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October 19, 2007

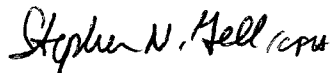
Hon. Ruthanne Miller, Chairperson
Board of Zoning Adjustment of the
District of Columbia
441 Fourth Street, NW Suite 210
Washington, DC 20001

Re: BZA Appeal No. 17667 (2175 K Street, N.W.)

Dear Chairperson Miller:

On behalf of the West End Place Condominium Association (the "Association"), Florence Harmon and Thomas Scholz, and Advisory Neighborhood Commission 2A, who are parties in opposition in this case, we submit the attached post-hearing memorandum of law, which has been drafted in the form of a proposed order.

Very truly yours,



Stephen N. Gell
Attorney for Florence Harmon
and Thomas Scholz



Cornish F. Hitchcock
Attorney for West End Place
Condominium Association and
Advisory Neighborhood Commission 2A

cc: John T. Epting, Esq.
David M. Avitabile, Esq.
Matthew LeGrant
Dennis Taylor, Esq.
Joy Howell
John Ridgely Shuman
David Jenks
Michael D. Wascom

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17667

EXHIBIT NO. 33

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Board of Zoning Adjustment
District of Columbia
CASE NO. 17667
EXHIBIT NO. 33

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**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

**In Re: Appeal of Minshall Stewart Properties, LLC of Zoning Administrator's
Determination Regarding Lot 83 in Square 73 (2175 K Street, NW)**

BZA Appeal No. 17667

**POST-HEARING MEMORANDUM OF WEST END PLACE CONDOMINIUM
ASSOCIATION, FLORENCE HARMON AND TOM SCHOLZ AND ADVISORY
NEIGHBORHOOD COMMISSION 2A**

October 19, 2007

This matter arose when Appellant Minshall Stewart Properties, LLC decided to forego a variance application that it had filed in order construct additional stories on top of its office building at 2175 K Street, N.W. (the "Office Building") and to proceed instead as a matter of right. The additional development was proposed under the Transfer of Development Rights ("TDR") regulations (11 DCMR Ch. 17), which permit additional density in designated "receiving zones." Appellant's change of position rested on the notion that the Office Building was, for zoning purposes, part of a single building along with the condominium building at 1099 22nd Street, N.W. (the "Condominium Building"). However, the Zoning Administrator, by a letter dated April 20, 2007, concluded that there were two buildings because there was not an above-grade "communication," as is required under the definition of "building" in the Zoning Regulations. That determination, affirmed by the Acting Zoning Administrator, is the subject of this appeal.

PRELIMINARY MATTERS

Status of Proceedings

Minshall Stewart Properties, LLC filed this appeal with the Board of Zoning Adjustment (the "Board" or "BZA") on May 8, 2007, challenging the Zoning Administrator's decision dated April 20, 2007, that the proposed development at 2175 K Street, N.W. should not be given matter-of-right status because for the purposes of Section 1709.20 (11 DCMR §1709.20), two buildings exist. West End Place Condominium Association, Florence Harmon, and Tom Scholz intervened as parties in opposition to the Appeal ("Intervenors"). The ANC 2A also filed a letter of protest to the Appeal. At the hearing on October 9, 2007 on this Appeal, the Board heard testimony from the Acting Zoning Administrator, Matthew LeGrant, Intervenors' expert, William Hasselman, and Intervenor Florence Harmon. For the reasons set forth below, this Board should rule that the proposed development at 2175 K Street, N.W. should not be given matter-of-right status. This Board should rule that the Zoning Administrator properly determined that the office building and residential building at issue are two separate buildings. Therefore, court, loading, and setback controls, are applicable and variances must be sought in order to develop the property under the Applicant's current plans.

Parties

Appellant is Minshall Stewart Properties, LLC (the "Appellant"). In December 2006, Appellant filed plans with the District to add three stories and an elevator penthouse to the office building at 2175 K Street, N.W. using TDR's, seeking variances from court, loading, and setback controls. See Application in BZA Case No. 17594. In April 2007, Appellant opted instead to pursue a legal argument that such variances are not necessary because the Condominium Building and Office Building are "one" building for zoning purposes, and therefore Appellant may build upward as a matter of right.

Intervenors are residents of the adjacent Condominium Building: the West End Place Condominium Association, Florence Harmon, and Tom Scholz. Intervenors argue that the Zoning Administrator correctly determined that the Condominium Building and Office Building are "two buildings" and that any modification of the structure would require variances if Appellant was seeking to proceed under Section 1709.20, which pertains to TDRs.

