required by party of the first part shall be paid by party of the second part. Party of the second part may, at its option, sheet and shore party of the first part's structures or underpin such structures. Additionally, if construction on lot 812 or on other property within square 71 which is owned by party of the second part so requires, party of the second part may demolish such structures, provide temporary structrres, and thereafter rebuild such structures as soon as practically possible as long as party of the first part can continue to operate its business on lot 34 with no more than a 48 hour delay in operations. Party of the second part shall be allowed to use 'tiebacks' on lot 34 and to connect to water and sewer lines on lot 34.

3. Both parties will reasonably cooperate in other problems that may arise due to the related construction on the two properties.

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1956 AUG 25 PM 1:41

DECLARATION OF COVENANTS AND EASEMENTS

THIS DECLARATION made this 24th day of September 1985, by and between 22nd AND M STREETS ASSOCIATES, a limited partnership organized under the laws of the District of Columbia (hereinafter "Associates") and EXXON CORPORATION, a New Jersey corporation (hereinafter "Exxon").

RECITALS:

Recital 1. Associates is the owner in fee simple of a certain parcel of land located in Square 71 in the District of Columbia and more particularly described on Exhibit "A" attached hereto and made a part hereof (hereinafter "Associates' Property").

Recital 2. Exxon is the owner in fee simple of a certain parcel of land located in Square 71 in the District of Columbia and more particularly described in Exhibit "B" attached hereto and made a part hereof (hereinafter "Exxon Property").

Recital 3. Associates wishes to grant, and Exxon wishes to accept, a thirteen foot (13') wide perpetual, non-exclusive easement on, over, under, across and through that portion of Associates' Property marked "Exxon Access Easement" and more particularly described and shown on Exhibit "C" attached hereto and made a part hereof.

Recital 4. Exxon wishes to grant, and Associates wishes to accept, a perpetual and exclusive easement under that portion of Exxon Property marked "Subterranean Easement" and more particularly described and shown on Exhibit "D" attached hereto and made a part hereof.

Recital 5. Exxon wishes to grant, and Associates wishes to accept, a perpetual and non-exclusive easement on, across and through that portion of the Exxon Property marked "Loading Dock Easement" and more particularly described and shown on Exhibit "D" attached hereto and made a part hereof.

Recital 6: Exxon wishes to grant, and Associates wishes to accept, rights of first and second refusal for purchase of the Exxon Property should Exxon desire to sell the Exxon Property at any time in the future.

Recital 7: Exxon wishes to grant, and Associates wishes to accept, the transfer of all gross floor area rights allowable under District of Columbia laws and regulations with respect to the Exxon Property, except for five thousand (5,000) gross square feet, provided that Associates is allowed to and does in fact use said gross floor area rights on property other than the Exxon Property. Notwithstanding the foregoing, if the canopy on Exxon's proposed motor fuel store is not allowed to be used in the calculation of gross floor area, then Exxon will retain only four thousand (4,000) square feet of gross floor area.

Recital 8: In order to establish the said easements and to evidence certain other agreements between Associates and Exxon as contained herein, the parties hereto are executing this Declaration.

Recital 9: The covenants herein and this Declaration are intended to implement the Agreement of Exchange entered into by the parties hereto on November 1, 1982. These covenants are intended to run with the land for the duration of said covenants and shall be binding on the parties hereto, their respective successors, heirs and assigns.

Recital 10: Exxon intends to demolish the existing improvements on the Associates' Property upon either completion of the improvements to be built on Exxon's Property or upon Associates' request.

NOW, THEREFORE, in consideration of the foregoing Recitals, each of which is incorporated herein by reference, and for other good and valuable consideration, the mutual receipt and sufficiency of which is hereby acknowledged, the parties hereto do hereby covenant and agree as follows:

EXXON ACCESS EASEMENT

1. Associates hereby grants and conveys to Exxon, for the use and benefit of the Exxon Property, a perpetual, non-exclusive vehicular and pedestrian easement and right-of-use, free of charge, on, over, across and through that portion of Associates' Property marked "Exxon Access Easement" and described and shown on Exhibit "C" attached hereto and and made a part hereof from 22nd Street, N.W. to and from the loading dock situated on the rear of the Exxon Property.

(a) Associates reserves the right to make any use of the "Exxon Access Easement" that is not inconsistent with the rights granted Exxon in this Declaration;

provided, however, that Associates shall not erect or permit to be erected any building or structure on the "Exxon Access Easement" that materially interferes with Exxon's use and enjoyment of the "Exxon Access Easement"; provided further that Associates reserves the right to close off the Exxon Access Easement for a reasonable time period during any and all construction work that may occur on Associates' Property. Associates retain the right to construct improvements or otherwise alter the property beneath and above the Exxon Access Easement so long as such improvements or alterations do not impair Exxon's use of said Easement.

