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November 19, 2004

VIA HAND DELIVERY

Board of Zoning Adjustment
for the District of Columbia
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

Re: BZA Case No. 17221 – Special Exception
Montrose LLC, 1819 Belmont Rd., N.W.

Dear Members of the Board:

On behalf of Montrose, LLC, Applicant in the above-referenced case, we are filing herewith an original plus twenty copies of its Memorandum of Points and Authorities on the Board's Authority to Hear Argument on the 1910 Height Act.

We look forward to the hearing in this matter scheduled for December 7, 2004.

Respectfully submitted,

Carolyn Brown

Mary Carolyn Brown

Enclosures

cc: Alan Roth, ANC 1C
Ann Hughes Hargrove, KCA
Travis Parker, Office of Planning

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BZA
Case No. 17221
Exhibit No. 39

Board of Zoning Adjustment
District of Columbia
CASE NO. 17221
EXHIBIT NO. 39A1

BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

APPLICATION OF MONTROSE, LLC	)	
PURSUANT TO 11 DCMR § 3104.1 FOR A SPECIAL	)	
EXCEPTION FROM THE ROOF STRUCTURE	)	**BZA CASE NO. 17221**
SET-BACK PROVISIONS UNDER §§ 411.11 AND	)	**ANC 1C**
400.7(b), FOR AN EXISTING FIVE-STORY	)	
RESIDENTIAL CONDOMINIUM IN THE R-5-D	)	**HEARING DATE (CON'T):**
DISTRICT AT 1819 BELMONT RD., NW	)	**DECEMBER 7, 2004**
(SQUARE 2551, LOT 45)	)	

APPLICANT'S MEMORANDUM OF POINTS AND AUTHORITIES ON BOARD'S AUTHORITY TO HEAR ARGUMENT ON THE 1910 HEIGHT ACT

I. INTRODUCTION

At its October 12, 2004, hearing on the above-referenced special exception case, the Board of Zoning Adjustment ("Board" or "BZA") requested the parties to brief the following issues:

(i) whether the Board has the authority to approve an application that is in conflict with the Height of Buildings Act of 1910 (the "1910 Height Act" or "Height Act"); and

(ii) whether the Applicant is barred under the doctrine of collateral estoppel from arguing that the special exception relief requested does not violate the Height Act in light of the Board's oral vote in BZA Appeal No. 17109.

II. SUMMARY

Pursuant to section 2510 of the Zoning Regulations, the Board of Zoning Adjustment should not take any action that is in conflict with the 1910 Height Act or its long-standing interpretation under the principle of *stare decisis*. Further, if the Board determines that long-

standing interpretation should be overturned, it should not take such action without direction from the Office of Attorney General, which is vested with exclusive enforcement authority over the provisions of the Height Act. Finally, the Applicant is not collaterally estopped from raising arguments made in BZA Appeal Case No. 17109 because no final decision has been issued in that case, and the time in which that decision could be reconsidered or appealed has not lapsed.

III.
DISCUSSION

A. Obligation of BZA to Comply with Provisions of 1910 Height Act

In ruling on special exception, variance and appeal cases, the Board of Zoning Adjustment is bound by the provisions of the 1910 Height Act, pursuant to section 2510 of the Zoning Regulations. That section provides that "[i]n addition to any controls established in this title, all buildings or other structures shall comply with the Act to Regulate the Height of Buildings in the District of Columbia, approved June 1, 1910." 11 DCMR § 2510.1 (2003) (*citations omitted*). Equally important, under the doctrine of *stare decisis*, the Board is also bound by the long-standing interpretations of the Height Act issued in previous decisions of the Board and the Zoning Commission.

Stare decisis is defined as "[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." *Black's Law Dictionary*, (8th ed. 2004). The D.C. Court of Appeals has held that this doctrine applies equally to administrative decisions of the BZA and the Zoning Commission. *See Smith v. District of Columbia Board of Zoning Adjustment,* 342 A.2d 356 (D.C. 1975). In *Smith*, the court ruled that the Zoning Administrator's approval of a deck given pursuant to a long-standing interpretation of the Zoning Regulations, and which had been approved in the past by the Board, has precedential effect under the principle of *stare decisis*

The 1910 Height Act roof structure setback issue being considered by the Board in this special exception has already been ruled on by the Zoning Commission and, under the principle of *stare decisis,* the Board is bound by that decision. In Zoning Commission Case No. 93-3C, the Commission found that the setback provisions of the 1910 Height Act only apply to exterior walls fronting on a street. Consequently, the Commission had the authority to grant relief from the setback provisions at perimeter walls where the penthouse exceeded the limits of the Height Act.

In that case, the Commission considered a planned unit development ("PUD") application filed by George Washington University to construct a new building that would include space for the television and radio stations, WETA ("WETA"). The proposed building included a penthouse that would be constructed to a height greater than that permitted under the 1910 Height Act, thus triggering the requirement that the penthouse be set back from all exterior walls a distance equal to its height. The setback requirements under sections 411 and 770 of the Zoning Regulations were also applicable to the proposed roof structure.

The applicant proposed a penthouse that would meet the setback requirements along the street frontage walls, but would not meet the setback requirements along the other walls of the building. Accordingly, the applicant requested relief from sections 411 and 770 of the Zoning Regulations.

The project faced considerable and formidable opposition from the community. Among their many complaints, the opponents argued that the penthouse violated the 1910 Height Act because it would not meet the 1:1 ratio setback requirements for all exterior walls. This contentious question consumed a major portion of the debate before the Zoning Commission and the National Capital Planning Commission, and generated intense scrutiny from the

neighborhood organizations, the development community, and the media. Ultimately, the Commission found that the proposed penthouse did not violate the 1910 Height Act. Instead, the Commission held that it had the authority to grant relief from the penthouse setback requirements for side walls of a building, even if the penthouse exceeded the maximum height permitted under the 1910 Height Act. In Finding of Fact No. 43, the Commission stated that it "concurs with the Zoning Administrator that the project, as modified, does not violate the Height of Buildings Act of 1910." A copy of Zoning Commission Order No. 749-A is attached as Exhibit A.

The Zoning Administrator submitted to the record a memorandum on the setback requirements under the Height Act, which stated that:

> [t]he setback requirements of a roof structure under provisions of the Act of 1910 have always been interpreted by the Zoning Division as being required to set back from the property line ***which adjoins a street***. The setback of a roof structure under the Zoning Regulations now requires roof structures to be set back from the exterior walls. Consequently, it is my opinion that the Zoning Commission, under a Planned Unit Review, does have authority to waive the setback of a roof structure from a property line which does not adjoin a street.

Memorandum to the Acting Director for the Office of Zoning from the Zoning Administrator, November 24, 1993, Zoning Commission Case No. 93-9C, Exhibit No. 90 (emphasis added). A copy of the Zoning Administrator memorandum, which was previously submitted to the Board, is attached hereto as Exhibit B for ease of reference. The Office of Attorney General also submitted a letter to the record endorsing the Zoning Administrator's interpretation. A copy of that letter is attached hereto as Exhibit C.

The Zoning Administrator based his decision on the long-standing interpretation that the term "exterior walls" in the Height Act had historically been interpreted to mean walls fronting on a street. Documents supporting the Zoning Administrator's position included a July 27, 1953, Opinion of the Office of Attorney General regarding penthouses above the height limits; a May

13, 1953 Memorandum from the D.C. Director of Inspections regarding housing for air conditioning equipment above the 130-foot level; a July 15, 1958 report of the Zoning Advisory Council on proposed amendments to the roof structure setback provisions of the Zoning Regulations; a July 22, 1958, Zoning Commission order substituting "lot lines" for "exterior walls" in the Zoning Regulations; and numerous BZA Orders approving relief from the penthouse setback provisions along interior lot lines where penthouses exceeded the maximum height under the 1910 Height Act. Copies of these documents have previously been submitted to the Board in this case. *See* Applicant's Prehaering Staetment in BZA Case No. 17221, September 28, 2004.

The National Capital Planning Commission ("NCPC") also endorsed the Zoning Administrator's interpretation of the setback provisions of the 1910 Height Act. Over objections raised by its staff in a report dated March 2, 1994, and based on advice of its counsel, NCPC found that the proposed WETA PUD "would not adversely affect the Federal Establishment or other Federal interests and would not be inconsistent with the Comprehensive Plan for the National Capital." *See* Report to the Zoning Commission of the District of Columbia, NCPC File No. ZC. 93-9C, March 3, 1994, and Draft NCPC Staff Report, attached as Exhibit D. In analyzing the objections raised by the ANC on the setback provisions of the 1910 Height Act, NCPC counsel advised that:

> In their pleadings, ANC 2A presents no other argument for the all around setback requirement other than the plain words of the Act itself.
>
> Based on the above [Report of the Advisory Council on Proposed Amendments to the Zoning Regulations dated July 16, 1958], it appears that, for at least forty years, and probably longer, those local entities with authority to administer zoning provisions in the District of Columbia have interpreted the Height Act setback provisions to apply only to exterior walls facing the street. *A court of law, in interpreting a statute, will give great deference to long standing administrative*

interpretations of that law by the body which has responsibility for administering that law.

Note from Sandra Shapiro, NCPC Counsel, to George Oberlander, NCPC staff, Re: George Washington University/WETA Zoning Commission Case No. 93-9C, February 17, 1994 (emphasis added), a copy of which is attached as part of Exhibit D.

Based in part on this advice, NCPC found that the federal interests of the 1910 Height Act were not adversely affected by the long-standing interpretation that "exterior walls" means only those walls fronting on a street.