At the hearing in this matter, the Acting Zoning Administrator, Matthew LeGrant supported the original Zoning Administrator's decision that the Condominium Building and Office Building were two separate buildings for the purposes of Section 1709.20.

ANC 2A, as the affected ANC, was automatically a party in this appeal. In a letter dated October 9, 2007, the ANC advised the Board of its unanimous resolution dated September 19, 2007 to support dismissal of the appeal and support of the Zoning Administrator's determination and Intervenors' position that the Condominium Building and Office Building are two buildings. The Office of Advisory Neighborhood Commissions has confirmed that ANC 2A gave proper notice of the meeting in which passed its resolution reflected in the letter dated October 18, 2007 from Gottlieb Simon, attached hereto as Exhibit A. See also Letter of Asher Corson, Chairperson of ANC 2A dated October 19, 2007, and letter of Florence Harmon, ANC 2A 06, dated October 9, 2007, attached hereto as Exhibit B and C, respectively. Thus, support of Intervenors' position by ANC 2A should be given "great weight."

FINDINGS OF FACT

1. In this case, two different Zoning Administrators visited the Condominium Building and Office Building on multiple occasions and concluded that two "buildings" exist because there is no above ground connection. Both the Zoning Administrator's determination and the Acting Zoning Administrator's testimony asserted that under the Zoning Regulations definition of "building," two buildings exist. The Board qualified Intervenors' witness, Mr. William Hasselman, as an expert in construction. Both he and Intervenor Florence Harmon testified that the buildings exist and are operated as two buildings. The Condominium Building

and Office Building are separated by an air shaft. Their utilities elevators, HVAC, and other elements operate quite independently.

2. Appellant's argument centers on the fact that the developer in 1980 had to seek zoning relief to build both buildings. That relief (which the Board granted) consisted of an exception to permit a single garage to serve both buildings and a variance to allow separate roof structures to exist on both buildings. The question of whether this was one building or two was not an issue the Board was asked to adjudicate. The only "connection" cited to the Board was an oral statement from the applicant's architect that the plans revealed a rear third floor balcony on the apartment building that would cross the zoning line.¹ The 1980 Board did not address the issue of a "connection" or "communication" in its decision. No where in the Record of the 1980 BZA proceeding was there authority cited for the position that this rear balcony constituted a connection or communication under the allegedly then-applicable interpretation of Section 199.²
3. There is no above-ground connection or communication that provides access between the two buildings. Moreover, none of the elements of the buildings that Appellant alleges are connections qualify as such, as detailed below:
 - a. The third floor rear balcony extension shown on the 1980 plans was never built, as shown by Intervenors' photographic exhibits and testified to by Mr. Hasselman.
 - b. The "connection" described in the 1980 BZA Transcript (third floor of the front of the Condo on 22nd Street)³ was never built and was never referred to in the 1980 BZA Order⁴;
 - c. The door from the underground Condominium parking garage to the Office Building is an emergency fire escape door and is not above-grade. The grade from which height is determined is on K Street, and the fire doors are two floors below the K Street grade and a floor below the entrance to the Condominium Building at 1099 22nd Street. Intervenors' Exhibits 14, 15, and 16 accurately depict this fact. In addition, the Board heard expert testimony from Intervenors' expert on construction, William Hasselman, and from Intervenor Florence Harmon that this entrance is below grade. The Zoning Administrator's 4/20/07 written determination also noted that this alleged connection is below grade, below ground and below the first floor of the Condominium Building.

¹ See Transcript dated January 23, 1980 in Application 13148 of Thaddeus A. Lindner ("1980 BZA Transcript").

² See Application of Thaddeus A. Lindner, BZA Order No. 13148 (February 2, 1980)("1980 BZA Order").

³ See 1980 BZA Transcript.

⁴ See 1980 BZA Order.