(b) Associates agrees to pay, or cause to be paid, all real estate taxes, charges, assessments and other impositions that may be imposed upon or levied against the Exxon Access Easement, and further agrees to deliver to Exxon, upon request, evidence of payment of all such charges.

(c) Associates agrees to pay, or cause to be paid, all maintenance and operating expenses as may be required in connection with the maintenance and repair of the Exxon Access Easement.

(d) Exxon shall hold Associates harmless from, and against, any and all claims by persons, or for damages to property, which may arise out of, or result from, the use of the Exxon Access Easement for the benefit of the Exxon Property and/or Exxon.

(e) If all or any portion of the Exxon Property or Associates' Property shall be taken pursuant to the power of eminient domain (which for the purposes hereof shall be deemed to include any sale to the holder of such power following a threatened taking), then the party whose property is so taken shall be entitled to the entire award for the value of the property so taken. The other party hereto shall not claim, or be entitled to, any portion of such award by virtue of any interest therein created by this Declaration. Notwithstanding the provisions of the foregoing sentence of this paragraph, the other party may file a collateral claim with the condemning authority (if permitted by law) for any amount over and above the value of the property being taken to compensate said other party for any damage suffered by such other party as a result of such taking, including, but not limited to, the value of any easement rights granted herein that have been taken.

(f) Exxon shall comply with reasonable security provisions if required by Associates so long as such provisions do not materially interfere with Exxon's use of the Exxon Access Easement as described herein.

(g) Associates reserves the right to relocate the Exxon Access Easement at its own expense and cost provided that it obtains written permission to do so from Exxon and subject to approval by Exxon of the plan for said relocation. This written permission shall not be unduly or unreasonably withheld by Exxon.

SUBTERRANEAN EASEMENT

2. Exxon hereby grants and conveys to Associates, for the use and benefit of Associates' Property, a perpetual and exclusive subterranean easement, free of charge, under that portion of the Exxon Property marked "Subterranean Easement" and described and shown on Exhibit "D" attached hereto and made a part hereof for purposes of providing Associates with access to the parking areas of Associates' Property and to provide to Associates additional parking area. Said Easement will not adversely effect the underground tanks and equipment, the building or the operation of the Exxon service station to be constructed on the Exxon Property.

(a) Exxon agrees to pay, or cause to be paid, all real estate taxes, charges, assessments and other impositions that may be imposed upon or levied against the Subterranean Easement, and further agrees to deliver to Associates, upon request, evidence of payment of all such charges.

(b) Exxon agrees to pay, or cause to be paid, all maintenance and operating expenses as may be required in connection with the maintenance and repair of the Subterranean Easement.

(c) Associates shall hold Exxon harmless from, and against, any and all claims by persons, or for damages to property, which may arise out of, or result from, the use, construction or maintenance of the Subterranean Easement for the benefit of the Associates' Property and/or Associates.

(d) If all or any portion of the Exxon Property or Associates' Property shall be taken pursuant to the power of eminient domain (which for the purposes hereof shall be deemed to include any sale to the holder of such power following a threatened taking), then the party whose property is so taken shall be entitled to the

entire award for the value of the property so taken. The other party hereto shall not claim, or be entitled to, any portion of such award by virtue of any interest therein created by this Declaration. Notwithstanding the provisions of the foregoing sentence of this paragraph, the other party may file a collateral claim with the condemning authority (if permitted by law) for any amount over and above the value of the property being taken to compensate said other party for any damage suffered by such other party as a result of such taking, including, but not limited to, the value of any easement rights granted herein that have been taken.

(e) Associates shall comply with reasonable security provisions if required by Exxon so long as such provisions do not materially interfere with Associates' use of the Subterranean Easement as described herein.

(f) Associates shall provide all necessary structural support including, but not limited to, all structural members, footings, foundations, walls and ceilings, necessary to maintain the physical integrity and the continuous, total, adequate and safe support of Exxon's property and improvements.

LOADING DOCK EASEMENT

3. Exxon hereby grants and conveys to Associates, for the use and benefit of Associates' Property, a perpetual and non-exclusive loading dock easement and right-of-use on, across and through that portion of the Exxon Property marked "Loading Dock Easement" and more particularly described and shown on Exhibit "D" attached hereto and made a part hereof.

(a) Exxon agrees to pay, or cause to be paid, all real estate taxes, charges, assessments and other impositions that may be imposed upon or levied against the Loading Dock Easement, and further agrees to deliver to Associates, upon request, evidence of payment of such charges.

(b) Exxon agrees to pay, or cause to be paid, all maintenance and operating expenses as may be required in connection with the maintenance and repair of the Loading Dock Easement.

(c) Associates shall hold Exxon harmless from, and against, any and all claims by persons, or to property, which may arise out of, or result from, the use of the Loading Dock Easement for the benefit of the Associates' Property and/or Associates.