The decisions reached by the Zoning Commission and NCPC are the only rational conclusion based on the consistent interpretation of the Height Act since 1910. Exterior walls are not defined in the Height Act and have no clear meaning from the context of the language of the Height Act. Likewise, the legislative history of the act lends no assistance in defining the term. However, the legislative history makes clear that the primary purpose of the Act dealt with fire safety with a reference to light and ventilation. *See* Opinion of the Office of Corporation Counsel, re Penthouses Constructed Above the 1910 Height Act Limits, July 27, 1953, a copy of which was previously submitted to the record. Because neither the language nor the legislative history of the Height Act is clear as to what "exterior walls" are, one must look to contemporaneous and continuous construction by the officials and agencies vested with the responsibility for the administration of the 1910 Height Act.

For the past 94 years, exterior walls have always been deemed to be walls that face on a street. First, the entire Height Act is based upon a relationship to public streets and not to any other building line or property line. Assuming that the evolving purpose of the Act is one of aesthetics relating to the Washington skyline, the essential public view is from public space, not from the interior of a square. Administratively, the only exterior wall for purpose of

measurement, which has permanence over a period of time when construction can occur in adjoining properties, is the wall that abuts a public street. Since the L'Enfant plan, public streets in the City of Washington were titled in the United States while the interior of the squares are in the control of the owners of the property within the square. *See C&P Telephone Company v. District of Columbia*, 106 W.L.R. No. 114 at 1065 (D.C. Super. Ct., Mar 27, 1978), *affd. Sub. No. U.S. v. C&P Telephone Company*, 418 A.2d 114 (D.C. 1980). Many buildings in the District of Columbia are constructed with party walls. By definition, a party wall can never be an exterior wall since 50 percent of the wall is owned by the abutting property owner. The coverage of on-line building walls can be changed by resubdivision and new construction. Adjacent buildings either to the rear or the side could cover all or a portion of the wall, either horizontally or vertically. No consistency could occur in the changing urban scene, unless exterior wall means street walls. Under the Building Code, no widows for light or ventilation may be placed on a side wall. Light and ventilation is required to be taken from one's own property.

Thus, based on the decision of the Zoning Commission in the WETA case, and the historical interpretation of the 1910 Height Act, the Board in the instant special exception case is bound by these previous decisions under the doctrine of *stare decisis* and is not permitted to make a decision that is in conflict with this long-standing interpretation. Even if the Board determined that these consistent interpretations of the setback provisions of the 1910 Height Act were in error and thus should be overturned, the Board would be constrained to follow the interpretation issued by the Zoning Commission, which has jurisdiction over the BZA. Further, even assuming the Board had the authority to overturn decisions of the Zoning Commission, it could only apply its new interpretation prospectively and not to any project for which a building permit had already been issued, as in the instant case. *Smith,* 342 A.2d 356, 359 (D.C. 1975)

(established principles of *stare decisis* require that any change in long-standing interpretation of Zoning Regulations to be made prospective only). To decide otherwise would render dozens, if not hundreds, of building non-conforming throughout the city.[1]

Further, because the 1910 Height Act vests the Office of Attorney General with sole enforcement authority over violations of its provisions, the Board should not make any new interpretations until it consults with the Office of Attorney General regarding what constitutes a violation of the setback provisions under the Height Act.

B. Collateral Estoppel Argument Raised by Opponents Not Ripe

At the October 12, 2004, hearing in this matter, the parties in opposition argued that the Applicant is barred under the doctrine of collateral estoppel from asserting that the special exception relief requested does not violate the Height Act in light of the Board's oral vote in BZA Appeal No. 17109. According to the opponents, the Board found in that appeal case that the penthouse as constructed at 1819 Belmont Road, N.W., exceeded the permitted height limits under the Height Act and the Board was without jurisdiction to grant relief from the setback requirements.

The opponents misunderstand the doctrine of collateral estoppel. In order for the doctrine to have effect, there first must be a final, unappealable order. Black's Law Dictionary defines collateral estoppel as a "doctrine barring a party from relitigating an issue determined against that party in an earlier action, even if the second action differs significant from the first one." To determine whether collateral estoppel applies to bar consideration of an issue, a court must determine whether (i) the issue is actually litigated and (ii) there is a ***final judgment*** on the merits; (iii) the issue decided in the prior adjudication was essential to the final judgment, and

[1] Virtually hundreds of building throughout the city may also be rendered non-conforming based on the Board's oral vote in BZA Case No. 17109 with respect to roof deck railings above the 1910 Height Act. However, this issue is not now before the Board and accordingly is not addressed herein by the Applicant.

(iv) the party against whom issued preclusion is asserted was a party or in privity with a party to the prior adjudication. *In re* Banks, 805 A.2d 990 (D.C. 200s); *Betts v. Townsends, Inc.* 765 A.2d 531 (Del. 2000). Here, the opponents cannot satisfy the second prong of the collateral estoppel test. The Board has not issued any final, effective order in BZA Appeal Case No. 17109. Moreover, if an administrative agency permits reconsideration of a decision, the decision is not final until time for filing for reconsideration has lapsed. AmJur, 4th ed., Admin Law § 378. Here, the Zoning Regulations not only permit an applicant to request reconsideration, but the Zoning Commission may initiate *sua sponte* review of a BZA decision. Further, the decision may be appealed to the D.C. Court of Appeals. Until these remedies are exhausted, the Board's decision is not final for purposes of an opponent asserting collateral estoppel.

In asserting their claim of defensive collateral estoppel, the opponents have erroneously assumed that the Board determined in Case No. 17109 that the penthouse at 1819 Belmont Road violated the 1910 Height Act. Despite the opinion of one Board member made during deliberations on the case, the Board could not have made such a ruling because it would be inconsistent with the Board's past and subsequent grants of relief in similar cases. *See, for example,* orders rendered prior to BZA Appeal Case No 17109 in BZA Case Nos. 11917 (1627 K Street); 12798 (1100 15th Street); 13061 (2301 Washington Circle); 13124 (1811 L Street); 13187 (1801 L Street); 13449 (1819 L Street); 13528 (801 18th Street); 13716 (1023 15th Street); 13788 (1111 14th Street); 14176 (816 Connecticut Avenue); 15159 (555 11th Street); 15169 (1430 K Street); 16681 (Square 456); 16641 (1210-16 Massachusetts Avenue); 17030 (911-19 E Street); 16778 (1108 K Street); 16700 (300 Massachusetts Avenue); ZC Order No. 961 (1700 K Street, N.W.); and ZC Order No. 594 (1111 20th Street, N.W); and order in BZA

Case No. 17186 (777 6th Street) issued one month after oral vote in BZA Appeal Case No. 17109.

In a May 16, 1994 memorandum, the Office of Attorney General noted that the Zoning Commission (or in this instance the Board) would be exposed to equal protection challenges if such inconsistent rulings were adopted by the agency. Writing in response to the WETA case and amendments proposed by Congress in H.R. 4242 to the 1910 Height Act but never enacted, the Office of Attorney General stated that:

> [a]n equal protection issue arises from the denial of a building permit to one landowner and the granting of such permit to another landowner where such landowners are similarly situated and the differing treatment is unrelated to or inconsistent with the permissible zoning standards imposed by a zoning regulation or law. *See City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985); *Art Van Furniture, Inc. v. City of Kentwood*, 437 N.W.2d 380 (Mich. App. 1989), *appeal denied*, 433 Mich. 918 (1989); *Kisil v. City of Sandusky*, 465 N.E.2d 485 (Ohio 1984); *Durante v. Town of New Paltz Zoning Board*, 90 A.D.2d 866, 456 N.Y.S.2nd 485 (1982); *Wolfmer v. Board of Zoning Adjustment*, 672 S.W.2d 147 (Mo. App. 1984). *See also Bannum, Inc. v. City of Louisville*, 958 F.2d 1354 (6th Cir. 1992); *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972); *P.L.S. Partners, Women's Medical center of Rhode Island, Inc. v. City of Cranston*, 696 F. Supp. 788 (D.R.I. 1988). *See generally* 1 Ziegler Rathkopf's THE LAW OF ZONING AND PLANNING, § 4.09 and cases cited therein (1986). H.R. 4242 singles out the WETA/GWU PUD for special, discriminatory treatment under the 1910 Height Act when other similarly situated applicants have been treated uniformly on the basis of the 84 year interpretation of the Height Act by the District of Columbia government.

Memorandum from the Office of Corporation Counsel (now Office of Attorney General) to U.S. House of Representatives Committee on the District of Columbia, May 16, 1994, copy attached as Exhibit E.

Thus, if in deciding BZA Appeal Case No. 17109 the Board departed from now 94 years of consistent interpretation of the Height Act to find that exterior walls means *all perimeter walls*, and then returned to its previous interpretation street frontage walls in subsequent BZA

Case No. 17186 decided July 2004, then the Board would be open to equal protection challenges. Thus, it is clear that the Board could not have made such an inconsistent ruling in BZA Appeal Case No. 17109 to single out Montrose, LLC for special discriminatory treatment where similarly situated applicants have previously and subsequently been uniformly treated under the 1910 Height Act.

Over the years, this Board has demonstrated a steadfast commitment to resolving difficult questions of zoning. It is clear that the Board intends to continue in this vein. Given the importance of the questions raised regarding the 1910 Height Act in this case, and the implications of such decision, it is important for this Board to consider this matter without delay.