- d. As noted by Mr. Hasselman in his testimony and as Intervenors' exhibits demonstrate, the two buildings are physically separate because there is a 20 inch separation between the two buildings with vents designed to keep out trash and rodents from the separation of the two buildings. There is no access or communication between or through such vents between the two buildings.
 - e. Figure 14 of Intervenors' exhibits is simply a plaza or patio adjacent to the Condominium Building that stops at a brick wall of the Office Building. It fails as a connection or communication for several reasons. First, this plaza does not provide an access to the Office Building because there is no opening in the Office Building at that level. Second, it is not covered as required under the prevailing definitions of "connection." See Appeal of Daniel Serwer and James W. McBride, BZA Case No. 16646 (February 20, 2001). Third, it is on a level below the level of the first floor of the Condominium Building and two floors below the first floor of the Office Building and one story below the grade level of the Condominium entrance on 22nd Street. Since Appellant has always claimed that the two buildings are a single building that takes its height from the K Street entrance, Appellant cannot now claim that the first floor of this alleged single building is at the level of the entrance of the Condominium Building (a story below the K Street grade). Moreover, the original Zoning Administrator and the Acting Zoning Administrator visited the site several times and never noted this plaza as a connection or communication. Additionally, Appellant has failed to demonstrate that the Board in 1980 viewed this feature of the proposed construction as sufficient to establish that the two buildings were only one building for zoning purposes. The argument of Appellant's counsel, Mr. Epting, that this patio is a "connection" or that he "thinks" he sees a "connection" between the two buildings is not evidence of a connection.
 - f. In addition, Appellant underscored the weakness of its conviction that the plaza was the "connection" by omitting it from previous written submissions, by failing to point it out to the various Zoning Administrators when they visited the building together, and by testifying at the hearing that Appellant had no intent to mention this point until rebuttal.
4. Ms. Harmon testified and entered evidence from the 1980s publication "Washington 100 Best Addresses" that notes the complete separation of the Office Building and Condominium Building:

The office building section is clearly demarcated because it sets well back from the façade of Washington Park Tower [now the Condominium Building], which borders the sidewalk. The offices are completely separated from the apartments; there are no internal connections, and each building has its own entrance, lobby, and elevator.

5. Ms. Harmon testified that the two buildings were separately constructed in the 1980s.
6. In his letter dated April 20, 2007, the former Zoning Administrator, Bill Crews, determined that “for the purposes of the applicability of section 1709.20 ... [2175 K St. NW and West End Place] are two buildings ...” He stated that “[w]hile the two *buildings* were permitted on one building permit, this is not controlling.” He went on to explain that “the controlling aspect is the definition of building which requires an above grade connection for structures to be considered one building. These two buildings have no above grade communication. The alleged communication that you [Appellant] showed me is below grade and below the main floor of both buildings contrary to your representation.” He added that “either building could be razed without affecting the other.”
7. Mr. Crews further stated that “Section 1709.20 was adopted after these buildings were built. I believe it is exactly this situation that the Zoning Commission was addressing in adopting Section 1709.20.”
8. Finally, in his April 20, 2007 determination, Mr. Crews found that “Section 101 of the Zoning Regulations require me to consider the provisions of the regulations to the minimum requirements and mandate a strict interpretation of the regulations.”
9. The Acting Zoning Administrator concurred in all of Mr. Crews’ findings in the April 20, 2007 determinations.

CONCLUSIONS OF LAW

1. The burden of proof is on Appellant to demonstrate that the Zoning Administrator’s determination should be reversed. See *Appeal of National Center on Institutions and Alternatives*, BZA Order No. 13479 (June 3, 1981).
2. The Board is obliged to uphold the determination of the Zoning Administrator if it can find that the Zoning Administrator “correctly applied the Regulation in making the decision,” “considered” the applicable regulations and laws, and there is a “rational conclusion and evidence” for the Zoning Administrator’s determination. *Watergate West, Inc. v. D.C. Board of Zoning Adjustment*, 815 A.2d 762, 765 (D.C. 2003).⁵ That standard is more than met here.

⁵ Moreover if the BZA’s decision to uphold the Zoning Administrator’s conclusion is supported by substantial evidence, then the D.C. Court of Appeals “must affirm its actions even though we might have reached another result, for it is not the function or authority of the reviewing court to superimpose its opinion upon the legitimate action of an administrative agency.” *Association for Preservation of 1700 Block of N Street, N.W. v. D.C. Board of Zoning Adjustment*, 384 A.2d 668, 670-71 (D.C. 1978), quoting, *Coakley v. Police and Firemen’s Retirement and Relief Board*, 370 A.2d 1345, 1347-48 (D.C. 1977).

3. The Zoning Administrator in this case concluded that that “for the purposes of the applicability of section 1709.20 [in the TDR regulations] ... [2175 K St. NW and West End Place] are two buildings for the purposes of section 1709.20.” Moreover, “[w]hile the two *buildings* were permitted on one building permit, this is not controlling.” He went on to explain that “the controlling aspect is the definition of building which requires an above grade connection for structures to be considered one building. These two buildings have no above grade communication. The alleged communication that you [the Appellant] showed me is below grade and below the main floor of both buildings contrary to your representation.” In addition “either building could be razed without affecting the other.”
4. Ample evidence in the present case, as set forth in the Findings of Fact, supports the Zoning Administrator’s decision that two buildings exist because there is no above-grade connection or communication. Moreover, the two buildings have always operated and have been historically treated as two buildings. The Office Building was separately constructed before the Condominium Building and either building could be razed without affecting the other.
5. Since 1979, for two structures to be a single “building,” Section 199 of the Zoning Regulations (11 DCMR §199) has required that there be an above-ground covered “connection” providing access between the two structures:

A structure having a roof supported by columns or walls for the shelter, support, or enclosure of persons, animals, or chattel. When separated from the ground up or from the lowest floor up, each portion shall be deemed a separate building, except as provided elsewhere in this title. The existence of communication between separate portions of a structure below the main floor shall not be construed as making the structure one (1) building.
6. The above interpretation of “building,” which the Zoning Administrator adopted, is spelled out in a number of Zoning Commission and BZA decisions. See DOT Headquarters Building in the Southwest Federal Center, Zoning Commission Case No. 03-05C (January 12, 2004); Rodut Associates of DC, LP, Appeal No. 17430 (March 21, 2006); Application of LDJA Limited Partnership (“LDJA”), BZA Order No. 13956 (June 1, 1983); see also Appeal of Daniel Serwer and James W. McBride BZA Case No. 16646 (February 20, 2001), citing Goto v. District of Columbia Board of Zoning Adjustment, 423 A.2d 917, 927 n.1 (D.C. 1980). Thus, as early as 1983 (after the Goto opinion), the BZA required that an above-grade covered connection providing access in order for two structures to be one “building” within the meaning of the zoning regulations. Moreover, as early as 1983, the BZA found that one “structure,” as opposed to one “building,” may

exist on one record lot for zoning purposes. No such communication in this present case exists.

7. It is a basic principle of law that an agency must apply the law in effect at the time the agency renders its decision, absent “manifest injustice.” Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 281-82 (1969); see also Bradley v. School Board of the City of Richmond, 416 U.S. 696, 711 (1974). Our Court of Appeals has referred to this principle as “so strong” that it might be necessary to “set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law.” Scholtz Partnership v. District of Columbia Rental Accommodations Board, 427 A.2d 905 (D.C. 1981), quoting Durham, 393 U.S. at 282.
8. The need for consistency in applying the current zoning rules and regulations (and not application of a 1980 standard) is particularly compelling here, given that the Appellant is proposing a development under TDR regulations. Section 1709.20 was adopted after these two buildings were built. The 1980 BZA could not have contemplated the intervening regulations enacted in 1990, which permitted the use of TDR's.
9. Matter of right development in the instant case under the TDR regulations is incompatible with the decision of the Board in the 1980 BZA Order. Application of that legal principles just cited requires deciding whether there is a “communication” under current interpretations of the law, not a 1980 view, and the Zoning Administrator correctly decided there is no such connection between the two buildings. There can hardly be claimed that requiring Appellant to seek variances from the TDR regulations would be “manifest injustice.” The Appellant initially filed for variance relief, and that case would have been heard six months ago had Appellant not reversed course at the last minute and sought to proceed as a matter of right.
10. Application of the Zoning Regulations as presently interpreted is appropriate for related reasons. The Zoning Administrator stated that Section 101 (11 DCMR § 101) of the Zoning Regulations requires him to “consider the provisions of the regulations to the minimum requirements and mandate a strict interpretation of the regulations.” In this connection, he noted that Section 1709.20 was adopted after the two buildings were constructed and that viewing the structures as two buildings would be consistent with that provision.
11. Specifically, the “minimum requirements” to which Section 101 refers to are those “adopted for the promotion of the public health, safety, morals, convenience, ... general welfare to:

(a) **Provide adequate light and air;**

- (b) **Prevent undue concentration of populations** and the overcrowding of land; and
- (c) **Provide** distribution of population, business and industry, and **use of land that will tend to create conditions favorable to transportation, protection of property, civic activity, and recreational, educational, and cultural opportunities**; and that will tend to further economy and efficiency in the supply of public services.” (*Emphasis supplied*).

To permit the Applicant matter-of-right development in this case would thwart the purpose of Section 101.