(d) If all or any portion of the Exxon Property or Associates' Property shall be taken pursuant to the power of eminient domain (which for the purposes hereof shall be deemed to include any sale to the holder of such power following a threatened taking), then the party whose property is so taken shall be entitled to the entire award for the value of the property so taken. The other party hereto shall not claim, or be entitled to, any portion of such award by virtue of any interest therein created by this Declaration. Notwithstanding the provisions of the foregoing sentence of this paragraph, the other party may file a collateral claim with the condemning authority (if permitted by law) for any amount over and above the value of the property being taken to compensate said other party for any damage suffered by such other party as a result of such taking, including, but not limited to, the value of any easement rights granted herein that have been taken.

(e) Associates shall comply with reasonable security provisions if required by Exxon so long as such provisions do not materially interfere with Associates' use of the Loading Dock Easement as described herein.

RIGHT-OF-FIRST REFUSAL

4. To the extent permissible under state and federal laws, Exxon grants Associates rights of first and second refusal for the purchase of the Exxon Property should Exxon desire to sell the Exxon Property at any time in the future. This provision has no force and effect if said purchase is by and between a subsidiary or other entity wholly owned by Exxon.

GROSS FLOOR AREA TRANSFER

5. Exxon hereby grants and conveys to Associates the transfer of all gross floor area rights with respect to the Exxon Property , except five thousand (5,000) gross square feet, provided that Associates is allowed to and does in fact use said gross floor area rights on property other than the Exxon Property. Notwithstanding the foregoing, if the canopy on Exxon's proposed motor fuel store is not allowed to be used in the calculation of gross floor area, then Exxon will retain only four thousand (4,000) square feet of gross floor area. Exxon agrees to comply with any and all necessary governmental applications and approvals to allow said transfer including, but not limited to, subdivision, zoning and building permit approvals, provided that said applications or approvals do not affect Exxon's use of the Exxon property.

DEMOLITION OF IMPROVEMENTS

6. Exxon agrees to remove any oil, gas or other petroleum product underground storage tanks from Associates' Property. Exxon also agrees that upon removal of the tanks, and within a reasonable time of discovery, it will be responsible for and remedy any oil, gas or other petroleum product contamination of Associates' Property soil caused by discharge of such products up until and including the time during which the tanks are removed. Exxon shall have the right of investigation and inspection with respect to such contamination at all times up until and including the time during which the tanks are removed. Upon removal of the tanks, Exxon will conduct soils borings and tests on Associates' Property at locations mutually acceptable to Exxon and Associates to determine potential soil contamination. The actual number of soils borings to be performed cannot be determined at this time. The parties intend that sufficient borings be performed to ascertain the degree, if any, of contamination to Associates' Property. Associates agree to release Exxon from all other responsibilities and liabilities with regard to oil, gas or other petroleum product contamination which is not caused by Exxon.

OBLIGATIONS

7. The obligations of any party hereunder shall apply only with respect to the period during which such party is the owner of a fee simple interest in the parcel of land and improvements, namely, the Associates' Property and the Exxon Property, or as the case may be, with respect to which such obligations apply. When such party ceases to own a fee simple interest therein, the obligations thereafter accruing shall be the obligations of its successor-in-ownership and interst.

COVENANTS RUN WITH THE LAND

8. All of the grants, covenants, terms, provisions and conditions herein shall run with the land intended to be benefited thereby and, shall be binding upon, and inure to the benefit of, the parties, their respective heirs, legatees, devisees, administrators, executors, personal representatives, successors and assigns.

SEVERABILITY

9. Except as otherwise provided, if one or more clauses or terms of this Declaration or any covenant running with the land is not given effect by any court, the

other clauses or terms of this Declaration shall remain in effect and the enforceability of such clauses, terms or covenants shall not be affected.

NOTICE

10. All notices and other communications hereunder shall be in writing and be deemed duly given if personally delivered or mailed by certified mail, return receipt requested, postage prepaid to:

EXXON:	ASSOCIATES:
Exxon Corporation 16945 Northchase Boulevard Houston, Texas 77060 c/o Paul H. Finley, Real Estate Manager	22nd and M Streets Associates c/o Ronald J. Cohen 6500 Rock Spring Drive Suite 302 Rockville, Maryland 20817

IN WITNESS WHEREOF, the parties hereto have executed this Declaration, as of the 24th day of September, 1985.

WITNESS:

22ND AND M STREETS ASSOCIATES,
a District of Columbia limited partnership

Diane R. Kramer

By: _____
Authorized General Partner

State of Maryland
County of Prince George's
~~DISTRICT OF COLUMBIA~~ to wit:

I, Diane R. Kramer, a Notary Public in and for the ~~District of~~ Prince George's County, ~~Maryland~~, do hereby certify that Ronald J. Cohen, who is personally well known to me (or satisfactorily proven) to be the General Partner of 22nd and M Streets Associates, a District of Columbia limited limited partnership, party to the foregoing and annexed Declaration of Covenants and Easements, bearing date the ____ day of _____, 1985, personally appeared before me in said District, and as such General Partner(s) acknowledged the same to be the act and deed of the said general/limited partnership.