V.
CONCLUSION

Based on the foregoing, the penthouse at 1819 Belmont Road, N.W., does not violate the roof structure setback provisions of the 1910 Height Act. Accordingly, Board should entertain the Applicant's request for special exception relief.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: Carolyn Brown

Whayne S. Quin
Mary Carolyn Brown
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October 12, 2004

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Memorandum of Points and Authorities in BZA Case No. 17221, were served this 12th day of October, 2004, by first-class mail, postage pre-paid, upon the following:

Ann Hughes Hargrove
Zoning Chair
Kalorama Citizens Association
1827 Belmont Road, N.W.
Washington, D.C. 20009

Alan J. Roth, Chairperson
Advisory Neighborhood Commission 1C
P.O. Box 21652
Washington, D.C. 20009

Mary Carolyn Brown

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A

(Corrected on 5/3/94)

GEORGE WASHINGTON

02017/083

Government of the District of Columbia

ZONING COMMISSION

ZONING COMMISSION ORDER NO. 749-A
Case No. 93-9C
(Consolidated PUD & Map Amendment @ 21st & H Sts., N.W.)
April 11, 1994

Pursuant to notice, a public hearing of the Zoning Commission for the District of Columbia was held on October 25 and 28, 1993. At the hearing sessions, the Zoning Commission considered an application from the George Washington University (GWU) and the Greater Washington Education Telecommunications Association (WETA). The application requested review and approval of a planned unit development (PUD) and related map amendment, pursuant to Chapter 24 and Section 102, respectively, of the District of Columbia Municipal Regulations (DCMR), Title 11, Zoning. The public hearing was conducted in accordance with the provisions of 11 DCMR 3022.

FINDINGS OF FACT:

1. The application, which was filed on June 16, 1993, requested consolidated review and approval of a PUD and a related change of zoning from R-5-D to C-3-C for Lot 880 in Square 101. At the public hearing, the applicants requested that the Commission also consider, in the alternative, rezoning the subject property to SP-2.

2. On August 2, 1993 at its regular monthly meeting, the Zoning Commission authorized the scheduling of a public hearing on the original application.

3. As a preliminary matter at the public hearing on October 25, 1993, Advisory Neighborhood Commission (ANC) 2A filed a motion to dismiss the application on the grounds that the building, as proposed, violates the Height of Buildings Act and that the Zoning Commission has no authority to approve a project that violates that Act. The Commission determined that the issues regarding the Act of 1910 were substantive matters to be addressed in the course of the proceeding but not requiring that the application be dismissed. Accordingly, the Commission denied the motion to dismiss the application.

4. As an additional preliminary matter at the public hearing, the Commission ruled to grant status as a party to the Bureau of Catholic Indian Missions, the owner of the abutting property to the east, and to the West End Tenants Association, comprised of occupants of the building at 2124 I Street. The Commission ruled not to grant party status to Maria Tyler, Edward Kelly and Marija Hughes. Ms. Tyler and Mr. Kelly are commissioners of Advisory Neighborhood Commission (ANC) 2A, and the ANC is automatically a party under the Rules of Practice and Procedure. Ms. Tyler, Mr. Kelly and Ms. Hughes live several blocks from the subject site, and none had a specific right or interest that would be affected by action on the application that would be different than any member of the general public. All three were given the opportunity to testify and participate as persons.

5. The PUD site consists of 26,492.25 square feet of land area and is presently used as a surface parking lot accommodating 47 automobiles and 25 motorcycles. It is located at the northeast corner of the intersection of 21st and H Streets, N.W. in Square 101, Lot 880, within the campus boundaries of George Washington University. Square 101 is bounded by Pennsylvania Avenue and I Street to the north, 20th Street to the east, H Street to the south, and 21st Street to the west.

6. Square 101 is split-zoned C-3-C and R-5-D. The northern half of the square (the entire I Street and Pennsylvania Avenue frontage) is zoned C-3-C and is developed with a mixed-use retail, service and office building which occupies the street frontage at 2000 Pennsylvania Avenue, N.W. The remainder of the square is zoned R-5-D.

7. The area surrounding the site is primarily developed with institutional and commercial uses. The Red Lion Row PUD development at 2000 Pennsylvania Avenue, N.W. abuts the site to the north within the same square. The George Washington University Yard is situated directly across H Street to the south of the site. The University's Lisner Auditorium is located on the southwest corner of the intersection of H and 21st Streets, diagonally across from the site. The University's Marvin Center is located directly across 21st Street from the site.

8. The R-5-D District permits general residential use at a medium-high density, including single-family dwellings, flats and apartments. The maximum height is 90 feet, the maximum floor area ratio (FAR) is 3.5 and the maximum lot occupancy is 75 percent.

9. The C-3-C District is a major business and employment center, permitting office, retail, service, housing and other mixed uses. The maximum height is 90 feet, the maximum FAR is 6.5 and the maximum lot occupancy is 100 percent. The PUD guidelines for the C-3-C District establish a height of 130 feet and an FAR of 7.0.

10. The SP-2 District permits matter of right, medium-high density development, including all kinds of residential uses as well as offices for nonprofit organizations, trade associations and professionals permitted as a special exception requiring approval of the Board of Zoning Adjustment (BZA). The maximum height is 90 feet, the maximum floor area ratio is 6.0 for residential and 3.5 for other permitted uses and the maximum lot occupancy of 80 percent for residential uses. The PUD guidelines establish a height of 90 feet and an FAR of 6.5 for residential and 4.5 for commercial uses.

11. Under the PUD process of the Zoning Regulations, the Zoning Commission has the authority to consider this application as a first stage PUD. The Commission may also impose development conditions, guidelines, and standards which may exceed or be less than the matter of right standards identified above for height, FAR, lot occupancy, parking and loading, or for yards and courts. The Zoning Commission may also approve uses that are permitted as special exceptions and would otherwise require approval by the BZA.

12. The District of Columbia Generalized Land Use Map Element of the Comprehensive Plan designates the subject site for institutional use. The greater portion of the subject square is also designated for high density institutional use.

13. The applicants propose to construct a building to be jointly occupied by GWU and WETA. GWU will use its space to house the University's National Center for Communications Studies and GWU Television, including classrooms, faculty offices and support space, seminar rooms, specialized laboratories and teaching facilities and broadcast and production facilities. WETA will use its space to house its principal executive offices, its general operations and broadcast studios and its related technical and administrative, production, distribution, broadcast, publishing, research and development, marketing, fundraising, educational and outreach activities and programs, including the activities and programs of the National Center for Public Broadcasting. The WETA space will include administrative and production staff offices and support space, television and radio broadcasting studios, production, post-production, screening, listening and related support space, control and editing rooms and space for

technical services and facilities. Of the total area in the building, 16 percent will be used exclusively by GWU, 28 percent will be used exclusively by WETA and the remaining 56 percent will be shared between the two.

14. The building will have a total gross floor area of approximately 139,808 square feet, or an FAR of approximately 5.29.

15. The applicants through testimony at the public hearing, indicated that because of the technical requirements involved in designing space for the television and radio broadcast facilities, the building has a different height at the front and the rear. The roof of that portion of the building which fronts on both H and 21st Streets has a height of 100 feet, 7 9/16 inches. Above that level is a roof structure which houses mechanical equipment and stair and elevator penthouses. This roof structure is 18 feet, six inches from the edges of the building fronting H and 21st Streets. The north side of the building, the area where the studios are located, has a height of 109 feet, 7 9/16 inches, measured from the point of measurement to the top of the solid roof of the studio, which is above the electrical grid on the eighth floor of the building. Above that roof is a roof structure housing electrical and mechanical equipment for the studio and the building. The roof over the northern roof structure is 2.5 feet lower than the roof over the southern roof structure. The top of the roof of the northern penthouse will be 116 feet, 7 9/16 inches above the measuring point.

16. There will be 15 satellite and microwave dish antennas located on the roof of the building to serve the uses proposed in the building. Ten of those antennas will be located on a tower at the southeast corner of the building. Five dish antennas will be located on the roof of the northern penthouse.

17. The building will contain a total of 110 parking spaces on two cellar levels. There will be nine bicycle parking spaces located on the first cellar level.

18. Loading and service access to the building will be provided through the "common service area" located on the north side of the building. This area was established in the Zoning Commission's approval of the PUD for 2000 Pennsylvania Avenue and was specifically reserved for service to that building as well as any future building to be constructed by GWU on the subject property. Two loading berths will be provided in the common service area to serve the subject building.

19. In association with the PUD project at 21st and H Streets, N.W., the applicants propose the following amenities and public benefits:

    a. The relocation of more than 250 long-term jobs at WETA from Virginia to the District of Columbia, resulting in $345,000 in annual new taxes to the District and $9.8 million in new income each year in the District's economy;

    b. The creation of construction jobs for 18 to 24 months;

    c. The strengthening of WETA's partnership with D.C. public schools and libraries;

    d. The establishment of a superbly designed mixed use building in the GWU campus area consistent with the Comprehensive Plan, the Land Use Element and the Campus Plan;

    e. The implementation of a streetscape program that compliments the design of the building, comports with the approved Campus Plan and sets a standard for extension of the design treatment into other areas on the campus;

    f. Providing an after-hours presence in the neighborhood, increasing local security since WETA operates 24 hours a day;

    g. Expanding WETA's activities and presence in the broader community in the District of Columbia to a wide variety of programs and projects;

    h. The establishment of an agreement between the applicants and the Minority Business Opportunity Commission regarding minority participation in the construction of the project; and

    i. The establishment of an agreement with the D.C. Department of Employment Services (DOES) committing the applicants to use DOES as their first source for recruitment, referral and placement of employees and to use their best efforts to utilize District residents for at least 51 percent of the jobs created by the project.

20. The applicants stated that the proposed development is consistent with the Comprehensive Plan for the National

Capital, and will further the District's land use, economic development, urban design, environmental protection, and transportation elements of the Plan.

21. The applicants' traffic expert testified that the traffic to be generated from the proposed development can be accommodated on the existing street network and all of the intersections in the vicinity will operate at acceptable levels of service. The parking and loading facilities of the project are sufficient to accommodate the needs of the project, and there will be no adverse transportation impact on the neighborhood or the larger area because of the development.

22. The applicants' antenna expert indicated that the total of 15 antennas located on the roof of the building will not result in dangerous or other objectionable conditions because of radiation or interference. He further stated that the antennas must be located and aimed so as not to be near any building or other obstruction which could interrupt or degrade the signal quality.