- 12. Therefore, Section 1709.20’s use of the term “building” and this Board’s present day application of the definition of “building” in Section 199 to require an above-grade communication between the Office Building and Condominium Building are supported by the policy set forth within Section 101’s requirements.
- 13. None of Appellant’s other arguments is persuasive. Although the original developer of the Office Building and Condominium Building may have pulled one permit and the two buildings are located on a single record lot, this Board should uphold the Zoning Administrator’s determination because a different situation exists today. Section 1709.20 was adopted after these two buildings were built. The 1980 BZA could not have contemplated the intervening legislation in 1990. It is important to remember that the Downtown Development District, the Receiving Zones and TDRs postdate the BZA approval that gave rise to this project involving the two buildings on a single record lot. Accordingly, it is irrelevant whether the original developer of the Office Building and Condominium Building pulled one permit to locate the two buildings on a single record lot because a different situation exists today because of intervening legislation.
- 14. In now determining that two buildings exist for the purposes of Section 1709.20, this Board is preserving the original intent of the 1980 BZA that sought to protect the residential building from the harmful effects of commercial development. The 1980 BZA thought it essential to preserve the residential character, light and air space, and privacy of the Condominium Building so as to protect the property rights of residential owners. For instance, the 1980 BZA Order approved separate penthouses to service separate elevator cores of the two buildings. The 1980 BZA also made note of the fact that more than five feet of unnecessary height and an additional ten feet of unnecessary wall space from the Office Building penthouse hanging over the Condominium Building roof terraces would have a “negative aesthetic impact and increase shadows to the detriment of the proposed roof garden use.” See ¶ 18 of 1980 BZA Order. Given the extraordinary care the BZA took to preserve the light, air, ambiance, and privacy of the condominium

building, it is unlikely that the 1980 BZA would have ignored the potential for harm if TDR's had existed at the time.

15. It would thus be an anomaly to read the regulations and the 1980 BZA order as Appellant proposes. The result would be to use a 1980 decision in order to allow development under rules that were enacted a decade later and in a manner that would be inconsistent with the reasoning of that 1980 decision. Appellant must take the bitter with the sweet, *i.e.*, the obligations imposed under current rules if it seeks to obtain the benefits available under current rules.
16. Accordingly, this Board concludes that there are no connections between the Condominium and Office Buildings that meet the regulatory requirements. There is no connection at the third floor balconies on the 22nd Street side or in the rear of the two buildings since such connections were not built, even though a rear connection may be shown on the plans. Access from one building to the other is not possible, and thus the Office Building and Condominium Building cannot be "one" building under Section 199. See Appeal of Daniel Serwer and James W. McBride, BZA Case No. 16646 (February 20, 2001). This Board further concludes that the so-called connection at the plaza level fails because it is two-stories below the grade on K Street, and one story below the grade level of the Condominium entrance on 22nd Street. Moreover, this plaza does not provide any access from one building to the other since this uncovered plaza of the Condominium Building meets a brick wall of the Office Building. The basement fire doors at the loading dock are too far below the level of the first floor to be considered a connection under the Zoning Regulation's definition of building. Likewise, the vents between 20 inch separation between the Condominium Building and Office Building are not connections or communications between the two buildings but are simply designed to keep out trash and rodents from the space separating the two buildings.
17. Even under the purported 1980 standards, it is unclear whether the 1980 BZA determined that "one" building existed for the purposes of application of the TDR regulations. The 1980 BZA Order and Record does not specify whether the 1980 BZA required a connection to exist between the Office Building and Condominium Building for both buildings to be on one permit for one record lot. While the 1980 BZA Transcript refers to one building in a few places, it also refers to the project as two buildings, two structures, and one "project." Moreover, Ms. Harmon testified that the record from the 1980 BZA Proceeding is incomplete. Most significantly, the 1980 BZA Order makes no mention of a requirement that the Office Building and Condominium Building be one "building" for the purposes of a single record lot zoning. In addition, Section 2516.1 of the Zoning Regulations permits two or more principal buildings to be erected on a single lot if approved by the BZA as a special exception under Section 3104 (11 DCMR §3104). The actions of the 1980 BZA could be read to provide such a special exception.

18. Even if the 1980 BZA did consider the proposed building as one building for zoning purposes, the current Board is under no obligation to follow suit. The former BZA acted on the facts with which it was presented at the time. We need not assume a mistake had been made to grant that the current Board can find differently given (1) the changed circumstances, (2) a different factual base, and (3) the subsequent modification of the regulations. The 1980 BZA may not have considered this one building if it had suspected that three more stories might be added. See Draude v. DC Board of Zoning Adjustment, 527 A.2d 1242, 1253 (D.C. 1987)(“Board may “apply different standards to different situations if each standard is consistent with the regulation and the situations are different in a way that makes it reasonable to use different criteria.”). Given the Board’s expressed concern for the light, air, and views available to the condominium owners, it is almost certain that it would have added conditions to protect the condominiums.
19. Appellant makes much of the Condominium Building’s dependence on the single building theory to maintain the height it enjoys. This is a specious argument. Appellant knows that after 25 years, it is unlikely that the Zoning Administrator would pursue action against the Condominium Building for exceeding the 90 foot height restriction. Laches, collateral estoppel, statute of limitations could all be valid defenses against such an action. The Acting Zoning Administrator offered his opinion that no such enforcement action was likely. Should an action be maintained successfully, however, the current BZA could retroactively read a variance into the previous action or grant one of its own.
20. Contrary to Appellant’s contention, a certificate of occupancy cannot be direct evidence of compliance with the original building plans in this case. As stated, the record is clear as to what connection the BZA found in justification of the alleged one-building treatment. The most likely connection, a balcony at the third floor, level was never built. Moreover, the BZA does not inspect buildings once built for compliance with its order. That is the function of the Zoning Administrator. The Board cannot be required to maintain a conclusion as to the one building if it later learns the plans were altered by the developer and the noncompliance was missed by the inspector. It would be a cruel twist not only to force the Board to swallow the noncompliance, but also to compound the noncompliance by granting an additional three stories on the Office Building, especially when the 1980 Board was so concerned about the height of the office building’s effect on the Condominium Building.
21. It is not clear that Appellant is an “aggrieved person” within the meaning of D.C. Code Section 5-420 and DC Zoning Regulations Section 8102.1. To be able to argue that one building exists, the “aggrieved person” would have to be the owner of the one building, which Appellant is not. See e.g., Hazdra Homes, Inc., v. County of DuPage, 27 Ill App. 3d 685, 326 N.E.2d 561 (2d Dist. 1975), Chicago Title, and Trust Co v. The Village of Mount Prospect, 63 Ill. App. 3d 223, 20 Ill. Dec.

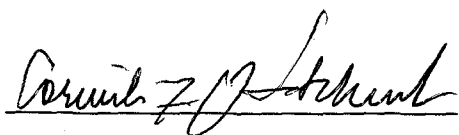
68, 379 N.E. 2d 901 (1st Dist. 1978)(standing to challenge zoning ordinances requires demonstration that the plaintiff has title to, or possessory interest in, the whole of the property to which the challenge applies).

22. Finally, the two roof structures that currently exist on the buildings were approved as a special exception in 1980. By all measure, even if the Board concludes that this is a single building, it is a non-conforming building. Under Section 11 DCMR § 2001.3 (b)(2), no nonconformity may be expanded without a variance. Building three more stories is such an expansion and may not be permitted without a variance.

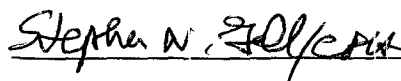
Conclusion

Accordingly, Appellant has failed to carry its burden, and the appeal from the Zoning Administrator's determination is denied.

Respectfully submitted,



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(202) 489-4813
Counsel for Advisory Neighborhood
Commission 2A and
West End Place Condominium



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Counsel for Florence Harmon (unit 1011),
and Tom Scholz (unit 1010), 1099
22nd Street N.W.

Association

CERTIFICATE OF SERVICE

I hereby certify that copies of this post-hearing memorandum were this 19th day of October 2007 served electronically upon:

John T. Epting
David Avitabile
Pillsbury Winthrop Shaw Pittman
2300 N Street, NW
Washington, DC 20037

Dennis Taylor
Assistant Attorney General
941 North Capitol Street, NE, Suite 9400
Washington, DC 20002

Matthew LeGrant
Acting Zoning Administrator
941 North Capitol Street, NW
Washington, DC 20002

with courtesy copies sent by first-class mail, postage prepaid upon:

John Ridgely Shuman
1004 22nd Street, NW
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David Jenks
1008 22nd Street, NW
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1010 22nd Street, NW
Washington, DC 20037



Cornish F. Hitchcock



Foggy Bottom and West End
Advisory Neighborhood Commission (ANC-2A)

c/o West End Branch Library 725 24th Street, NW Washington, DC 20037 (202) 607-8429

October 9, 2007

Hon. Ruthanne Miller, Chairperson
Board of Zoning Adjustment of
Washington, DC
441 4th Street, NW, Suite 210 South
Washington, DC 20001

Re: Minshall Stewart Properties BZA Appeal No. 17667

Dear Chairperson Miller:

At its regularly scheduled meeting on September 19, 2007, the Foggy Bottom and West End Advisory Neighborhood Commission (ANC 2A) considered the BZA Appeal No. 17667 of Minshall Stewart Properties. With four of the five Commissioners present, a quorum at a duly called public meeting, the following resolution was approved:

The Foggy Bottom and West End Advisory Neighborhood Commission opposes BZA Appeal No. 17667 by Minshall Stewart Properties, in which Minshall Stewart appeals the Zoning Administrator's determination dated April 20, 2007 that two buildings exist.

Minshall Stewart's appeal is a change in its legal theory in which it argues that one building exists in an attempt to build three floors and a rooftop penthouse as a matter of right. For the reasons stated in the ANC 2A letter dated April 8, 2007 (attached hereto), the ANC continues to oppose this proposed development. Community members continue to describe exceptional concerns about reduction of light and air, increased shadows on existing residences, increased traffic and deliveries without capacity for these uses.

As this project is located in my Single Member District, the ANC 2A has appointed me as its representative in this matter. Feel free to contact me at 202-390-4438 on this matter. Additionally, Cornish Hitchcock, Esq. will assist the ANC 2A in this matter and may be contacted at (202) 489-4813.

ON BEHALF OF THE COMMISSION.

Sincerely,

Florence E. Harmon
ANC 2A 06 Commissioner

cc: John Epting

Exhibit A



Foggy Bottom and West End
Advisory Neighborhood Commission (ANC-2A)

c/o West End Branch Library 725 24th Street, NW Washington, DC 20037 (202) 607-8429

April 8, 2007

Geoffrey Griffis, Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Suite 210 South
Washington, DC 20001
Deliver via Facsimile: (202) 727-6072

RE: BZA Application #17594 by Minshall Stewart Properties for a Variance from Court Width Requirements, a Variance from Forty-Five Degree Setback Requirements, and a Variance from Loading Zone Requirements in the C-3-C District Immediately Adjacent to the 5-R-E District at 2175 K Street, NW (Square 73, Lots 883 and 884)

Dear Chairperson Griffis:

At its regularly scheduled meeting on March 21, 2007, the Foggy Bottom and West End Advisory Neighborhood Commission (Commission or ANC 2A) considered BZA Application #17594 by Minshall Stewart Properties for a variances from court width requirements, forty-five degree setback requirements, and loading zone requirements at 2175 K Street, NW. With six of six commissioners in attendance, a quorum at a duly called public meeting, the following motion was unanimously approved:

The Foggy Bottom and West End Advisory Neighborhood Commission opposes BZA Application #17594 by Minshall Stewart Properties for a variances from court width requirements, forty-five degree setback requirements, and loading zone requirements at 2175 K Street, NW.

The reasons for the Commission's unanimous opposition to this application are as follows:

Community members described exceptional concerns about the application. Residents testified that the size and bulk of the proposed development will reduce light and air, increase shadows on existing residences, increase traffic and deliveries without further capacity for these uses, and cause strain on the residential community on the block and the historic landmark across the street. It was also noted by residents that none had received the required notice by the Office of Zoning regarding this application and found out about the proposal, in some cases, only hours prior to ANC consideration of the matter. Finally, residents of the adjoining West End Place Condominium testified that the applicant never contacted nor consulted with the association's board or management in its design phase, despite the fact that the buildings had been designed and built to share amenities, have the same underlying zoning relief, and have shared architectural design and cohesiveness.

ANC 2A notes that the applicant has not demonstrated the practical difficulties or economic hardship to allow for these massive changes. Indeed, the property is currently leased and has active ground floor retail. The property could easily be renovated while maintaining the current height and density. In addition, although the applicant requests relief from the requirement of providing additional loading dock capacity, its representatives conceded that they had done no studies to demonstrate whether the absence of the added loading dock would create access or traffic problems.

The proposal will have immediate and significant impacts on those living in this neighborhood. Many residences in the West End Place will be in almost constant shadows if this application is approved. The historic Schneider's Triangle will lose light. Residents will have an office building towering over residential rooftop decks.

These matters were all closely considered by your predecessors on the BZA. These structures were approved through a zoning relief case in 1980. The BZA order itself notes concern about the heights of the buildings and roof structures. The development of these structures--which helped to cement changes which led to the creation a vibrant, mixed use community in the West End--is listed in publications of the best addresses in the District of Columbia. The buildings collectively step-down from the more dense, taller buildings of the "down-town" commercial area to the more residential areas of the West End, Foggy Bottom, and Georgetown. These buildings exemplify effective planning and good development as they currently exist. The changes in zoning districts within a single block is unusual and splits an area treated as one for the zoning relief granted to allow the West End Place and 2175 K to be built.

The proposed height will be greater than even the controversial development on Square 54, which the Zoning Commission recently reduced in height. This property is clearly visible from Washington Circle, part of the original L'Enfant plan, and should not over-power the historic, residential Schneider's Triangle. Those who live on these blocks moved in and many purchased property under the belief that the development of the area was mature. The unique architecture, design, and relationship of these structures should be respected and the BZA should not retreat from the wise and carefully proscribed decisions of their predecessors.

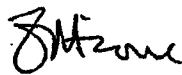
Neighbors have clearly demonstrated that the zoning relief requested for the forty-five degree set-back and the loading dock will have a negative impact on their properties. The applicant has not demonstrated practical difficulties or economic hardship. Moreover, the applicant has not even considered other alternatives, provided promised information to address neighborhood concerns, nor communicated with stakeholders about various proposed changes. Finally, proper notice was not provided to affected residents.

The BZA should reject this proposal and protect the appropriate mixed use development that was created as result of BZA approval in 1980.

As this property is located in my Single Member District, the Commission has appointed me its representative on this matter. Please feel free to contact me on (202) 607-8429 or by email at vince.micone@anc2a.org. Additionally, Cornish Hitchcock, Esq., will assist the Commission with legal matters related to this application. Mr. Hitchcock may be reached on (202) 489-4813.

ON BEHALF OF THE COMMISSION:

Sincerely,



Vince Micone
Vice Chairperson

cc: John Epting, Esq.

**Foggy Bottom and West End
Advisory Neighborhood Commission (ANC -2A)**

c/o West End Branch Library 725 24th Street, NW Washington, DC 20037
(202) 386-6207

October 19, 2007
Hon. Ruthanne Miller, Chairperson
Board of Zoning Adjustment of
Washington, DC
441 4th Street, NW, Suite 210 South
Washington, DC 20001

Re: Minshall Stewart Properties BZA Appeal No. 17667

Dear Chairperson Miller:

As Commissioner Harmon explained in her letter to you dated October 9, 2007, the Foggy Bottom and West End Advisory Neighborhood Commission (ANC 2A) considered the BZA Appeal No. 17667 of Minshall Stewart Properties at its regularly scheduled meeting on September 19, 2007. With four of the five Commissioners present, a quorum at a duly called public meeting, the following resolution was unanimously approved:

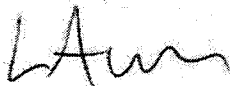
The Foggy Bottom and West End Advisory Neighborhood Commission opposes BZA Appeal No. 17667 by Minshall Stewart Properties, in which Minshall Stewart appeals the Zoning Administrator's determination dated April 20, 2007 that two buildings exist.

Also, as this project is located in Ms. Harmon's Single Member District, the ANC 2A appointed her as its representative in this matter at its September 19, 2007 meeting..

I want to assure you that this ANC 2A meeting on September 19, 2007, was properly noticed. As Mr. Gottlieb Simon noted in his letter dated October 18, 2007, a regularly scheduled ANC 2A meeting does not require notice of the agenda items. Rather, we complied with all notice requirements by noticing the time and place of this September 19, 2007 regular meeting in the Foggy Bottom Current (3 times) and by posting four notices in each SMD prior to the meeting date. Also, the time and place of September 19, 2007 ANC 2A meeting was announced at the prior ANC 2A meetings well before this date.

ON BEHALF OF THE COMMISSION.

Sincerely,



Asher Corson
ANC 2A Chairperson

cc: John Epting

Exhibit B

Government of the District of Columbia
Office of Advisory Neighborhood Commissions



October 18, 2007

Commissioner Florence Harmon
Apt. #1011
1099 22nd Street NW
Washington, DC 20037

Dear Commissioner Harmon:

You asked me whether Advisory Neighborhood Commissions (ANCs) are required to include the meeting agenda with the notice of their meetings? The answer is "no."

ANC procedures are governed by DC Law, then by ANC bylaws, and where not otherwise provided, by Robert's Rules of Order. Neither the DC Code [Section 1-309.11(c)], the ANC 2A bylaws, nor Robert's mandate that the meeting notice list the items to be discussed at the meeting. By contrast the ANC's bylaws and Robert's do require that the notice for a *special* meeting include "the time, place, and exact purpose of the meeting." No other business may be taken up at a special or "called" meeting. This restriction does not attach to regularly scheduled meetings.

Moreover, the Office of the Attorney General has taken up the issue of proper notice for ANC meetings many times. It has never interpreted notice to require more than announcing the time and place of the meeting in at least two of the four methods listed in the statute (i.e. publication in a newspaper, distribution to a mailing list, posting four notices in each SMD, and a previously selected method of the ANC's choosing).

In sum, District law may require certain District governmental bodies to publish their agendas in advance, but ANCs are not included among them.

Sincerely yours,

Gottlieb Simon
Executive Director

Exhibit C