GIVEN UNDER MY HAND AND SEAL this 24th day of September, 1985.

Diane R. Kramer
Notary Public

My Commission Expires: July 1, 1986

[NOTARIAL SEAL]

ATTEST:

EXXON CORPORATION,
a New Jersey corporation

J. J. Moore, Assistant Secretary

By: W. E. Gattis
W. E. Gattis, Agent and
Attorney-in-Fact

LS

* * *

* to wit:

I, _____, a Notary Public in and for the _____ _____, do hereby certify that _____, who is named as attorney-in-fact for The Exxon Corporation, the corporate party to the foregoing and annexed Declaration of Covenants and Easements, bearing date the _____ day of _____, 1985, personally appeared before me in said _____ _____ the said _____, being personally well known to me (or satisfactorily proven) as the person named as attorney-in-fact in said instrument for the _____ and acknowledged said instrument to be the act and deed of the said corporation, and that he delivered the same as such.

GIVEN UNDER MY HAND AND SEAL this 4 day of September, 1985.

Notary Public

PAULA H. JACKSON
Notary Public, State of Texas
My Commission Expires: My Commission Expires Dec. 22, 1987

[NOTARIAL SEAL]

EXHIBIT
9

The Downtown Cluster of Congregations

1313 New York Avenue, N.W. ■ Washington, D.C. 20005 ■ (202) 347-7015 ■ Fax (202) 347- 4630

June 9, 2003

Chairman Geoffrey Griffis & Members
DC Board of Zoning Adjustment
441 4th Street, NW Rm. 210
Washington, DC 20001

Re: BZA Application # 17014 - 2110 M Street, NW **Via fax**

Dear Chairman Griffis and Members,

I wanted to write in support of this application for residential recreation space, FAR, and height variances for the re-development of this currently vacant lot.

First, I note that this application received unanimous ANC support. The reasons for that are clear. The project will deliver 114 new residential units to the Foggy Bottom area. This is to be applauded, and assists in the city's effort to attract 100,000 new residents. The FAR variance request is for construction of a canopy over the adjacent Exxon station. This will certainly be a most welcome amenity for all concerned

The height variance is owing to the site's configuration. The added height is consistent with New Hampshire Avenue which the south elevation will face. Without the variance some 28 residential units would be lost. Yet the height is equivalent with much of the surrounding area. The recreational space variance I believe is certainly acceptable given the balconies that will be provided, and the current type of urban living amenities residents expect. Providing about 5% of residential recreation space is in keeping with the Board's actions with several other new residential projects in downtown.

Clearly, the enhanced property tax revenues, new resident-generated income and sales taxes, the addition of some 6,000+ sq. feet of new retail in the project, as well as the civic contribution the new residents will offer are all to be welcomed, and more than justify the variances being requested. Certainly new jobs will also be created both during the construction and subsequent on-going operation. In short, I would urge your approval of the project.

Respectfully,

Terrance Lynch
Executive Director

FAX

From: Terry Lynch, Executive Director
Downtown Cluster of Congregations

To: Richard Nettler / Jeanne Reeles

# of Pages (Incl. Cover): 2

Remarks: Letter of Support —

For Questions, tel: (202) 347-7015
(fax): (202) 347-4630

EXHIBIT
10

COUNCIL OF THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20004

June 10, 2003

Mr. Geoffrey Griffis, Chair
Board of Zoning Adjustment
441 4th Street, NW, Room 210
Washington, DC 20001

Re: BZA Application No. 17014 of EastBanc, Inc.; 2110 M Street, N.W.
Square 71, Lots 11, 19, 21, 23, 26-28, 801-806, 812, 816 and 817 (the "Property")

Dear Mr. Griffis:

I am writing in support of the above-referenced application of EastBanc, Inc. for variances from the height, FAR and residential recreation space requirements of the Zoning Regulations.

As you may be aware, on June 11, 2003, the District is kicking off its campaign "City Living, DC Style" to attract 100,000 new residents. The Ward 2 element of the Comprehensive Plan is compatible with this goal by its objective of creating new residential neighborhoods in Ward 2. EastBanc's proposed development will create 114 new units, thus providing needed housing to attain the District's goal of attracting 100,000 new residents. Additionally, given the Property's proximity to the Central Business District, this new housing will be attractive to professionals who work in that area.