23. The Office of Planning (OP), by report dated October 14, 1993, and by testimony at the public hearing, recommended approval of the application subject to conditions. The OP reported that the greater portion of the subject square, including the subject site, is designated for institutional use on the Generalized Land Use Map of the Comprehensive Plan. The northeastern corner of the square is designated for high density commercial use. The OP was of the opinion that since the proposed project is designed for educational and commercial mixed uses, it would appear to be not inconsistent with the Comprehensive Plan, given the soft-edge nature of the Generalized Land Use Map. The OP further reported that the proposed project appears to be generally consistent with the designation of the site for educational mixed use on the GWU Campus Plan. The OP further reported that the change of zoning to C-3-C would be comparable to the abutting property to the north. The PUD process would give the Zoning Commission authority to control the height, size and design of the building. With respect to the design of the building, OP reported that, through the use of setbacks, color and materials, the apparent mass and height of the building will be reduced so that the building will serve its transition role between the 130-foot high buildings to the north and the 40 to 90-foot high buildings to the east and south of the site. The design emphasizes the building's horizontality, rather than its height. The OP noted that the applicants, in coordinating the plans with OP, had modified the tower and location of dish antennas on the roof of the building to mitigate potential impacts and improve the already superior building design.

The OP identified the benefits and amenities which would result from construction of the project, as summarized above in Finding of Fact No. 19. The OP concluded that the proposed project is compatible with the existing streetscape on Pennsylvania Avenue and 21st Street, as well as existing development within the university campus and the surrounding area. The OP recommended approval of the application provided that the applicants adequately quantify the proposed amenity package relative to the requested zoning relief.

24. The Department of Public Works (DPW), by memorandum dated October 13, 1993, advised that it had reviewed the applicants' traffic impact study and generally agreed with the conclusion that there will be no significant impact and that those impacts that are expected to occur are manageable. The DPW requested the applicants to make a firm commitment to reducing automibile use by the persons employed in this building. The DPW recommended that at least four bicycle parking spaces be provided in the building. The DPW recommended against installation of the circular driveway, leading to the entrance to the building on H Street, N.W. because it eliminated three to four on-street parking spaces and presents additional hazards for pedestrians.

25. Advisory Neighborhood Commission (ANC) 2A by resolution dated October 17, 1993, and by report dated October 18, 1993, and by testimony at the public hearing, opposed the application. The following summarizes the issues raised by the ANC:

    a. The subject site is not appropriate for WETA's activities. WETA should be located elsewhere in the District of Columbia, preferably in a commercially zoned area or near Howard University.

    b. The applicants are using the PUD process to circumvent the Zoning Regulations, because they are seeking Zoning Commission approval for the project on a piecemeal basis outside the normal BZA process governing university development pursuant to an approved Campus Plan.

    c. The project violates the Height of Buildings Act, because the height of the building is listed as being 116 feet, 7 9/16 inches above the measuring point and the Act permits a height of only 110 feet.

    d. The dish antennas on the roof of the building extend above the 110-foot level and therefore violate the Act of 1910.

e. The proposed project is not consistent with GWU's approved Campus Plan, since the Plan refers only to University use and the WETA television and radio stations are a commercial use. In addition, the Campus Plan as approved contains no reference to height in excess of that permitted under the current zoning.

f. The Zoning Commission should not process the subject application until GWU begins construction on residence halls on the campus, to eliminate objectionable conditions created by a large number of students residing in the Foggy Bottom neighborhood outside the campus boundaries.

g. The applicants' traffic analysis did not account for visitor traffic, did not adequately support its assumption for modal split and assumed without knowing that the signal at 21st and H Streets could be re-timed.

h. The economic and fiscal benefits claimed for the proposed project are overstated. The benefits should be compared to the site developed with a GWU mixed use building rather than to a parking lot.

i. The proposed project does not provide amenities and benefits that are not available under existing zoning controls with WETA located on a matter of right site elsewhere in the District of Columbia.

26. Five individual residents of the community appeared at the hearing and supported the application. The points raised in support of the application include but are not limited to the following:

a. The project should be approved but with a rezoning to SP-2, rather than C-3-C, so as not to set a precedent for expansion of commercial zoning south of Pennsylvania Avenue.

b. The project would be good for the District of Columbia and for the neighborhood, and enjoys wide-spread community support within the Foggy Bottom/West End community.

c. The use is consistent with the GWU Campus Plan, which designates the site as an alternative site for educational mixed use.

d. This site is not designated as a housing site under the Campus Plan and approval of the application will not cause any loss of potential sites for additional on-campus housing.

e. The project proposes a beautiful building with underground parking, consistent with the residential architecture of the neighborhood.

f. The 24-hour presence of WETA in the neighborhood increases neighborhood security.

g. The presence of WETA, a public service type organization, is essential to the overall welfare of the city.

27. The Bureau of Catholic Indian Missions, the owner of the property which abuts the subject site to the east, appeared as a party in opposition to the application. The Bureau advised that it is the beneficiary under an easement across the subject property and that the development could not proceed until the Bureau's rights to the easement have been addressed.

28. The application was opposed by the West End Tenants Association, also a party to the application. The West End Apartment Building is located at 2124 I Street, N.W., west of and adjacent to the Marvin Center. The West End Tenants Association's oppo-sition included, but was not limited to the following points:

a. The area is already unsafe for pedestrians.

b. There are no amenities to the neighborhood.

c. The parking situation on campus is already one of the worst in the city.

d. Rezoning to commercial or special purpose from residential creates additional pressures in terms of a precedent.

e. There is at least a potential for harm from such large numbers and concentration of antennas.

29. Four individuals testified at the hearing in opposition to the application, amplifying the concerns of the ANC and identifying the following issues:

a. The antennas proposed on the building will have substantial negative effects because of electromagnetic radiation.

b. The project is not consistent with the approved GWU Campus Plan.

c. The project should not be approved until GWU has demonstrated its committment to developing a substantial on-campus housing policy.

30. At the conclusion of the public hearing on October 28, 1993, the Zoning Commission requested the following information:

a. The applicants' written response on electromagnetic emissions;

b. Memoranda on the Height of Buildings Act of 1910 from the applicant, the Zoning Administrator, ANC-2A, and the Office of Corporation Counsel (OCC);

c. Written testimony from Edward Kelly;

d. The applicants' transportation plan;

e. Written testimony from Maria Tyler;

f. The MBOC Agreement executed by the applicants;

g. A drawing showing the location of bicycle parking in the parking garage; and

h. Redrafted language requesting modest flexibility on signage and finishes from OZ.

31. The Commission at its monthly meeting of December 13, 1993, considered a motion dated November 16, 1993 from Ms. Marija Hughes which requested reconsideration of the Zoning Commission's decision which denied her party status.

32. At that meeting, the Commission also considered a memorandum dated December 9, 1993 from the Director of the Office of Zoning recommending that the Commission deny Ms. Hughes' motion for reconsideration.

33. Pursuant to 11 DCMR 3028.8, Z.C. Order No. 749 denying party status to Ms. Marija Hughes became final and effective upon publication in the District of Columbia Register on January 28, 1994 (41 DCR 477).

34. At the public meeting of January 10, 1994, the Commission reviewed and discussed all of the written post-hearing submissions in the record of the case. The post-hearing submissions included responses from the applicant, the Zoning Administrator, ANC-2A and Maria Tyler's and Edward Kelly's written testimony. Subsequent to discussion, the Commission took proposed action.

35. At the public meeting of March 14, 1994, the Commission postponed final action on the case until the Commission had ample opportunity to read the draft order, as prepared by the Office of Zoning staff.

36. A special meeting of the Commission was held on March 24, 1994 to consider adoption of draft Z.C. Order No. 749-A as final action in the case. At that meeting, the Commission discussed the following items:

    a. Letters dated March 24, 1994 from ANC-2A and the West End Tenants Association requesting the Commission to reopen the record to receive new materials that may affect the case.

    b. Proposed legislation from Congressman Pete Stark titled "H.R. 4121, District of Columbia Building Height Act of 1994."

37. The Office of the Corporation Counsel (OCC) advised the Commission that the letters dated March 24, 1994 from ANC-2A and the West End Tenants Association, as well as the letter dated March 14, 1994 from Congressman Pete Stark were ex-parte communications and should not be accepted into the record. OCC also advised the Commission that if the Commission decided on its own motion, it could legitimately open the record to receive comments from the parties on the proposed legislation.

38. After a thorough discussion, the Commission voted to reopen the record to receive the proposed Congressional legislation and legal briefs from the parties on how the proposed legislation would affect the subject PUD. The Commission also determined on its own motion, that it would reopen the record to receive comments from the parties on the proposed legislation.

39. In accordance with the deadlines established by the Zoning Commission at its meeting of March 24, 1994, the following items were received into the record:

    a. Letter dated April 6, 1994 from Wilkes, Artis, Hedrick & Lane regarding the Height Act Amendment.

b. Memorandum dated April 6, 1994 from ANC-2A regarding the Height Act Amendment.

c. Letter dated April 6, 1994 from the West End Tenants Association regarding the Height Act Amendment.

d. Motion to reopen the record for additional evidence on the Height Act Issue from ANC-2A dated April 6, 1994.

e. Response from the applicant dated April 7, 1994 regarding ANC-2A's motion to reopen the record.

40. At its regular monthly meeting of April 11, 1994, the Commission took note of the above-mentioned items and determined on its own motion that there is no need for additional hearings as requested by ANC-2A.

41. The Commission concurs with the recommendations and/or positions of OP, DPW and the applicant and believes that the application should be approved.

42. The Commission concurs with the applicant that the project is appropriate for the site and is not inconsistent with the Comprehensive Plan.

43. The Commission concurs with the Zoning Administrator that the project, as modified, does not violate the Height of Buildings Act of 1910.

44. The Commission believes that it is not in the position to assess the health implications of the antennas and looks to the appropriate Federal and District agencies to set policy in that area.

45. The Commission finds that while C-3-C zoning is being applied, it is not designed to set a precedent to permit the introduction of commercial zoning or activities on the campus.

46. The Commission finds that the easement issue raised by the Bureau of Catholic Indian Missions relates to a private access agreement between the applicant and the Bureau and encourages those involved to settle the matter.

47. The Commission finds that the site is well-served by public transportation, that the transportation management plan proposed by the applicants will help to mitigate the minor traffic impacts of the project and that the proposed

development will not have a significant impact on the intersection of 21st and I Streets for either vehicular or pedestrian traffic.

48. The Commission finds that the applicants have satisfied the intent and purpose of Chapter 24 of DCMR, Title 11, Zoning.

49. The proposed action of the Zoning Commission to approve the application with conditions was referred to the National Capital Planning Commission (NCPC) under the terms of the District of Columbia Self-Government and Governmental Reorganization Act. NCPC, by letter dated March 3, 1994 indicated that the proposed PUD and related amendment to the Zoning Map of the District of Columbia would not adversely affect the Federal Establishment or other Federal interest and would not be inconsistent with the Comprehensive Plan for the National Capital.

CONCLUSIONS OF LAW

1. The PUD process is an appropriate means of controlling development of the site in a manner consistent with the best interests of the District of Columbia.

2. The development of this PUD project carries out the purpose of Chapter 24 of the Zoning Regulations.

3. The development of the project is compatible with District-wide and neighborhood goals, plans and programs, and is sensitive to environmental protection and energy conservation.

4. The approval of this application is not inconsistent with the Comprehensive Plan for the National Capital, as amended.

5. The approval of the application is consistent with the purposes of the Zoning Act (Act of June 20, 1938. 52 stat. 898) and the Zoning Map of the District of Columbia, by furthering the general public welfare and serving to stabilize and improve the area.

6. This application can be approved with conditions which ensure that the development will not have an adverse effect on the surrounding community or the District.

7. The approval of this application will promote orderly development in conformity with the entirety of the District of Columbia zone plan as embodied in the Zoning Regulations and Map of the District of Columbia

8. The Zoning Commission has accorded ANC 2A the "great weight" to which it is entitled.

9. This application is subject to compliance with D.C. Law 2-38, the Human Rights Act of 1977.

DECISION

In consideration of the findings of fact and conclusions of law herein, the Commission hereby ORDERS the APPROVAL of the application for consolidated review of a PUD and map amendment from R-5-D to C-3-C for Lot 880 in Square 101, located at the northeast corner of the intersection of 21st and H Streets, N.W. The approval of this PUD is subject to the following guidelines, conditions and standards:

1. The PUD shall be developed in accordance with plans prepared by the architectural firm of Ayers Saint Gross, marked as Exhibit Nos. 19, 65, 66, 67, 69 and 102, as modified by the guidelines, conditions and standards of this order.

2. The building shall be constructed for the joint use of George Washington University (GWU) and the Greater Washington Education Telecommunications Association (WETA) for educational and radio and television broadcasting and support purposes.

3. The building will have a total gross floor area of approximately 139,808 square feet, or an FAR of approximately 5.29.

4. The height of the building shall not exceed 101 feet as measured to the roof of the building as it faces 21st and H Streets and 110 feet as measured to the roof of the studios on the eighth floor of the building at the rear, as shown more precisely on Sheets F21 and F22 in Exhibit No. 102B of the record.

5. The PUD shall contain a minimum of 110 off-street parking spaces located in the cellars of the building and a minimum of nine bicycle parking spaces located on the first cellar.

6. Two off-street loading berths shall be provided at the northeast corner of the building as shown on Sheet F32 of Exhibit 19, with access to the common service area from 21st Street.

7. The east facade of the building shall be as shown on Exhibit 67 of the record.

8. The location and height of the five antennas on the roof of the roof structure shall be as shown on Tab U5 of Exhibit 27 of the record.

9. All antennas on the building shall be of a soft white color to match the color used in the main facade, as shown on Exhibit No. 64 of the record, and shall not be illuminated.

10. The height and design of the tower at the southeast corner of the building shall be as shown on Exhibit 66 of the record and shall be of the identical color of the antennas, as referenced in Condition No. 9.

11. Landscaping shall be provided as shown on Sheet F6 of Exhibit 19, as modified by Condition No. 13(d) and shown on Exhibit No. 65 of the record.

12. Exterior materials and colors shall be as modified by Condition 13(c) and shown on Exhibit 64 of the record.

13. The applicants shall have flexibility with respect to the following:

    a. Varying the location and design of interior components, including partitions, slabs, doors, hallways, columns, stairways, location of elevators and electrical and mechanical room, provided that the partitions do not change the exterior configuration of the building including the penthouse.

    b. Make minor adjustments to the facade and window size and detailing.

    c. Varying the final selection of the color of materials within the color ranges proposed on Exhibit No. 64 of the record, based on availability at the time of construction.

    d. Television viewing area must be landscaped in accordance with Exhibit No. 65 of the record.

14. The applicants shall comply with the Memorandum of Understanding which they have entered into with the Minority Business Opportunity Commission, which provides that at least 35 percent of the construction related contracts for the project must be awarded to Certified Minority Business Enterprises as shown on Tab F of Exhibit No. 88 of the record.

15. The applicants shall comply with the First Source Agreement with the Department of Employment Service (DOES) which provides that the applicants will use DOES as their first

source for the recruitment, referral and placement of employees in connection with the construction of the project as shown on Exhibit No. 22 of the record.

16. The change of zoning from R-5-D to C-3-C for Lot 880 in Square 101 shall be effective upon recordation of a covenant as required by 11 DCMR 2407.3.

17. No building permit shall be issued for the site until the applicants have recorded a covenant in the Land Records of the District of Columbia between the owner and the District of Columbia and satisfactory to the Office of the Corporation Counsel and the Zoning Regulations Division of the Department of Consumer and Regulatory Affairs (DCRA). The covenant shall bind the owner and all successors in title to construction on and use of the property in accordance with this order and amendments thereto of the Zoning Commission.

18. The Office of Zoning shall not release the record of this case to the Zoning Regulations Division of DCRA until the applicants have filed a certified copy of the covenant with the records of the Zoning Commission.

19. The PUD approval by the Zoning Commission shall be valid for a period of two years from the effective date of this order. Within such time, application must be filed for a building permit as specified in 11 DCMR 2407.1. Construction shall start within three years of the effective date of this order.

20. Pursuant to D.C. Code Section 1-2531 (1987), Section 267 of D.C. Law 2-38, the Human Rights Act of 1977, the applicants are required to comply fully with the provisions of D.C. Law 2-38, as amended, codified as D.C. Code, Title 1, Chapter 25 (1987), and this order is conditioned upon full compliance with those provisions. Nothing in this order shall be understood to require the Zoning Regulations Division of DCRA to approve permits if the applicants fail to comply with any provision of D.C. Law 2-38 as amended.

Vote of the Zoning Commission taken at the public meeting on January 10, 1994: 5-0 (John G. Parsons, William B. Johnson, William L. Ensign, Jerrily R. Kress and Maybelle Taylor Bennett, to approve the PUD and change of zoning to C-3-C with conditions).

This order was adopted by the Zoning Commission at the public meeting on April 11, 1994 by a vote of 5-0: (John G. Parsons, Maybelle Taylor Bennett, William L. Ensign, Jerrily R. Kress to adopt as corrected, and William B. Johnson, to adopt by absentee vote).

In accordance with the provisions of 11 DCMR 3028, this order is final and effective upon publication in the D.C. Register; that is, on APR 29 1994.

MAYBELLE TAYLOR BENNETT
Chairperson
Zoning Commission

MADELIENE H. ROBINSON
Director
Office of Zoning

zco749-a/SDB/LJP

B

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION

November 24, 1993

'93 NOV 24 A11 27
OFFICE OF ZONING
DISTRICT OF COLUMBIA

MEMORANDUM

TO : Madeliene H. Robinson
Acting Director
Office of Zoning

FROM : Joseph F. Bottner, Jr.
Zoning Administrator

SUBJECT : Zoning Commission Case No. 93-9C (PUD and Map Amendment at 21st & H Streets, N.W. - GWU/WETA)

First, my apology for being tardy in responding to your memorandum dated November 15, 1993, relating to the above referenced subject. I do request to Zoning Commission to waive its rules and practice to allow this reply to become a part of the record.

I have reviewed the document you enclosed with your memorandum. My purpose in the review was to provide comments with respect to the Height of Building Act of 1910.

It is my view that the building in the area of "Studio A" is in conflict with the "height of building" as regulated by the Act of 1910. The Act of 1910 allows the height to be "measured from the level of the sidewalk opposite the middle of the front of the building to the highest point of the roof."

When the question on the height, as well as mechanical equipment was first presented, I was under the impression that it was identical to the property at 110 First Street, N.E. However, upon retrieving the files for 110 First Street, N.E., I realized it is not identical.

The setback requirements of a roof structure under provisions of the Act of 1910 have always been interpreted by the Zoning Division as being required to set back from the property line which adjoins a street. The setback of

ZONING COMMISSION
CASE No. 93-9C
EXHIBIT No. 90

11/24/93

a roof structure under the Zoning Regulations now requires roof structures to set back from the exterior walls. Consequently, it is my opinion that the Zoning Commission, under a Planned Unit Review, does have authority to waive the setback of a roof structure from a property line which does not adjoin a street.

cc: Peter Maszak

C

Government of the District of Columbia

OFFICE OF THE CORPORATION COUNSEL
JUDICIARY SQUARE
441 FOURTH ST., N.W.
WASHINGTON, D. C. 20001

Confidential: Subject to Lawyer-Client Privilege

IN REPLY REFER TO:

93 NOV 18 P4:08

OFFICE OF ZONING
DISTRICT OF COLUMBIA

November 18, 1993

TO: Madaliene H. Robinson
Director, Office of Zoning

FROM: Peter Szegedy-Maszak
Assistant Corporation Counsel

SUBJECT: Height Act of 1910: Issues Raised in Zoning Commission Case No. 93-9C (GWU/WETA PUD)

You have requested our advice concerning the compliance of the above project with the 1910 Height Act, D.C. Code § 5-405 (1992). We are advised by the Office of the Zoning Administrator that the above project complies with his interpretation of the Zoning Regulations and with prior administrative practice of his Office. We also understand that the Zoning Administrator will advise you about his interpretation of the Height Act of 1910 as it applies to the above case. Finally, we understand that there is administrative precedent by the Zoning Administrator supporting his interpretation.

In the event that you require further legal review of the above issues, please contact this Office at 727-6240. The Office of the Zoning Administrator has not requested legal advice on this matter at this time.

cc: James Randall, OCC

D

S T A F F D R A F T

NATIONAL CAPITAL PLANNING COMMISSION
801 PENNSYLVANIA AVENUE, N.W., SUITE 301
WASHINGTON, D.C. 20576

R E V I S E D
(3/2/94)

0-7

NCPC File No. Z.C. 93-9C

21ST AND H STREETS, N. W.
(GEORGE WASHINGTON UNIVERSITY AND THE GREATER WASHINGTON EDUCATION TELECOMMUNICATIONS ASSOCIATION (WETA))
APPLICATION FOR A CONSOLIDATED PLANNED UNIT DEVELOPMENT AND RELATED AMENDMENT TO THE ZONING MAP OF THE DISTRICT OF COLUMBIA
REZONING LOT 880 IN SQUARE 101 FROM R-5-D TO C-3-C

Report to the Zoning Commission of the District of Columbia

March 3, 1994

The Commission, pursuant to Section 5 of the Act of June 20, 1938, as amended by the District of Columbia Self-Government and Governmental Reorganization Act (D.C. Code, 1981 edition, sec. 5-417), has reviewed the proposed Zoning Commission's Guidelines and Standards for the Planned Unit Development at 21st and H Streets, N.W. and the related zoning change from R-5-D to C-3-C for Lot 880 in Square 101. The Commission finds that Guideline No. 1, as it relates to the penthouse setbacks is in violation of the 1910 Height Act requiring roof structures to setback from exterior walls. For this reason, the proposed map amendment and related Planned Unit Development would adversely affect the Federal Establishment or other Federal interests in the National Capital and would be inconsistent with the Comprehensive Plan policy "to protect the historic horizontal character of the National Capital by limiting building heights in accordance with An Act to regulate the height of buildings".

To bring this building into conformance with the Act it would be necessary to either:

a. remove or setback the portion of the mechanical attic that is placed above the studio a distance of approximately nine feet from the exterior north and east walls of the building, or

b. lower the building height to 110 feet by reducing floor to floor heights internally or lowering the ground floor approximately 6 foot 4 inches, or some combination thereof.

* * *

BACKGROUND AND STAFF EVALUATION

Description of Proposal

The Zoning Commission for the District of Columbia, pursuant to D.C. Code, 1981 edition, sec. 5-417, has submitted a proposed consolidated Planned Unit Development (PUD) for Lot 880 in Square 101, located on the northeastern corner of the intersection of 21st and H Streets, N.W., generally bounded by Pennsylvania Avenue and I Street to the north, 20th Street to the east, H Street to the south, and 21st Street to the west. (See Map A). The site is also located within the boundaries of the approved campus plan for the George Washington University's (GWU) campus, is presently used as a surface parking lot, and is currently zoned R-5-D. The proposal requests a related zoning change for this site from R-5-D to C-3-C. (See Map B).

The PUD application has been initiated by the Greater Washington Education Telecommunications Association (WETA). WETA intends to build an eight-story educational mixed-use building, to be jointly occupied by GWU and WETA. GWU will use its space to house the university's National Center for Communications Studies and GWU Television, as well as, classrooms, faculty offices and support spaces. Twenty-eight percent of the total gross floor area will be allocated for WETA uses, 16% will be allocated to GWU uses, and the remaining 56% will be shared. WETA will use its space to house its principal executive offices, administrative and technical staff offices and broadcasting studios. WETA contends that the proposed PUD would enable WETA to consolidate its facilities, which are currently housed in seven different locations.

The proposed site consists of 26,429 square feet of land (0.6 acre) and would contain a total gross floor area of 139,808 square feet, a floor area ratio (FAR) of 5.29. In accordance with the Guidelines, Conditions and Standards (Guidelines) proposed by the Zoning Commission, the height of the building roof as it fronts on 21st and H Streets is approximately 101 feet above the measuring point established at elevation 65.25 feet. In accordance with the zoning regulations, the height of this penthouse is 18' - 6" and is setback 18' - 6" from the edge of the building on 21st and H Streets. The penthouse is not setback from the edge of the building on the north or east. (See Attached Architectural Drawings).

The northwestern portion of the structure contains two studios on the top floor, the eighth floor. The roof over the studios are not discernable from the building's exterior. The roof is located approximately 109' - 7 " above the measuring point. As a penthouse, the portion above the

studio roof is used to house electrical and mechanical equipment. The roof of this penthouse is 7' - 0" above the roof of the studio roof and 2' - 6" below the roof of the penthouse that fronts on 21st and H Streets. The elevations of the PUD's principal penthouse are articulated with architectural detail that creates the appearance of windows, similarly proportioned to the building's fenestration. The proposed penthouse contains no windows and is not occupiable. (See Attached Architectural Drawings).

The proposed PUD would provide 110 below-grade parking spaces on two levels and a minimum of nine bicycle parking spaces located on the first cellar. Access would be provided from H Street. Loading facilities would be located on the north side of the proposed building and would be accessed from 21st Street, utilizing a common service area which separates the site from the Red Lion Row PUD at 2000 Pennsylvania Avenue.

The PUD will accommodate fifteen antennas on the roof of the building. All antennas on the building will be soft white colored to match the color of the PUD's principal facade and will not be illuminated. The drawings indicate that five of these antennas will be located at the rear of the building, on the roof of the penthouse above the studio. These antennas are intended for transmit and receive communication from earth-orbiting satellites. One antenna will be 2.4 meters in diameter, one will be 4.2 meters in diameter, and three will be 6.1 meters in diameter. The antennas rotate in an arc to send and receive communications. The mounted height of the largest antenna at the maximum height in the arc will be 24 feet above the top of the penthouse roof.

The remaining ten antennas will be mounted on the tower located at the southeast corner of the building, fronting on H Street. These antennas are microwave antennas operating on a point-by-point basis with locations on other buildings and towers. Of these antennas, two are used for transmitting purposes and eight are used to receive communication. The tower has been designed as an architectural embellishment to the building and its height enables the ten antennas to provide clear line-of-sight communication. The top of the tower is at elevation 207.38 feet, approximately 142 feet above the measuring point and 41.5 feet above the roof at this location.

Existing and Proposed Zoning

Square 101 is split-zoned R-5-D and C-3-C. The northern half of the square, which includes the entire I Street and Pennsylvania Avenue frontage, is zoned C-3-C, and is developed with mixed-use retail and office buildings. The remainder of the square is zoned R-5-D. The proposed zoning change would extend the abutting C-3-C zoning over the R-5-D zoned portion of the proposed PUD site. This would make the proposed zone the same as the larger area of Square 101 containing the Red Lion Row PUD at 2000 Pennsylvania Avenue.

The R-5-D District permits general residential use at a medium-high density, including, one-family dwellings, flats and apartments. The maximum height is 90 feet, the maximum FAR is 3.5, and the maximum lot occupancy is 75 percent.

The C-3-C District is a major business and employment center, permitting office, retail, service, housing and other mixed uses. The maximum height is 90 feet, the maximum FAR is 6.5, and the maximum lot occupancy is 100 percent. The PUD guidelines for the C-3-C District provide a maximum building height of 130 feet and an FAR of 7.0.

The Zoning Commission's proposed Guidelines indicate that the height of the building's street elevations should not exceed 101 feet and the height of the studio's roof should not exceed 110 feet. The Guidelines also set a maximum FAR of 5.29. The proposed PUD would be developed to the maximum allowable standards stipulated in the Guidelines. The Guidelines, however, are below the maximum allowable standards for PUDs under the C-3-C zone. Although the proposed rezoning and subsequent development of the site allows a greater FAR and building height than the existing R-5-D, the site's development would be consistent with the surrounding institutional high-density development permitted in both zones.

Regulation of Building Height in the District of Columbia

The regulation of the height of buildings in the District of Columbia is subject to two sets of controls. The Zoning Regulations (11DCMR) and the Act to regulate the height of buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 452: D.C.>Code, sec. 5-401 et seq.) (Height Act of 1910). The Zoning Regulations establish the maximum height permitted in each of the various zoning districts. The Act of 1910 limits the maximum height of buildings in the District of Columbia. In any given instance, the more restrictive control sets precedence. The following lists the principal requirements established by the Act of 1910 and the Zoning Regulations:

The Act of 1910.

> No building shall be erected, altered, or raised in the District of Columbia in any manner so as to exceed in height above the sidewalk the width of the street, avenue, or highway in its front, increased by 20 feet; (Sec. 5-405a)
>
> The height of a building on a corner lot will be determined by the width of the wider street. (Sec. 5-405d)
>
> Spires, towers, domes, minarets, pinnacles, penthouses over elevator shafts, ventilation shafts...may be erected to a greater height than any limit prescribed in 5-401 to 5-409...provided, however, that such structures when above such limits of height shall be fireproof, and no floor or compartment thereof shall be constructed or used for human occupancy above the top story of the building upon which such structures are placed: and provided, that penthouses, ventilation shafts, and tanks shall be set back from the exterior walls distances equal to their respective heights above the adjacent roof.. (Sec. 5-405h)

For the purposes of Sections 5-401 to 5-409 the height of buildings shall be measured from the level of the sidewalk opposite the middle of the front of the building to the highest point of the roof. If the building has more than one front, the height shall be measured from the elevation of the sidewalk opposite the middle of the front that will permit of the greater height. (Sec. 5-407)

Zoning Regulations.

The height of building is defined as the "vertical distance measured from the level of the curb opposite the middle of the front of the building to the highest point of the roof or parapet....If a building fronts on more than one (1) street, any front may be used to determine the maximum height of the building; but the basis for the height of the building shall be determined by the width of the street selected as the front of the building. (Sec. 199.1)

The C-3-C permits the height of buildings to be exceeded as follows: A spire, tower, dome, pinnacles or minarets serving as architectural embellishments, penthouse over elevator shaft, ventilator shaft, antennas, chimneys, smokestacks or fire sprinkler tanks may be erected to a height in excess of that which this section otherwise authorizes. (Sec. 770.3)

If housing for mechanical equipment, a stairway or elevator penthouse is provided on the roof of a building or structure, it shall be erected or enlarged as follows:

(b) It shall be set back from all exterior walls a distance at least equal to its height above the roof upon which it is located; and

(c) It shall not exceed eighteen feet six inches (18' - 6") in height above the roof upon which it is located. Mechanical equipment shall not extend above the permitted 18' - 6" height of the housing. (Sec. 770.6)

The Height Act of 1910 establishes that the maximum height of the proposed PUD may not exceed 110 feet. The resulting maximum height is based on the calculated total width of the street right-of-way plus an additional twenty (20) feet. The site fronts on both 21st and H Streets, which both have rights-of-way of 90 feet. The Zoning Regulations establishes that roof structures, which include penthouse, are limited to 18' - 6" in height. Both the Height Act of 1910 and the Zoning Regulations require roof structures to be set back one-to-one from the edge of the roof at exterior walls. The interpretation of the Act and the zoning regulations has been to apply the term "exterior walls" to those walls which front on a street. Exceptions to the setback requirements for PUDs can be made by the Zoning Commission.

District of Columbia Office of Planning Report

The Office of Planning's (OP) Final Report on this PUD, dated October 14, 1993, recommends approval of the proposed PUD and related map change. The report states the following:

> ...the proposed project and the requested change in zoning are consistent with the designation of the site as high-density commercial and institutional as well as its location in the Central Employment Area on the Generalized Land Use Map.
>
> ...with the revised design of the tower and positioning of the antennas, the proposed project is compatible with the existing streetscape on Pennsylvania Avenue and 21st Street as well as existing development within the University campus and the surrounding area.
>
> ...the applicant's proposal is in harmony with the purpose and intent of the Zoning Regulations and Map. The Office of Planning believes that the proposed project would not affect adversely the use of neighboring properties in terms of noise, traffic and other objectionable conditions....the proposed project appears to be generally consistent with the designation of the site for educational mixed-use on the GWU campus Plan, for the years 1985 through 2000.

Antenna Impacts

The fifteen antennas proposed for installation on the roof of the proposed PUD range in size and scope from standard television and radio receiving antennas through microwave relay antennas to 20-foot diameter earth-station satellite dishes. Eight of the antennas are receive only, while the remaining seven are for both transmitting and receiving. The receive only antennas do not radiate energy and generate no electromagnetic emissions. The applicant's consultant report, dated November 17, 1993, prepared by Communications Engineering, Inc., addresses environmental concerns and makes the following conclusion:

> Microwave signals from the antennas mounted on the roof will travel in a directed beam from a transmitting antenna to a receiving antenna or satellite. If any structure blocks this beam, the transmission will be lost. Therefore, these antennas will be aimed well above homes and other buildings to insure a clear transmission path...An individual would have to stand on the roof, directly in front of the antenna for a significant time in order to be exposed to electromagnetic emission levels that might be considered harmful. The roof of this building will not be accessible to the general public...In conclusion, the antennas proposed for the new WETA/GWU building are safe and do not threaten the public health in any way.

Transmitting antennas must be licensed by the Federal Communications Commission (FCC). The FCC has adopted the American National Standards Institute (ANSI) recommendations for safe operational limits. Antennas used for transmitting must meet the requirements established by the FCC and require their approval prior to installation. Although an application has not yet been filed, the applicant indicates their intention to file with the FCC after the proposed PUD has received final approval from the Zoning Commission. The FCC's review is limited to the size and intensity of the proposed antennas and any future technological changes to these antennas

will need to be further evaluated. Staff has requested FCC representatives to address the cumulative impacts of such antennas at the Commission meeting.

Historic Preservation

The proposed PUD is located approximately four blocks east of the Foggy Bottom Historic District, which is listed in the National Register of Historic Places (National Register). It is in the immediate vicinity of the Red Lion Row and the Lisner Auditorium. The Red Lion Row, located on the south side of the 2000 block of I Street is a designated landmark listed in the National Register which is now integrated into a larger more contemporary designed PUD. The Lisner Auditorium is listed in the District of Columbia Inventory of Historic Sites, but is not listed nor has it been determined eligible for listing on the National Register. The District of Columbia Inventory of Historic Site also lists a number of properties, in the area of the proposed PUD, that are locally designated but are not listed nor have been determined eligible for listing in the National Register

The PUD will tower above most of the historic properties in the area. Nevertheless, its architectural detailing and horizontal banding reduce its perceived height and visually relate with the historic properties. Subsequently, the proposed PUD would not adversely effect any properties that are listed or considered eligible for listing in the National Register.

Comprehensive Plan for the National Capital

The Comprehensive Plan's Generalized Land Use Objectives Map designates the site and the greater portion of Square 101 for institutional use. The proposed PUD would be located in close proximity to Pennsylvania Avenue, N.W., and U. S. Reservations 28 and 29 (James Monroe Park), and U. S. Reservations 30 and 31 (Edward R. Murrow Park). The Preservation and Historic Features element of the Comprehensive Plan designates Pennsylvania Avenue as a Special Street. The following policy on Special Streets from this element applies:

> The exceptional width and openness of the street space along Special Streets should be retained where this quality exists. Street views or vistas should not be obscured and movement should not be impaired by structures or signs within the public rights-of-way.

The James Monroe and Edward R. Murrow Parks are designated as Decorative Parks in the Parks, Open Space and Natural Features element. The following policy applies:

> The Decorative Parks (squares, circles and triangles) associated with the L'Enfant City should be protected and enhanced generally as green landscaped areas, providing oases for pedestrians and settings for monuments, memorials and art.

An antenna tower and large satellite dishes will be required to serve the broadcast function of the proposed PUD. The antenna structure will extend approximately 41.5 feet above the roof of the building. The following element in the Preservation and Historic Features applies:

Continue to protect the historic horizontal character of the National Capital by limiting building heights in accordance with An Act to regulate the height of buildings in the District of Columbia, approved June 1, 1910.

Federal Interest

The identified Federal interests in the proposed PUD and related map amendment are the impacts on views and vistas from Pennsylvania Avenue, a designated Special Street, and the U. S. Reservations 28, 29, 30 and 31 that line Pennsylvania Avenue, in the vicinity of the proposed PUD. The identified Federal interests also assess the proposal's compliance with the Height Act of 1910.

Visual Impacts from Pennsylvania Avenue and Related U. S. Reservations. At its maximum height , which includes the height of the penthouses, the proposed PUD measures 119 feet. Most of the buildings along H Street and Pennsylvania Avenue, within a two to three block radius of the site, range in height from 90 to 130 feet. The Red Lion Row PUD located in the northern end of Square 101, which fronts on Pennsylvania Avenue and the James Monroe Park measures approximately 130 feet high. Given the height and bulk of existing development in the surrounding area, views of the proposed PUD's principal mass will not be visible from sites along Pennsylvania Avenue.

Visual Impact of the Proposed Tower. The proposed PUD includes a tower-like feature that has been designed as an architectural embellishment and enables the function of ten rooftop antennas. At its highest point, the tower reaches elevation 207.38 feet, approximately 142 feet above the measuring point and 41.5 feet above the roof at this location. Sightline studies determine that the proposed tower will be barely visible from Pennsylvania Avenue, the James Monroe and Edward R. Murrow Parks, identified Federal interests. The qualities that define this Special Street, these Decorative Parks and their related views, therefore, will not be adversely effect by the proposed tower.

The Preservation and Historic Features element of the Comprehensive Plan contains specific reference to the protection of the historic horizontal character of the National Capital, in accordance with the Act of 1910. With respect to the Act of 1910 and the zoning laws that regulate the height of buildings in the District of Columbia, there is no prescribed limit on the height of spires and towers that serve as architectural embellishments.

Height Act of 1910 - Building Height Requirements. The Height Act of 1910 which regulates the height of building in the District of Columbia establishes that the maximum height of the proposed PUD is 110 feet, exclusive of the height of penthouses for mechanical and electrical equipment. The determination of this height is based on the calculated total width of the streets on which the PUD fronts plus twenty (20) feet. In this case, the proposed PUD fronts on 21st and H Streets, and both have street right-of-way widths of 90 feet. The height of the proposed roof above the measuring point is approximately 101 feet. The height of the penthouse is 18' - 6". This height does not exceed the maximum allowable building height permitted by the Act of 1910.

The roof of the studios located in the northwest portion of the proposed PUD measures approximately 117' high, from the proposed measuring point. This height is above the maximum allowable building height permitted by the Act of 1910.

Height Act of 1910 - Rooftop Setback Requirements. The Height Act of 1910 and the zoning regulations require roof structures to be setback at a 1:1 ratio from the edge of the roof (at exterior walls). The penthouses meet the setback requirements on the 21st and H Street frontages, but are flush with the edge of the proposed building on the north and east sides. Staff has been advised by the District of Columbia Zoning Administrator that it has been the Zoning Commission's long-standing interpretation of the Act that the term "exterior walls" applies to those walls which front on a street. Based on the long-standing interpretation of this term "exterior walls", the Zoning Commission has determined that the setback requirements for the north and east walls internal to the square do not apply.

Staff disagrees with this interpretation and contends that the proposed PUD has four exterior walls. The south and west exterior walls front on 21st and H Street. The north exterior wall is internal to the square and faces the rear of the Red Lion Row PUD and is separated by a common service area, approximately 52-feet wide. The east exterior wall, also internal to the square, abuts a three-story townhouse. It is the staff's conclusion that since the building has four exterior walls, the penthouse must be setback from all walls in accordance with the Height Act of 1910 and the zoning regulations. Any other departure creates a building inconsistent with the Comprehensive Plan policy to protect the historic horizontal character of the National Capital.

In the staffs experience (since 1967), all public and private buildings reviewed by the Commission, that required penthouses, have had those penthouses setback from all exterior walls in accordance with the Height Act.

Upon consideration of all identified Federal interests, staff finds that Guideline No. 1, as it relates to the penthouse setbacks, is not in keeping with the Commission's interpretation of the intent of the 1910 Height Act requiring roof structures, which include penthouses, to be setback from exterior walls. For this reason, the proposed map amendment and related Planned Unit Development could adversely affect the Federal Establishment or other Federal interests in the National Capital and would be inconsistent with the Comprehensive Plan for the National Capital.

NATIONAL CAPITAL PLANNING COMMISSION
801 PENNSYLVANIA AVENUE, N.W., SUITE 301
WASHINGTON, D.C. 20576

February 17, 1994

Note to George Oberlander

Re: George Washington University/WETA Zoning Commission Case No. 93-9C

You asked me to look into an issue raised in the above case regarding the setback requirements of a roof structure. Specifically, in pleadings filed on behalf of Advisory Neighborhood Commission 2A (ANC 2A) by the law firm of Driscoll & Draude, it is stated that "the elevator penthouse and the 'studio mechanical penthouse' on the proposed building are not setback at all on the east side of the building (SHT. F-17 and F-18; 10/28 TR. 32-33), and, therefore, violate the setback requirements of the Height Act." ADVISORY NEIGHBORHOOD COMMISSION 2A'S RESPONSE TO POST-HEARING SUBMISSIONS, BEFORE THE ZONING COMMISSION OF THE DISTRICT OF COLUMBIA, January 3, 1994, at p. 4. November 22, 1993, at page 3. In addition to this issue, ANC 2A also raises the issue of whether the studio penthouse falls within the exception in the Height Act.

> The Height Act does not include an exception for penthouses containing mechanical equipment. The only penthouses allowed above the otherwise applicable height limit under the Height Act are 'penthouses over elevator shafts' (D.C. Code 5-405(h)). The structure over the studios is not an elevator penthouse.

ADVISORY NEIGHBORHOOD COMMISSION 2A'S RESPONSE TO POST-HEARING SUBMISSIONS, BEFORE THE ZONING COMMISSION OF THE DISTRICT OF COLUMBIA, January 3, 1994, at page 3. After reviewing the two issues, I have concluded the following.

I. Setback

The Height Act references are to D.C. Code section 5-405(h) which allows "penthouses over elevator shafts" to be erected above the otherwise applicable height limits "provided, that penthouses. .shall be set back from the *exterior walls* distances equal to their respective heights above the adjacent roof." (Emphasis added) The main penthouse (which contains the elevator equipment) is not set back on the east side of the building. (D.C. Zoning Regulations also require set-backs; however, I do

not believe that the Commission has any Federal interest in whether a local agency permits exceptions to its own regulations as long as the Height Act is not implicated.)

The Building Height Act of 1899 provided an exception to height limits for "spires, towers and domes." The Act of 1910 added other rooftop structures, including elevator penthouses, and, without explanation, added the current requirement for setbacks. There appears to be no legislative history further interpreting the meaning of "exterior walls."

In a letter dated November 24, 1993, addressed to Madeliene H. Robinson, Acting Director, Office of Zoning, Joseph F. Bottner, Jr., Zoning Administrator, states that:

> The setback requirements of a roof structure under provisions of the Act of 1910 have always been interpreted by the Zoning Division as being required to set back from the property line which adjoins a street. The setback of a roof structure under the Zoning Regulations now requires roof structures to set back from the exterior walls. Consequently, it is my opinion that the Zoning Commission, under a Planned Unit Review, does have authority to waive the setback of a roof structure from a property line which does not adjoin a street.

I spoke with Mr. Bottner who told me that although he had no written authority for his position, he knew from his own experience that, at least since the 1960's, the Zoning Commission has consistently taken the position that the phrase "exterior walls," in the Height Act, refers to exterior walls adjoining a street. He further told me that there are many buildings in the District of Columbia on which elevator penthouses are not set back from exterior walls which do not face streets but rather face adjoining buildings, alleys, or courtyards.

I also spoke with Peter Maszak in the Corporation Counsel's Office whose responsibility is to advise the Zoning Administrator. He told me that although he was unaware of any written Corporation Counsel opinion, he had told Mr. Bottner that he was prepared to accept the Zoning Administrator's position based upon long standing administrative interpretation. (Wayne Quinn had told me that he had seen a Corporation Counsel opinion from approximately 1959 interpreting the setback provision but he can no longer find it. No one else seems to know where that opinion is either.)

I also received a package of materials from Wayne Quinn, attorney for the applicants, The George Washington University and the Greater Washington Education Television Association. (WETA) In addition to reiterating the position that the Zoning Commission

has consistently interpreted exterior walls to mean exterior walls facing a street, Mr. Quinn enclosed a Report of the Zoning Advisory Council on Proposed Amendments to the Zoning Regulations, dated July 16, 1958. (The Zoning Advisory Council at that time included a Commission official, William F. McIntosh). The Council was considering proposed regulations relating to the location of elevator and stairway penthouses and requiring setbacks on all sides. The report notes that:

> Set back provisions of such appurtenances are contained in the Act of June 1, 1910, (36 Sat. 452), regulating the height of buildings in the District of Columbia. The Act provides that when above the limit of height, a penthouse, etc., shall be set back from the exterior walls of the building on which it is located a distance equal to its height above the adjacent roof. Under the regulations recently repealed, the application of this provision was construed by the Zoning Commission to mean exterior walls from the street sides only, an interpretation considered in harmony with the Act and not in violation thereof. . . [T]he required set back of penthouses from all outside walls of the building does not in many instances serve any useful purpose to protect light and air for adjoining properties.

A copy of this entire report is attached.

In their pleadings, ANC 2A presents no other argument for the all around setback requirement other than the plain words of the Act itself.

Based on the above, it appears that, for at least forty years, and probably longer, those local entities with authority to administer zoning provisions in the District of Columbia have interpreted the Height Act setback provisions to apply only to exterior walls facing the street. A court of law, in interpreting a statute, will give great deference to long standing administrative interpretations of that law by the body which has responsibility for administering that law. In this case, the force of this long standing interpretation may be somewhat undercut by the apparent lack of ambiguity in the statute itself. However, the ultimate question for the Commission is whether it believes that, in the absence of an adverse impact on any other clearly defined Federal interest such as Pennsylvania Avenue, the Federal interest it has consistently found in maintaining the integrity of the Height of Buildings Act is in any way compromised if this interpretation stands.

II. Studio Penthouse

As noted, ANC 2A is also contending that the "studio mechanical penthouse" does not meet the requirements of D.C. Code 5-405(h)

for an exception to the Height Act since it is not an elevator penthouse.

In this regard, there is an opinion of the Corporation Counsel, dated July 27, 1953, in which he concludes that the exception in the Act is not limited to penthouses over elevator shafts.

> I caused a study to be made of the Act approved June 1, 1910, and the legislative history of such Act, with particular reference to the last paragraph of section 5 of such Act, as a result of which I have concluded that the phrase in such paragraph, 'penthouses over elevator shafts,' may be construed to include penthouses over stairways leading to the roof and penthouses *over other utilities necessary in connection with the operation of a building*, but not to include penthouses to be used for residential, office or business purposes. . . (Emphasis added)

OPINION OF VERNON E. WEST, DISTRICT OF COLUMBIA CORPORATION COUNSEL, July 24, 1953, at page 4.

Clearly, the Act of 1910 could not be presumed to enumerate every type of roof structure containing mechanical equipment necessary to operate a building in light of changing technology. In the particular situation at issue, the Corporation Counsel was considering a penthouse to house air conditioning and heating equipment and his opinion was based, in large part, upon construction requirements which could not have been foreseen in 1910. By the same token, therefore, an argument could be constructed to the effect that the Congress of 1910 could not have foreseen the need for the type of mechanical equipment needed in a building constructed for broadcasting purposes. (In the documents I have been given, ANC 2A does not raise the issue of whether the "roof" as described in the revised plans is a genuine "roof" under the statute.)

Again, if the issue is raised, the Commission may want to consider whether any harm is done to the Federal interest in the Height Act by an interpretation that the Studio Penthouse is a Penthouse covered by 405(h).

Please let me know if you need any further information.

Sandra Shapiro

cc: Mr. Griffith
Mr. Gresham
Ms. Stephenson