EastBanc proposes to construct a mixed-use development containing approximately 6,500 square feet of ground floor retail, 114 apartment units, and a below-grade parking facility containing 145 spaces at the Property. This project overcomes the challenges presented by the existing Exxon station adjacent to the vacant portion of the Property. Most notably is the necessary remediation at the Property, the necessity of building a canopy over the filling station, which canopy contributes to the additional FAR requested, and the small size and narrowness of the available vacant land for the proposed new building. EastBanc's proposal is a creative solution for the productive use of this unique, vacant property.

It is apparent from the documents submitted in support of the application that EastBanc has made extensive efforts to comply with the Zoning Regulations within the limitations presented by the uniqueness of the Property. Because of the existing Exxon station and the requirement of constructing a canopy over the filling station, a variance is required to allow the additional .26 FAR resulting from this canopy. Additionally, because of the location of the Exxon station, the amount of vacant land available for development is narrow and limited in size, resulting in the need for a height variance, as well as a variance from the residential recreation space requirements of the Zoning Regulations. These variances can be granted without

substantially impairing the intent and purpose of the zone plan. Similarly, the granting of the variances will not have an adverse impact on the surrounding neighborhood. In fact, the proposed project is consistent in height and density with the development in the surrounding neighborhood.

Given the significant benefit the proposed development will have on the furtherance of the goals of the Comprehensive and Zone Plans, as well as the goal of the District to attract new residents, I urge the Board to approve the required variances.

Thank you for the opportunity to comment on this application.

Sincerely,

Jack Evans

Jack Evans
Councilmember, Ward 2

JACK EVANS
COUNCILMEMBER, WARD 2

1350 Pennsylvania Avenue, NW, Suite 106
WASHINGTON, D.C. 20004
202-724-8058
Fax: 202-724-8023

FAX TRANSMISSION COVER SHEET

Date: *June 10, 2003*

To: *Jeannine Rustad Zigner, Robins, Kaplan, Miller & Ciresi L.L.P.*

Fax: *202-223-8604*

Re: *Support for BZA Application No. 17014 of EastBanc, Inc.; 2110 M Street, N.W.*

Sender: *Councilmember Jack Evans*

YOU SHOULD RECEIVE _3_ PAGE(S), INCLUDING THIS COVER SHEET. IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL 202-724-8058.

Exhibit 11

Government of the District of Columbia
Board of Zoning Adjustment

Application No. 17014 of EastBanc, Inc., pursuant to 11 D.C.M.R. 3103.2 for three area variances pursuant to Sections 7701.1, 771.2 and 773.3 of the Zoning Regulations, to allow the development of a mixed-use, residential/retail project at 2110 M Street, N.W. (Square 71, Lots 11, 19, 21, 23, 26-28, 801-806, 812, 816, 817 and 34).

HEARING DATE: June 10, 2003
DECISION DATE: July 1, 2003

DECISION AND ORDER

EastBanc, Inc. ("EastBanc") filed the instant application as contract purchaser and agent for the owner of Square 71, Lots 11, 19, 21, 23, 26-28, 801-806, 812, 816 and 817)(the "Property") and with authorization from ExxonMobile Corporation, as to Lot 34 (the "Exxon Site"), seeking area variances from the maximum height limitations, floor area ratio requirements and the residential recreation space requirements of Sections 770, 771 and 773 of the Zoning Regulations, respectively. The variances would allow EastBanc to develop the Property with a mixed-use residential/retail project. The application is self-certified. The Property that is subject to the application has a street address of 2110 M Street, N.W. The Exxon Site has a street address of 2150 M Street, N.W. EastBanc is represented in these proceedings by Robins, Kaplan, Miller & Ciresi LLP. After a public hearing, the Board granted the application.

PRELIMINARY AND PROCEDURAL MATTERS

Notice of Application and Notice of Hearing. By memoranda date June 3, 2003, the Office of Zoning advised the Zoning Administrator; D.C. Office of Planning; Department of Public Works; Advisory Neighborhood Commission (ANC) 2A, 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 June 10, 2003. Pursuant to 11 D.C.M.R. § 3133.13, on April 9, 2003, the Office of Zoning mailed the Applicant, the owners of all property within 200 feet of the subject property and ANC 2A notice of the hearing. Notice of hearing was also public shed in the *D.C. Register* on April __, 2003, at __ DCR ____. The applicant's affidavit of posting indicates that on May 23, 2003, 3 zoning posters were placed on the M Street, New Hampshire Avenue and 22nd Street frontages of the subject property, in plain view of the public.

Ownership of the Property. At the June 10, 2003 hearing, EastBanc reported that it had closed on its purchase of the Property and was now the owner of the Property. Additionally, EastBanc had filed a subdivision plat to subdivide the Property, as well as Lot 34, into a single lot of record.

FINDINGS OF FACT

The Subject Property and Surrounding Area.

1. The Property is located in Square 71. Square 71, which is triangular in shape, is bounded by New Hampshire Avenue, N.W. to the southeast, M Street, N.W. to the north and 22nd Street to the west. The northwest section of Square 71, the Exxon Site, is improved with an Exxon gas station. The Property, which is currently utilized as a surface parking lot, occupies all but the southern lot of the remainder of Square 71. See Exhibit B. The Property and the Exxon site, combined, contains 28,373 square feet of land. The subject property is located in the C-2-C zone district.

2. The C-2-C zone district is designed to serve commercial and residential functions and permits matter-of-right high density development, including office, retail, housing and mixed-uses. C-2-C districts are to be compact and located in or near the Central Employment Area. Buildings in the C-2-C zone district may be entirely residential or a mixture of commercial and residential uses. The Property is one of the few vacant properties remaining in the West End area of Ward 2.

3. The surrounding area is characterized by medium to high density mixed-use buildings, including several large-scale PUD developments. The northeast corner of 22nd and M Streets is improved with a nine-story Marriott hotel. Adjacent to the Marriott hotel to the east is a mixed-use retail and office nine-story building. Directly across 22nd Street at the southwest corner of 22nd and M Streets is the eleven-story Ritz Carlton PUD. Across New Hampshire Avenue at Square72, Lot 74, is the Sheraton City Centre Hotel, with a nine-story office building to its north and east. Also in Square 72, at the southwest corner of that square is the Savoy Apartments and at the southeast corner of Square 72 a nine-story office building.

4. The maximum height in the C-2-C is 90 feet. The maximum FAR in the C-2-C zone district is 6.0 for residential use, with a maximum of 2.0 FAR allowed for other permitted uses. Although the residential recreation space requirements have been reduced to reflect a realistic goal in the Downtown Development District, the current requirement for the C-2-C zone district is fifteen percent (15%) of the residential gross floor area, of which at least fifty percent (50%) must be located outdoors.

5. Under § 3100.1 of the Zoning Regulations (11 D.C.M.R.), the Board may approve an area variance, provided that the applicant meets the conditions specified in §3103.2 of chapter 31 of this title, including that: (1) the property is unique because of its size, shape or topography; (2) the owner would encounter practical difficulties if the Zoning Regulations were strictly applied; and (3) the variance will not cause substantial detriment to the public good and will not substantially impair the intent, purpose and integrity of the zoning plan.

The Proposed Project.

6. The proposed building will contain approximately 6,500 of retail space on the ground level; 114 residential units on levels 1-9, consisting of approximately forty percent (40%) 1-bedrooms and 1-bedroom dens, fifty percent (50%) 2-bedrooms and 2-bedroom dens,

and ten percent (10%) 3 bedrooms; and 145 parking spaces on levels B1-B3. The residential lobby will be located off of 22nd Street, N.W. with parking access off both 22nd Street N.W. and New Hampshire Avenue, N.W. Approximately ninety percent (90%) of the residential units will have private terraces and/or balconies. It is the intent of EastBanc to create a vertical garden through the use of planters along these terraces, which planters shall be maintained by the condominium association. The proposed project will include a replacement canopy to be constructed over the filling pumps at the Exxon Site.

7. The height of the proposed building is 110 feet and the total FAR 6.26, consisting of 5.68 FAR of residential use and .58 FAR of commercial use, including the .26 FAR attributed to the Exxon replacement canopy. The proposed project includes residential recreation space of between 7,020 and 7,800 square feet, for a total of four and one half to five percent (4.5 to 5.1%) of residential recreation space. Of this space, approximately seventy percent (70%) will be outdoors and thirty percent (30%) will be indoors. In addition to the residential recreation space provided, approximately ninety percent (90%) of the apartment units will contain private balconies.

The Requested Variances.

8. EastBanc is seeking an FAR variance .26 to allow for the additional FAR of the canopy over the Exxon station. Additionally, EastBanc is seeking variances from the height restrictions and residential recreation space requirements of the zoning regulations.

9. The height variance will allow the appropriate setback from the gas station, as recommended by the building code and resulting from the need to construct a canopy over the gas station. Additionally, the height and residential recreation space variance will allow the EastBanc to provide the maximum number of marketable residential units in the project. Compliance with the residential recreation space requirements of the zoning regulations would result in the loss of twenty-eight (28) residential units. Because of the existing Exxon station, the narrowness of the site and the need to comply with building code and zoning regulations pertaining to penthouses and setbacks, it is not possible to provide additional residential recreation space outdoors.

Extraordinary or Exceptional Conditions of the Property.

10. Square 71 has been improved with an Exxon gas station for many years. However, as testified by Anthony Lanier, President of EastBanc, the gas station was previously located on another portion of the site. Due to a fire on the site and the underground spillage of gasoline, Exxon and the prior owner of the Property agreed that the Exxon station would be move to its present site, Exxon would transfer its development rights to the adjacent sites, now owned by EastBanc, and that Exxon would indemnify the prior owner for losses related to the consequence of having to remediate the site. At present, the site still needs complete remediation. And, as a consequence of the transfer of development rights, this insured the inclusion of the Exxon site and structures in any adjacent development to take advantage of the matter of right floor area ratio since nothing can be built above the Exxon station.

11. Although the entire site subject to this application is 28,373, the Exxon station, which is to remain, occupies 8,468 square feet, or thirty percent (30%) of the site, leaving less than 20,000 square feet of land available for development by EastBanc. In addition to its relatively small size, it is oddly shaped and has a narrow width. As demonstrated in EastBanc's post-hearing submissions, but for the requirement of including the Exxon station in the proposed development, EastBanc would be able to develop the property as a matter-of-right.

12. The agreement with Exxon requires that EastBanc construct a canopy over the filling station. EastBanc proposes to landscape the rooftop of the canopy. The canopy must be at least sixteen feet (16') high to allow for trucks to access the gas station. It is not possible to build any residential units directly over the canopy, as Exxon will not consent to such development. As a result, the first floor (devoted to retail) has a floor plate with a height of twenty-two to twenty-three feet (22' to 23'), approximately ten feet (10') higher than the typical retail floor height.

13. EastBanc must relocate a sewer line which runs beneath the Property and remediate the site due to a leakage from the gas station.

Practical Difficulties.

14. The exceptional and unique condition presented by the size, shape and narrowness of the Property, as well as the need to incorporate the Exxon station in the development, has created practical difficulty in designing an efficient building that fully complies with the Zoning Regulations.

15. The existing Exxon station reduces the amount of land available for development by thirty percent (30%) and results in a compressed area for development, which, in addition to its small size, is oddly shaped and narrow. The requirement of building a canopy over the Exxon station, as well as building code requirements, further affect the size of the property available for development, as well as the height of the building. The requirement of relocating the sewer line presents further difficulties in developing the site. These conditions preclude EastBanc from developing the Property without resort to relief from the Zoning Regulations.

16. The Board finds that due to "a confluence of factors unique to the Property," including the existing Exxon station and the restrictions and requirements placed on development of the Property by Exxon; small size, narrowness and odd shape of the property available for development; existing sewer line; and the building code requirements in relation to the residential units adjoining the portion of the property occupied by the Exxon station, EastBanc 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 Purpose, Intent or Integrity of the Zone Plan.

17. The Property is located in West End section of Ward 2. This area has been targeted for the enhancement of the M Street corridor, thus providing for connection of Georgetown with the Connecticut Avenue area. See D.C.M.R. § 1359.2.

18. Objectives for residential land use in Ward 2 include the conservation and enhancement of existing residential neighborhoods and the creation of new residential neighborhoods. 10 D.C.M.R. § 1326.1(a)&(b). Objectives for housing in the Comprehensive Plan for Ward 2 include stimulating the production of new housing to meet all levels of need. 10 D.C.M.R. § 1304.1(a). It is recommended that the District encourage the private sector to provide new housing at locations consistent with District land-use policies and objectives. 10 D.C.M.R. § 1305.1(a). The Comprehensive Plan further provides for the encouragement of housing in appropriate locations in commercial areas. 10 D.C.M.R. § 1305.1(e)(1).

19. With regard to economic development, one of the objectives for Ward 2 is to "enhance the image of Ward 2 as a place to do business and to reside." 10 D.C.M.R. § 1301.1(a).

20. The proposed project contributes substantially to the objectives of the Comprehensive Plan. The project will enhance the M Street corridor between Georgetown and Connecticut Avenue, N.W. Given the Property's proximity to the Central Business District, the new housing provided will be attractive to professionals who work in that area.

21. The area variance of approximately four percent (4%) from the FAR provisions is *de minimus* and, as such, will not adversely affect the surrounding neighborhood. Furthermore, because the variance is slight, it will not impair the intent, purpose and integrity of the zoning plan.

22. The proposed height is compatible with the buildings in the immediate surrounding area, which range in height from 90 to 110 feet. Because southern elevation of the proposed new building faces New Hampshire Avenue, N.W., which has a width of 120 feet, the proposed height is consistent with and well within the limitations of the Act to Regulate the Height of Buildings of 1910 (D.C. Code § 6-601.05).

23. In addition to the private recreation space provided in the project, there is ample public recreation space in the surrounding neighborhood. Across 22nd Street, in the Ritz Carlton (Square 51) PUD, there is a 100,000 square foot Sports LA fitness club. Additionally, the Property is located less than two (2) blocks north of Washington Circle, approximately three (3) blocks south of Dupont Circle and three (3) blocks west of Rock Creek Park and two (2) blocks south of public tennis courts.

24. The Board credits the opinion testimony of Robert Sponsellor, EastBanc's architect who was accepted as an expert in architecture and zoning, that the proposed building meets the requirements of the test for area variances, including that the proposed project will not harm the intent, purpose or integrity of the Zone Plan and that the proposed project will enhance the surrounding neighborhood.

ANC and Office of Planning Reports.

25. In its report dated June 3, 2003, ANC 2A indicates that on May 21, 2003, at a regularly scheduled and duly-noticed meeting, with a quorum present, ANC 2A unanimously voted to adopted a resolution supporting the requested variances. The ANC noted that EastBanc

agreed to provide in the condominium bylaws that eighty percent (80%) of the residential units will be owner occupied.

26. By report dated June 3, 2003, the Office of Planning ("OP") recommended that the requested variances be granted. OP believes that EastBanc has met the tests for variance relief.

Support of the Application.

27. A letter of support for the application dated June 9, 2003, was submitted by The Downtown Cluster of Congregations.

28. By letter dated June 10, 2003, Jack Evans, Councilmember, Ward 2, indicated his support for the requested variances. Councilmember Evans noted that the residential units provided by the proposed project would further the District's campaign "City Living, DC Style" to attract 100,000 new residents to the District, which campaign was to be kicked off on June, 2003.

III. CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing findings of fact and evidence of record, the Board concludes that Millennium is seeking three area variances pursuant to Sections 700, 771 and 773 of the Zoning Regulations from the height, floor area ratio and residential recreation space requirements, respectively, so as to complete the construction of a mixed-use development consisting of residential condominium and retail uses at 2110 M Street, N.W. (Square 71, Lots11, 19, 21, 23, 26-28, 801-806, 812, 816, 817 and 34). Granting such variances requires a showing that the strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulty upon the owner arising out of some extraordinary or exceptional condition of the property, such as exceptional narrowness, shallowness, shape, or topographical conditions. D.C. Code § 5-424 (g)(3). Further, the Board must find that the application will not be of substantial detriment to the public good and will not substantially impair the intent, purpose, and integrity of the Zoning Regulations and Map.

The Board is thus 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 recently, 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).

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.").

EastBanc must demonstrate that compliance with the area restrictions is unduly burdensome and the practical difficulties are unique to the site. In finding an extraordinary or exceptional condition, the Board may rely upon a confluence of factors. Thus, a condition inherent in the structures built, rather than in the land itself, may also serve to satisfy an applicant's burden of demonstrating uniqueness. Here, the site is indeed unique, as that term has been applied for area variances, and a practical difficulty does result from the strict application of the Zoning Regulations.

The difficulty in complying with the Zoning Regulations are due to unique circumstances peculiar to the subject property. Extraordinary circumstances uniquely affecting the Property include:

(1) The location of the existing Exxon station on the Property.

(2) The requirement of building a canopy over the Exxon station, which canopy must have a clearance of eighteen feet (18') and the concomitant restriction on the ability to construct any residential use above the gas station.

(3) Building code recommendations and requirement of the code official that the residential units be setback from the gas station. In a matter of right building providing a set back of a minimum of fifteen to twenty feet (15'-20'), only a total of twenty-five percent (25%) of openings (*i.e.*, windows) would be allowed on the first and second floors facing the Exxon station. In contrast, the proposed building

provides an ideal distance of separation of twenty to twenty-five feet (20'-25'), which will allow for forty-five percent (45%) openings on the first and second floor. The typical residential building, provides an average percentage openings between forty and sixty percent (40 & 60%).

(4) The need to relocate sewer lines.

(5) The need to remediate environmental conditions on the site from a prior Exxon fire and leak.

(6) The narrowness and odd shape of the vacant land available for development.

Clearly, the development of the Property offered many challenges from the outset, both from the size, shape and narrowness of the Property, as well as the location of the existing Exxon station on the property and the requirements that (a) a new canopy be constructed over the filling station and (b) of the building code regarding residential setbacks from the filling pumps. As demonstrated by the applicant's post-hearing submissions, but for the inclusion of the Exxon station in the proposed development, EastBanc could develop the property as a matter-of-right. As a consequence, practical difficulties arise from the uniqueness of the Property.

Finally, the requested variances can be granted without substantial harm to the surrounding neighborhood and without substantially impairing the intent, purpose or integrity of the zoning regulations. The variance from the FAR requirements is *de minimus*. The proposed height of the building is consistent and in conformity with the height of surrounding buildings. The reduction in private recreation space is addressed by the many public recreation amenities in the surrounding community.

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 report, and for the reasons stated in this decision, agrees with OP's 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. The Board accepts the recommendation of ANC recommendation that the variances be approved.

The Board concludes that the applicant has met its burden. It is hereby **ORDERED** that the application be **GRANTED**.

VOTE:

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

FINAL DATE OF ORDER: