Zoning Commission Case No. 03-16

Modification of the Approved Planned Unit Development
to Allow the Option to Convert the Watergate Hotel to an Apartment House

REBUTTAL, CLOSING REMARKS AND POST-HEARING SUBMISSION OF THE APPLICANT, MONUMENT RESIDENTIAL, LLC, ON BEHALF OF BRE/WATERGATE, LLC

I.
Introduction

The above-referenced application requests permission to have the option to change the use of the existing Watergate Hotel to a cooperative apartment house of a maximum of 133 units. The existing building would remain essentially as is, with the only exterior changes being the addition of carports, replacement of windows in kind and some minor additions to the roof, all of which have been reviewed favorably by the Commission of Fine Arts. Changes interior to the building would include replacement of hotel rooms with apartment units, rearrangement of below grade space, including a total of 140 parking spaces on the three below grade levels and six surface spaces and continued inclusion of a health club and restaurant on the B-1 and B-3 levels.

The Zoning Commission held hearings on the application on March 1 and 4, 2004. At the conclusion of the hearing, the Commission allowed the Applicant to submit its closing remarks and further rebuttal in a written post-hearing submission.

ZONING COMMISSION
District of Columbia
CASE NO. 03-16
EXHIBIT NO. 152

ZONING COMMISSION
District of Columbia
CASE NO.03-16
EXHIBIT NO.152A1

II.
Additional Rebuttal and Responses to Opposition Testimony

The Applicant responds as follows to issues raised by the parties and persons in opposition to the proposed PUD modification.

A.
Modifications to the Approved PUD

It is not uncommon or unusual for the Zoning Commission to approve modifications to a planned unit development. The Zoning Regulations expressly provide for a process for consideration of proposed amendments, and the Commission has approved significant changes in use, height, density and design because the factors which led to an original decision have been changed because of time, economics, planning or other circumstances.

The Watergate PUD has included a hotel from the beginning. The nature of that hotel may have been conceived to be more of an apartment style hotel, contemplating stays of a month or more. In any event, a hotel has been a part of the project since the original approval.

The project itself has been modified significantly and substantially many times since the original approval in 1962. The original PUD consisted of four phases:

- Stage I: an apartment house now known as Watergate East at 2500 Virginia Avenue, containing 301 apartment units and also including approximately 50,000 square feet of retail and service commercial uses above and below ground;
- Stage II: an office building and the subject hotel, at 2600 and 2650 Virginia Avenue, respectively, to also include approximately 25,000 square feet of additional retail and service commercial uses;

- Stage III: an apartment house now known as Watergate West at 2700 Virginia Avenue, containing 143 apartment units; and
- Stage IV: an apartment house located along the New Hampshire Avenue and F Street side of the property to contain approximately 850 apartments.

The total development comprised approximately 1,600 dwelling units, 300 hotel rooms, 185,000 square feet of office space, 80,000 square feet of retail and service space and 1,250 parking spaces.

The PUD was modified in 1968 to change the shape of the buildings and the uses for Stage IV (now Watergate South and the 600 New Hampshire office building). Office uses were limited to those permitted in the SP District. The PUD was modified in 1972 to allow general office use in the 600 New Hampshire office building and in 1976 to allow general office use in the 2600 Virginia office building. The PUD was modified again in 1989 to increase the size of the health club in the Watergate Hotel.

At the conclusion of that modification, the complex was described by the Zoning Commission as having over 500,000 square feet of office space, a 237 room hotel, 644 apartment units, 1,240 parking spaces and a significant amount of retail space. Approval of the subject modification would respond to current conditions, as the Commission has responded before, and would eliminate the hotel but would increase the number of apartment units, closer to the level contemplated in 1962.

B.
Comprehensive Plan

The planning witnesses presented by the opposition relied in particular on §§1332 and 1333 of the Comprehensive Plan to argue that removal of the existing

hotel would be inconsistent with the Comprehensive Plan. Focusing on those particular sections of the Ward 2 element of the Plan, without reference to other parts of the Plan, does not yield a complete picture of the goals, objectives and policies of the Plan as they should be considered by the Zoning Commission in deciding this case.

The Comprehensive Plan is composed of both District and Federal elements. There is no significant guidance contained in the Federal elements related to this request to modify an existing PUD, so to determine consistency with the Plan, the primary focus must be on the District elements. The District elements are set forth in Title 10 of the D.C. Municipal Regulations, and include General Provisions, city-wide elements related to Economic Development, Housing, Environmental Protection, Transportation, Public Facilities, Urban Design, Preservation and Historic Features, Downtown, Human Services and Land Use, as well as eight ward plans.

The General Provisions element of the Plan instructs how to interpret the District elements:

- "The primary dynamic of the District elements of the Plan is the overlapping of its elements' goals. This overlapping is intentional." (§112.1)
- "District elements of the Plan should be studied and executed in concert with each other and should be interpreted broadly." (§111.(a))
- "The interpretation and implementation of any element should necessarily rely upon, and be respectful of, the objectives and policies of other elements." (§112.1(b))
- "An element may be tempered, even defined, by one (1) or more of the other elements. This may occur within one (1) element and between elements. Since the Land Use element integrates the policies and objectives of all other

District elements, it should be given greater weight than the other elements." (§112.1(c))

- "The interpretation of the District elements of the Plan should also be guided by the major themes set forth in §101.1, which establish the overall priorities of the District elements of the Plan." (§112.2)

Accordingly, the Plan must be read as a whole, and reliance on a narrow portion of the Plan to assess compliance is inconsistent with the above-cited provisions.

What comes out of the broader reading of the entire Comprehensive Plan, both city-wide and Ward 2 element provisions, is the emphasis on housing. The Housing element is replete with references to the production of new housing (e.g., §§300.2, 302.1, 302.2(a), 1304.1(a)). The Generalized Land Use Map of the Land Use element, designates the site in the mixed use high density residential and medium density commercial category. While a broad range of uses could fit within that designation, including commercial, hotel and residential, the density categories (high residential vs. medium commercial) suggest a preference for residential. Certainly, changing the hotel to an apartment house would not be inconsistent with this land use designation.

Further, the overall thrust of the hotel provisions of the Ward 2 element is to locate hotels at appropriate locations, particularly citing locations near the new Convention Center north of Mount Vernon Square (e.g., §1331.5). While §1333.1(a)(1) speaks to encouraging continued improvement of existing hotels, it cannot be read to prevent the conversion of an existing hotel to another favored use, residential.

C.

Zoning Regulations Applicable to PUDs

The original approval from the Zoning Commission for the Watergate PUD was given in 1962. The regulations applicable to PUDs in 1962 were considerably different from those contained in the present Zoning Regulations. A copy of the Regulations in effect in 1962, which contained amendments through May 23, 1961, is attached as Exhibit A. Aside from the differences in the process, which included involvement by both the National Capital Planning Commission and the Board of Zoning Adjustment and only one hearing before the Zoning Commission, the standards and criteria against which PUDs were to be judged were also different.

Most importantly, as it relates to an argument advanced by the opponents to this application, there was no balancing test between the development incentives or the degree of flexibility requested by an applicant and the benefits or amenities offered as part of an application. The concept of amenities was not added to the Regulations until 1979 and the balancing of amenities and benefits was not added to the Regulations until 1995. Consequently, directly contrary to the assertions of the opposition, the hotel could not have been offered as an amenity to satisfy the Regulations in 1962, since amenities were not part of the Regulations.

D.

Economic Benefits to the District

Basile Baumann Prost Associates ("BBP"), the applicant's economic benefits consultant, responds to the issues raised by the opposition as follows:

1.

The Effect and Importance of New Residential Development

The significant economic and fiscal benefit to the District from the conversion of the hotel to quality residential use stems from a variety of factors: the significant capital investment and hence construction period benefits; the transfer of the on-site hotel demand, and hence economic impact, to other, better located hotels in the District; and, primarily from the new permanent households on site, who will live, spend, work and pay taxes to the District.

Prior economic and fiscal impact evaluations conducted by BBP have documented the significant positive economic and fiscal impact of residents who occupy high value (and have high property tax generating) units. These residents in turn have high incomes which generate significant local income tax. These residents make significant local purchases which generate local sales tax and in turn create demand for retail and other service, and retail and service jobs. These expenditures and jobs in turn create economic spin-offs or multiplier impacts which create an entire cycle of economic benefits. These residents at the same time result in minimal new service costs to the District in terms of such high cost public services as education and human services.

BBP is not alone in recognizing the importance of bringing new high income households into the District. The Rivlin Report sees only two ways for the District to address its economic and social problems: try to get more help from the Federal government or grow the District's own tax base. This means increasing the income, spending and wealth of the existing population and enlarging that population.

Virtually all economic and development reports on the District (Rivlin Report, Brookings reports, Office of Planning reports, etc.) note that, in particular, upper income households with no children are a big help on the resource front. Higher income new residents grow the tax base, provide customer support for area stores and are a force for improving services while at the same time not using many District government services.

2.
Jobs Created by the Conversion

As clearly noted in the footnotes to the BBP tables, the total estimated number of jobs created does not differentiate as to where employees live. This is true for both the analysis of the existing hotel and the planned residential units. The fiscal impacts however, are based only on taxes that would be paid to the District, i.e., adjusted for where people make expenditures, work and pay taxes.

a.
Retail Jobs Created

The indirect employment impacts are based on Regional Economic Impact multipliers and thus measure the employment impact within the region. In the case of the existing hotel analysis, this includes multipliers for hotel, health club and restaurant, which is considered part of the hotel. In the case of the residential conversion (excluding transfer demand discussed later) it also includes the restaurant and health club plus the residential staff and the on-site resident expenditures.

BBP used the following analysis to determine how the resident expenditures translate into 402 indirect jobs. Based on the estimated price of the units, the households are conservatively assumed to have average household incomes of $258,400 per year. This is based on a conservative estimate of an average unit sales price of $646,000 and a sales price of 2.5 times income. These figures have not been adjusted upward for potential very high income households who would also likely purchase units. This translates into consumption expenditures totaling $30.6 million, when adjusted for Bureau of Economic Analysis (BEA) estimates of percentage of total income that is disposable income (85%) and the percentage of disposable income that is spent on consumer expenditures (95%).

Based on the RIMS II model for the region, 10.6 jobs are created per million dollars of expenditures (or one job per $76,201 in expenditures), resulting in the 402 employees estimate. As a test of reasonableness, BBP also applied an earnings multiplier to total residential earnings. The Regional Earnings Multiplier is 0.2517, generating an earnings impact of $9.5 million. Based on the 402 jobs, this averages $23,747 per job, which equates to full time equivalent average annual retail wages in the region, and confirms the indirect job estimate.

b.

Location of Indirect Jobs Created

As noted above, BBP's estimate of indirect jobs is not location specific but a regional impact. In order to estimate the proportion of indirect jobs which would occur in the District alone, BBP compared the RIMS II output multipliers for the

District only with the RIMS II output multipliers for the Region as a whole. The Regional multipliers were utilized in the original BBP analysis .

There is a relatively modest difference in the output multipliers for the Region versus the District. This is particularly true for the pertinent multipliers of retail trade, hotels/motels and real estate. The District multipliers are seventy-nine, eighty-four and eighty-nine percent respectively of the Regional multipliers.

Based on these ratios the proportion of indirect jobs that are created only in the District can be calculated for each of the pertinent sectors. The following table displays the estimated direct and indirect jobs for the existing hotel and the proposed residential conversion by the District and remainder of Region location, utilizing the published RIMS II economic multipliers:

Direct and Indirect Jobs
By Use Option, By Type
By Location at Buildout
Watergate Project

	Existing Hotel	Residential Conversion	Increment	Transfer Demand	Total Increment
Total Jobs	**350**	**453**	**103**	**299**	**402**
Direct	**228**	**41**	**(187)**	**188**	**1**
Indirect	**122**	**412**	**290**	**111**	**401**
District	**113**	**326**	**213**	**93**	**306**
Remainder of Region	**9**	**86**	**77**	**18**	**85**
Total District	**341**	**387**	**26**	**281**	**307**

These clarified figures display the total economic impact for the region and the positive economic impact in terms of District jobs. They are based on conservative figures regarding residential income and hence residential expenditures and accepted economic impact factors developed by the U.S. Department of Commerce,

Bureau of Economic Analysis localized for the District Metropolitan Area and the District of Columbia itself.

c.
Fiscal Impacts

In order to obtain an accurate picture of the taxes that would be generated by the residential conversion, BBP took into consideration the proportion of jobs created that would be held by persons residing in the District, retail sales which would be made in the District and on-site residents who would pay income taxes to the District. All fiscal tax factors assume the currently prevailing tax rates and are in constant 2003 dollars to avoid any tax increment that would stem from inflation.

BBP adjusted downward the fiscal impact of the project to account for employees who do not reside in the District (this was done for both the existing hotel and the proposed conversion) and do not pay District income taxes. Similarly, BBP also adjusted downward District sales taxes to accommodate for residential expenditures made outside the District and income taxes paid to the District by residents of the Watergate to provide for occupants who claim residence in other locations to avoid paying District income taxes. These adjustments address the issue of the net tax benefits to the District.

Significantly, these adjustments are identical to those utilized by the District's CFO in evaluating the net new tax impacts from tax increment financing projects. These assumptions underpin the conclusions set forth in the BBP analysis that substantial economic and fiscal benefits will accrue to the District of Columbia if the hotel is converted to an apartment house as proposed. Once again, these

findings are consistent with the findings of the Rivlin Report and other reports focusing on the economic well being of the District that obtaining additional tax paying residents is critical to the long term economic stability of the city.

d.
Timing of Benefits

The analysis of the economic and fiscal impact of the residential conversion was quantified at build out, in constant 2003 dollars, and for a single year. The annual economic benefits during the assumed relatively short absorption period of the project would be less than once the project is completely sold, but the benefits would increase to the full level as the project is absorbed.

Utilization of constant dollars avoids quantification of any economic or fiscal impact resulting from inflation. Utilization of constant dollars however, greatly understates the annual benefits of the residential project over time, as the $2.8 million (2003 dollars) annual fiscal benefit does not include any real dollars increase in the value of the residential units, or the income of the on-site residents or employees residing in the District. Over ten years, a modest three percent per year real dollar increase in values would raise the annual fiscal benefit of residential conversion from the existing hotel by approximately $1 million per year to an annual total of $3.8 million.

Finally, the annual incremental tax benefit to the District conservatively estimated at $2.8 million (constant 2003 dollars) represents a sustainable long term benefit to the District as evidenced by the sustainability of the existing Watergate residential units. This long term sustainable benefit is equivalent to creating a

revenue stream or annuity for the District. At a conservative public sector capitalization value of eight percent, the value of the annuity is $35 million. That is to say that the economic value of the revenue stream is $35 million.

E.
Loss of Hotel Jobs

One of the issues raised by opponents was the loss of the existing hotel jobs. Notwithstanding whether the Zoning Commission approves this application, there is no guarantee that the existing hotel will remain in operation. The average room rate achieved in the hotel for the last several years has declined and the hotel has lost its competitive position in the hotel market to newer, better located hotels. This application is not for a variance and the Applicant is not required to establish a practical difficulty or hardship. However, the plain economic reality is that the existing hotel may not remain in operation and the owners and the Applicant are contemplating an appropriate and, in fact, a superior alternative use.

In other scenarios, the operator of the hotel could change, the hotel could be converted from a union hotel to a non-union hotel or the type of operation could change to a point where different employees would be required. In short, the Commission's action on this application to modify the PUD will have little to do in the long term with whether the existing hotel jobs are retained at this site.

As noted in the BBP report and in the testimony of James Prost, the hotel market in the District of Columbia is comparatively strong. There is a substantial likelihood that the existing hotel demand will shift to other hotels nearby and elsewhere in the District of Columbia, causing those hotels to seek additional

employees to service that demand. The hotel operator has confirmed that there are 188 current employees of the hotel, of whom forty-four, or less than twenty-five percent, live in the District.

Additionally, there is significant turnover in the employment base; over the last twelve months, fifty-six employees, or about one-third, have turned over. As noted by BBP, the total number of direct and indirect jobs, including jobs located in the District and/or jobs held by District residents, generated by the proposed apartment house use will be more than the number generated by the hotel, even though the type and location of those jobs will be different.

F.
Traffic Impact

Wells & Associates, LLC, the Applicant's traffic consultant, responds to the comments of Joe Mehra, P.E., as follows:

1.
Trip Generation Comparison

Mr. Mehra evaluated the number of weekday AM and PM peak hour trips that are generated by the existing 250-room hotel versus the trips that would be generated by the proposed 133-unit coop apartments and 90-seat restaurant. Mr. Mehra testified that "the analysis shows that the proposed uses will generate more vehicle trips than the existing uses."

Mr. Mehra's staff observed traffic entering and exiting the hotel parking garage and the porte cochere driveways during a single morning and single afternoon two-hour period, counting a total of 59 vehicles entering or exiting these

driveways during the AM peak hour and 58 entering or exiting these driveways during the PM peak hour. Mr. Mehra estimated that 133 luxury condominiums/ townhouses and the 90 seat restaurant would generate 59 AM peak hour trips and 85 PM peak hour trips. These estimates are based on Institute of Transportation Engineers (ITE) trip generation rates and a 21.7 percent transit mode share derived from 2000 Census journey-to-work data for Census Tract 56. Thus, Mr. Mehra concluded that the proposed coop apartments and restaurant would generate the same number of AM peak hour trips, but 27 (or 47 percent) more PM peak hour trips, than the existing hotel.

Mr. Mehra's analysis is flawed in at least three critical respects:

1. Mr. Mehra's staff did not count all of the trips that are generated by the existing hotel. Hotel guests, visitors, restaurant customers, and employees can park in the public parking garage that is part of the Watergate complex, in the service drive along Virginia Avenue, at the adjacent Kennedy Center, or elsewhere nearby. Likewise, taxicab and other drivers can drop off hotel guests and employees on the service drive or courtyard west of the lower lobby. These trips were not counted.
2. Mr. Mehra's method of analysis is inconsistent, comparing "apples to oranges." There is no rationale provided for using driveway counts and surveys for the hotel but using ITE projections for luxury condominium/ townhouses.

3. Mr. Mehra used the wrong "transit mode split." Mr. Mehra used a 21.7 percent transit mode split, based on the 2000 Census. The 2000 Census actually shows that, inc Census Tract 56, where the subject site is located, 83.5 percent of all residents commute to work by bus, subway, bicycle, or walk, or work at home (1,735 trips by carpool, bus, subway, bicycle walk or work at home versus 343 trips by driving or taxi). Using these higher non-auto mode splits, the 133 coop apartments and restaurant would generate only 15 AM peak hour trips and 36 PM peak hour trips. As shown on the following table, the proposed uses would generate 44 (or 75 percent) fewer AM peak hour trips, and 22 (or 38 percent) fewer PM peak hour trips than the existing hotel, even compared to the under-counted hotel:

EXHIBIT 1 (Revised)
The Watergate Hotel
Trip Generation Analysis

Trip Type/ Land Use	Amount	Units	AM Peak Hour In	AM Peak Hour Out	AM Peak Hour Total	PM Peak Hour In	PM Peak Hour Out	PM Peak Hour Total
Watergate (Existing Program)								
Total Trip Generation (Existing Program)			22	37	59	24	34	58
Watergate Hotel (Proposed Program)								
Residential Condominium(1)(233)	133	D.U.	17	55	72	50	29	79
Transit Mode Share (2)	83.5%		14	46	60	42	24	66
Net New Trips			3	9	12	8	5	13
Restaurant (Code 831)	90	Seats	2	1	3	16	7	23
Transit Mode Share	0%							
Net New Trips			2	1	3	16	7	23
Total Trip Generation (Proposed Program)			5	10	15	24	12	36
Comparison								
Difference (Existing v Proposed)			(17)	(27)	(44)	0	(22)	(22)
Percentage			-78%	-73%	-75%	1%	-65%	-38%

Notes: (1) Trip Generation, Sixth Edition , The Institute of Transportation Engineers
(2) 2000 Census Data for tract 56.

Source: MCV ASSOCIATES, INC.
(Revised by Wells & Associates, March 22, 2004)

2.
Building Population

The Wells & Associates' conclusion that the 133 proposed apartment units would generate fewer trips than the existing hotel also is consistent with the building population of both uses. As shown on the following table, the existing hotel would be occupied by 377 guests and staff on an average day and the proposed apartments would be occupied by only 170 residents and staff on an average day:

Average Number of Persons per Day

PUD Modification of the The Watergate Hotel

Total Persons as Hotel	
Occcupied Room Nights	61,000
Occupants per room	1.36
Room Night Occupants	82,960
Days in year	365
Avg. Occupants / Day	227
Avg. Staff / Day [3]	150
Total Persons / Day	377

[1] Hotel data based on 2003.

Total Persons as Residential	
Number of Units	133
Persons per Household [2]	1.41
Household Persons	188
Occupany average	80%
Avg. Daily Household Persons	150
Avg. Daily Staff Members	20
Total Persons / Day	170

[2] 2000 Census, Census Track 56, Block Group 2 (Watergate Residences Only.)

[3] Per Controller Watergate Hotel - Maintenance 9, Security 8, Sales 8, Accounting 7, Front Office 16, Housekeeping 40, Restaurant 21, Kitchen 22, Stewarding 14 and PBX 5.

It is logical that the higher hotel population would generate more peak and off-peak trips than the lower resident population.

G.
Authority of Monument Residential LLC
to Undertake the Proposed Modification

Questions were raised about the Applicant's ability to undertake the project because, at the time, Monument Residential LLC was not registered in the District of Columbia. The Applicant has formed more than fifty Delaware limited liability companies (LLCs) that are affiliates of Monument Residential LLC. The District of Columbia Code, § 29-1060(a) (a copy of which is attached as Exhibit B) expressly does not require an LLC formed in another state, to register in the District in order to simply own real property, own personal property or maintain bank accounts. According to the District of Columbia Code § 29-1058(b) (copy also attached as Exhibit B), the fact that a Delaware LLC is not registered in the District does not impair the validity of any contract or act of the LLC. Most importantly, an LLC that is not registered in District is nonetheless subject to all applicable District taxation and regulation (District of Columbia Code § 29-1060(b)).

Notwithstanding that D.C. law does not require Monument Residential to register, Monument Residential LLC has been registered in the District. A copy of its District of Columbia Certificate in Good Standing is attached as Exhibit C.

The contract to buy the Hotel is assignable by Monument Residential LLC without the Seller's consent to an affiliate of Monument. It is a very common practice nationwide, to enter into a contract to buy commercial real estate in the name of a then existing entity and assign the contract to a new affiliate prior to closing.

Monument's affiliate will be formed in Delaware and will be registered in the District at the time it buys the Hotel or undertakes any activities which would require it to be registered in the District. Each of Monument's more than fifty Delaware LLCs that own real property is registered in the jurisdiction (D.C., Maryland or Virginia) where its property is located.

H.
Ability to Undertake the Project
Without the Sale of Watergate East's Interests

The property operated as the "Watergate Hotel" is comprised of two components, the hotel tower on Lot 807 and certain facilities constructed underground on a leased portion of the adjacent Lot 806. Together they form the real property owned or controlled by BRE/Watergate LLC ("BRE") and under contract for sale to the Applicant. In 1990, Watergate Improvement Associates ("WIA") sold Lot 807 to BRE's predecessor and the lease for the underground premises on Lot 806 was amended. In consideration of the purchase of the hotel, the new lease terms gave BRE's predecessor use of the underground premises for $12 a year for the next seventy-five years. In 1993, WIA sold the landlord's interest in Lot 806 to Watergate East, Inc. ("WEI"), subject to the remaining seventy-two years of the lease.

Currently, the fee interest in the underground premises on Lot 806 is owned by WEI and leased to BRE. The underground premises on Lot 806 currently contain parking, meeting rooms, restaurant facilities, bathrooms and offices. These facilities are contiguous to and physically connected to the hotel tower below

ground. By the terms of the lease, BRE owns all of the improvements in the underground premises.

Under the lease, WEI has no right to control the use of the improvements in the underground premises. The use definition in the lease is not limited to a hotel use:

> "Lessor makes no representation or warranty with respect to the Property or its fitness or availability for any particular use . . . Lessee shall use the Property for the operation of the Improvements and will not do or permit any act of thing which is contrary to any Legal Requirement or Insurance Requirements, or which might impair the value or usefulness of the Property or any part thereof, or which constitutes a public or private nuisance or waste."

(Section 5 of the Lease dated March 1, 1966) (copy attached as Exhibit D). "Improvements" is broadly defined to include all current and future buildings, structures and improvements. (Section 36 of the Lease dated March 1, 1966) (copy attached as Exhibit D). It is clear from the lease that the landlord does not have a right to require hotel use.

The opponents have argued that WEI as landlord can use an approval right over alterations to block Monument's conversion of the hotel to residential cooperatives. This is not the case. Under the lease BRE or its successors may, at their own expense, make reasonable alterations and additions to the improvements in the underground premises or any part thereof provided they:

- Do not change the general character of the premises;
- Do not impair the fair market value;

- Do all alterations in a good and workmanlike manner in compliance with all insurance requirements; and
- Promptly pay for the alteration work.

If the tower on Lot 807 is converted to a housing cooperative, the underground premises on Lot 806 will not have a reduced value or impaired usefulness, and the premises will be used in the same general manner as today. Minor changes to the underground premises on Lot 806 will not cause there to be a change in the general character of the property.

In the event that the cost of the alteration is more than $100,000, then the work must be done under the supervision of an architect satisfactory to WEI and shall also be done in accordance with plans, specifications, cost estimates and a bond approved by WEI. WEI cannot disapprove any use nor can it arbitrarily withhold approval of plans, specifications, cost estimates or a bond. The lease provides that "any approval or consent of Lessor [WEI] required hereunder shall not be unreasonably (in any ordinary business sense) withheld."

The 1990 lease amendment does not require hotel use. The 1990 lease amendment (copy attached as Exhibit E) states that the underground premises on Lot 806 are currently (then) being used in connection with an existing hotel. It does not state that hotel use of the underground premises is required nor does it say that hotel use is required on Lot 807. The word "currently" would be inappropriate if the underground premises were permanently required to be used in connection with a hotel. The 1990 lease amendment also states that the underground premises are an

integral part of the hotel and cannot be severed from the operations of the hotel, but it does not purport to amend the broad and permissive use provision. Rather, it is in a section that addresses the sale of the tenant's interest in the underground premises. The amendment states that, because of the relationship between the underground premises and the operations of the hotel, the underground premises can only be transferred to a transferee of Lot 807. This provision was intended to prohibit an assignment of the underground premises on Lot 806 to anyone that did not own Lot 807. This provision would apparently prohibit a transfer of the leasehold interest in the underground premises to WEI, unless it was also the buyer of the hotel.

I.
Affordable Housing Commitment

At the request of the Zoning Commission and to meet the concerns of the Office of Planning, the Applicant proposed to include an affordable housing component to its project. The affordable housing would be provided through a contribution of $250,000 to renovate an existing building to produce not less than 3,000 square feet.

One possible use for the contribution would be for the Applicant to partner with Jubilee Housing Inc. ("Jubilee"). Jubilee is a 501(c)(3) non-profit organization, founded in 1973, whose mission is to provide affordable housing and supportive services for low-income citizens in the Adams-Morgan neighborhood of the Nation's Capital. Jubilee serves more than 850 individuals and families, and has been a model for programs around the country seeking effective responses to the urban

affordable housing crisis. Rent is maintained at levels well below 40 percent of market rate for the area, and residents have access to a broad network of social services that support personal growth and empowerment.

More than just "bricks and mortar," Jubilee Housing is a context for people who are living in profound poverty to have the opportunity to rebuild their lives. Life-changing programming includes various skills building classes and activities, access to a broad network of social services, and empowerment initiatives that give residents a voice in the structures and processes that affect their lives. One of the defining marks of the Jubilee mission is the involvement of the resident community in shaping the development of new initiatives and opportunities within the housing community.

Jubilee serves the 18,000 residents of Adams Morgan and Ward 1, the geographic heart of the District of Columbia, characterized by its multi-ethnic diversity and vibrant commercial districts, by providing affordable housing for more than 850 individuals within 284 apartments in eight buildings. Adams Morgan residents are sixty-seven percent Caucasian, seventeen percent African American and sixteen percent Latino. Only thirty-four percent of the households own their homes, compared to forty-one percent for the entire District.

By contrast, Jubilee's residents are fifty-eight percent Black, thirty-three percent Latino and nine percent report other racial origins. While the median household income in Ward I is $52,649, significantly above the national average, Jubilee's residents primarily fall into the category of low to very low wage earners.

In fact, more than two-thirds earn less than thirty percent Area Median Income ("AMI"); half of this population earns less than twenty percent of the AMI.

Jubilee is the owner of a vacant building at 1631 Euclid Street, N.W., Square 2576, lot 63. The Applicant's contribution to Jubilee of $250,000 would cover the hard construction costs, estimated at $58,000 per unit, of creating four three-bedroom units in the building. Construction is anticipated to start in the Spring of 2005, with completion projected for the Winter of 2005.

The Commission has previously approved planned unit developments which included an off-site affordable housing component. The original housing linkage PUD involved the office building at 1215 I Street, N.W., where the John Akridge Company partnered with Jubilee to assist in the renovation of 150 units of affordable housing. A second PUD for office development at 901 New York Avenue, N.W., also included an off-site affordable housing component. This is an efficient and effective means to create affordable housing, in a neighborhood context where the need for that housing is especially great.

J.
Uses of Special Value to the Project

In recognition of the concerns of the residents of the existing Watergate apartment buildings, the Applicant has proposed to retain the two uses which are claimed to be the most important and of the most value, the health club and a restaurant. The Applicant will provide the facilities for those two uses in the areas designated on the plans. The Applicant has developed more detailed plans and specifications for the fit-out of the health club, which demonstrate the improvement

of the physical facility over the existing condition. A copy of those plans and specifications are attached as Exhibit F.

The management, levels of service and operation of those uses will be determined by the future owners of the new apartment house. The Applicant has provided a mechanism to include the residents of the current apartment houses in making the decisions about the future of those facilities, should the existing cooperatives want to be involved in those decisions.

III.
Closing Remarks and Conclusion

The subject application to allow the hotel to be converted to an apartment house should be approved. As evidenced at the public hearing, there is substantial support for the conversion within the Watergate complex and within the community, including both Advisory Neighborhood Commission 2A and the Foggy Bottom Association.

Notwithstanding the issues and concerns raised at the hearing and in the record by residents of the existing cooperative apartment houses, the best use of the property for the project, the neighborhood and the city would be to allow for an additional 133 units of permanent housing. The loss of the existing hotel jobs at this site will be more than offset by an increase in hotel jobs at other District hotels as the hotel demand shifts to other locations and by jobs in other sectors of the economy, particularly retail jobs, created by the spending of the residents.

The Applicant has proposed to include a health club and a restaurant in approximately the same location in the building as those uses currently exist. As

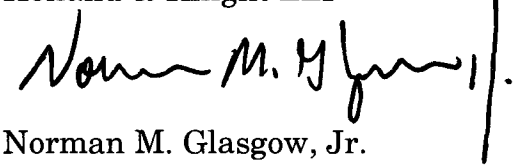
expressed in the record, the concerns of the residents about the potential loss of the hotel centered on their use of those facilities.

The Applicant has changed the ownership structure of the proposed apartment house to make it a cooperative, rather than a condominium. In response to questions from the Commission and at the urging of the Office of Planning, the Applicant has also proposed to make a contribution of $250,000 to an affordable housing provider for a project in the city.

The Applicant has responded to and addressed those issues raised at the hearing and in the record. What is before the Commission is a land use question: should the Commission allow the proposed hotel to be converted to an apartment house? The Applicant believes that the answer to that question is an unequivocal and emphatic "Yes" and that the record supports positive action by the Commission. Accordingly, for all the above reasons, the Applicant respectfully requests that the Zoning Commission approve the proposed PUD modification.

Respectfully submitted,

Holland & Knight LLP



Norman M. Glasgow, Jr.



M. Carolyn Brown
Suite 100
2099 Pennsylvania Avenue, N.W.
Washington D.C. 20006
202-955-3000

Certificate of Service

I hereby certify that on April 1, 2004, a copy of the foregoing Rebuttal, Closing Remarks and Post-Hearing Submission of the Applicant, Monument Residential, LLC, on behalf of BRE/Watergate, LLC, was served by hand on the following persons or organizations:

Advisory Neighborhood Commission 2A
c/o Dorothy Miller
Chairperson
Apartment D206
2440 Virginia Avenue, N.W.

D.C. Office of Planning
c/o Mr. Joel Lawson
Suite 400
801 North Capitol Street, N.E .
Washington, DC 20002

Watergate West, Inc.
c/o Richard L. Aguglia
Hunton & Williams
Suite 1200
1900 K Street, N.W.
Washington, Dc 20006-1109

Committee of Concerned Owners
c/o Audrey and William Wolfe, Jr.
Apt. #702/3-North
2510 Virginia Avenue, N.W.
Washington, DC 20037

Watergate East Committee Against Hotel Conversion to Co-op Apartments
c/o Jack H. Olender, Esq.
Apt. #1203-South
2500 Virginia Avenue, N.W.
Washington D.C. 20037

Steven E. Sher
Director of Zoning and Land Use Services
Holland & Knight LLP

7404.3 If approved by the Board of Zoning Adjustment the conditions set forth in paragraph 7404.2 may be waived or modified. Before authorizing such waiver of modification, the Board shall give consideration to:

7404.31 The adequacy of protective and screening walls located on adjacent residential property;

7404.32 Topographic and traffic conditions; and,

7404.33 Any adverse effect the requested waiver or modification of standards may have on adjacent residential property.

7404.4 The Board may require such special treatment of the premises as it shall deem necessary to protect the value of adjacent property.

ARTICLE 75

MISCELLANEOUS PROVISIONS

Section 7501—Site Plans for Large-Scale Planned Development of Five Acres or More

7501.1 The purpose of this Section is to encourage, in one or more Districts irrespective of use restrictions required by general zoning regulations, the design of well-planned, large-scale residential, institutional, or commercial developments, or a combination thereof which will offer a variety of building types or more attractive and efficient overall planning and design without sacrificing creative and imaginative planning. Under this Section well planned shopping centers, large-scale residential developments, and other types of uses or combination thereof might be developed with greater flexibility than otherwise would be possible under these regulations in area zoned as Residence, Special Purpose or Commercial or combinations thereof. The procedure and standards established herein are intended to permit, with Zoning Commission approval, diversification in the use, size, type and location of *structures*, and to improve circulation and site facilities while at the same time insuring adequate standards relating to public health, safety, welfare and convenience in the use and occupancy of *buildings* and other facilities in planned building groups. (Case No. 61-3 of 5-23-61)

7501.2 Each application (in duplicate) for a large-scale planned development shall be filed with the staff of the Zoning Commission. When filed such application shall certify that: (Case No. 61-3 of 5-23-61)

7501.21 The area to be included within the development contains five or more acres: (Case No. 61-3 of 5-23-61)

7501.22 The names and known addresses of each property owner included within the area to be developed are designated and listed in the application filed; and (Case No. 61-3 of 5-23-61)

7501.23 The *gross floor area* of all *buildings* does not exceed the sum of the total permitted within that portion of each Residence, Special Purpose, or Commercial District under the *floor area ratio* limitations established by these regulations for each *district*, provided:

(a) The maximum permitted *gross floor area* for all uses in R-5-D, Special Purpose and C-3-B Districts shall be 6.0; and the maximum permitted *gross floor area* for R-1, R-2, or R-3 Districts shall be determined by multiplying the area of those portions of the designated area located in an R-1 or R-2 District by a *floor area ratio* of 0.4 and those portions of the designated area located in an R-3 District by a *floor area ratio* of 0.6;

(b) No *building* exceeds the maximum *height of buildings* permitted in the least restrictive *district* in which any of the designated area is located; provided that in the Special Purpose and C-3-B Districts a maximum height of 130 feet may be permitted;

(c) No *building* located in a Residence District exceeds on any one *lot* the bulk limitations established by the *floor area ratio* and *percentage of lot* occupancy requirements of the R-5-D District;

(d) No *buildings* located in a Special Purpose or Commercial District exceeds on any one *lot* the bulk informations established by the *floor area ratio* requirements of the Special Purpose District under (a) above;

(e) *Yards* and *courts* for each residential or institutional *building* shall be of an area and dimension not less than the requirements for each such *building* in the R-5-D District; and *yards* and *courts* for each commercial *building* shall be of an area and dimension not less than the requirements for each such *building* in the Special Purpose District; and,

(f) Off Street *parking spaces* and loading *berths* for each residential or institutional *building* shall be provided in an amount not less than that required for each such *building* in an R-5-D District; and off street *parking spaces* and loading *berths* for each commercial *building* shall be provided in an amount not less than that required for each such *building* in the C-3-B District. (Case No. 61-3 of 5-23-61)

7501.3 An applicant for a large-scale planned development may submit his application in preliminary form, and in sufficient detail to permit a clear understanding of the problems involved. In addition to the certification required by 7501.2 he shall submit: (Case No. 61-3 of 5-23-61)

7501.31 Give copies of a site plan or plans drawn to scale showing:

(a) The proposed use, location, dimensions, number of *stories* and approximate height of each *building*:

(b) The approximate area and dimensions of each *lot* proposed for each building and the exact area of the total site;

(c) The approximate lot occupancy of the *building* on each *lot* to be used for residential purposes and the approximate *floor area ratio* of each *building;*

(d) The location and approximate number of all off-street *parking spaces* and *loading berths;*

(e) The topography of the development area and the elevations of *streets* and *alleys* bounding and within the site area;

(f) The location of existing or proposed public and private right-of-ways and easements bounding and intersecting the designated area, and indications as to which of the right-of-ways or easements are to be continued, relocated or abandoned; and,

(g) The approximate number, size and type of stores; the approximate amount of area for offices; the approximate number of families or persons to be accommodated in each type of *structure;* and the approximate number and scope of commerical adjuncts for *hotel* or *apartment* use. (Case No. 6-3 of 5-23-61)

7501.32 Five copies of a map showing the existing zoning of the designated area and the zoning of all property within 200 feet of the proposed development area. Case No. 61-3 of 5-23-61)

7501.4 Within 5 business days after receipt of an application for a large-scale planned development the Planning Officer of the Zoning Commission shall submit the application and accompanying documents to the National Capital Planning Commission for review and report. In reviewing each application the National Capital Planning Commission sshould give consideration to: (Case No. 61-3 of 5-23-61)

7501.41 The intent of Paragraph 7501.23, the provisions of which are to be construed as maximum permissive digressions to be applied as minimum standards only when clearly in furtherance of objectives outlined in the preamble. Standards may be graduated or varied if they reflect the intent and purpose of criteria under general zoning requirements of the *districts* in which the planned development is proposed; but no application should be recommended the purpose of which is the circumvention of such requirements. (Case No. 61-3 of 5-23-61)

7501.42 The National Capital Planning Commission should also give consideration to whether:

(a) The provision for light and air is in all respects adequate for the proposed development;

(b) Properly planned open spaces, *parking spaces* and *loading berths* are provided within the planned area;

(c) Any deviation from the use, height, area, density, or bulk provisions of general zoning regulations will have any adverse affect on the use of neighboring property in accordance with the zone plan; and

(d) The plans for the development are consistent with the comprehensive plan for the City as a whole. (Case No. 61-3 of 5-23-61)

7501.5 Prior to the submission of its report to the Zoning Commission, the National Capital Planning Commission may require the applicant to provide additional plans or other information deemed necessary for a comprehensive report. These may be submitted direct to the reporting Commission provided a copy of each is also filed with the office of Zoning Commission; but if a model is required or submitted, duplicates need not be provided.

After report to the Zoning Commission by the National Capital Planning Commission, the plans for such development shall not be approved unless a public hearing thereon is first held by the Zoning Commission. (Case No. 61-3 of 5-23-61)

7501.51 Notice of such public hearing shall be given in the same manner as is required for consideration of proposed amendments to these regulations and maps. (Case No. 61-3 of 5-23-61)

7501.6 If found to be in harmony with the intent and purpose of the zoning map and regulations, a large-scale planned development approved by the Zoning Commission will be in general approval of a designated plan only; but such guides, standards, conditions and limitations as the Commission may determine, will be made a part of the approving order. This order shall not become final unless submitted to the Board of Zoning Adjustment as provided by Paragraphs 7501.61 and 7501.7. (Case No. 61-3 of 5-23-61.

7501.61 The plan approved in general by the Commission shall be valid for a period of one year only, unless within such period application for further processing is made to the Board of Zoning Adjustment as provided in Paragraph 7501.7 (Case No. 61-3 of 5-23-61)

7501.7 Any applicant whose large-scale development plan has been approved by the Zoning Commission may file application for further processing before the Board of Zoning Adjustment; but unless modified or exempted elsewhere in this Section, all other rules governing Board procedure, including public hearing and notice shall apply. (Case No. 61-3 of 5-23-61)

7501.71 In addition to citation of the formal record of proceedings before the Zoning Commission the applicant shall at the time of filing submit:

(a) Complete floor plans and architectural elevations of each *building;*

(b) Roof plans and architectural elevations of all roof structures for each *building;*

(c) The grading and drainage plan for the development area;

(d) The planning and landscape plan for the development area;

(e) The finished site plan with *lot* areas and dimensions showing thereon all *buildings* and noting precisely any difference in their approved location or size, the location and details of all other *structures* not classed as *buildings* and the location, details and grades of all driveways requiring curb cuts; and

(f) As a part of the site plan or on a separate drawing, the detail open parking plans, including circulation, screening and lighting, and the circulation relation between separate compounds, garage facilities and *street* access. (Case No. 61-3 of 5-23-61)

7501.72 It shall be the duty and responsibility of the Board of Zoning Adjustment to implement the general approval of the development plan given by the Zoning Commission, and to that end, subject to all conditions which the Commission may impose by formal order and to the limitations contained in Paragraph 7501.23, the Board shall have all of the powers hereinbefore vested in the Zoning Commission by the provisions of this Section, except that, the Board shall not have the power to amend the approved development plan by changing the use of any *building* or by increasing or reducing:

(a) The approved number of *buildings* or approved number of *stories* of any *building;*

(b) By more than 5% the approved estimated *height,* bulk, *lot occupancy* or *gross floor area* of any *building;*

(c) By more than 5% in any *building* the estimated number of *apartment* units, *hotel* rooms, institutional rooms, or *gross floor area* to be used for commercial or adjunctive purposes.

(d) By more than 5% the estimated number of off-street *parking spaces* approved for the development as a whole. Case No. 61-3 of 5-23-61)

7501.73 If in harmony with the objectives of this Section and in accord with the intent of the Zoning Commission's approving order, the Board may permit or require:

(a) The shifting of any approved *building* within its *lot lines* as originally submitted to the Zoning Commission in order to retain the flexibility of design desirable hereunder, or by reason of unforseen sub-soil conditions or adverse topography;

(b) The construction, including type and design, of retaining, screening or decorative walls, or other *structures* not classed as *buildings,* and not shown or detailed on the approved plan; and,

(c) Controlled use of signs, but shall determine and fix their number, size, color, scope, type and location; (Case No. 61-3 of 5-23-61)

7501.74 The Board shall also consider and:

(a) Fix the location and size of *hotel* and *apartment house* adjunct authorized by the Zoning Commission;

(b) Where not specified determine the type of stores and service outlets, and within the maximum limits of the Zoning Commission's approved plan, adjust their size to fit the needs of the proposed tenants;

(c) Determine the adequacy of landscaping, planting, screening and drainage plans; and

(d) Take all other actions necessary to effect the plan approved by the Zoning Commission. (Case No. 61-3 of 5-23-61)

7501.75 The Board shall retain its jurisdiction over roof *structures* and in addition shall have jurisdiction over roof *structures* normally approvable by administrative process. (Case No. 61-3 of 5-23-61)

7501.76 When application is made by a public agency for a development plan under the provisions of this Section and the rules and requirements of that agency require or impose greater restrictions than those permissible or approved by the Zoning Commission, the more restrictive requirements of the public agency shall apply. In order to aid in the final processing of the development plan such restrictions shall be filed in the record before the Board. (Case No. 61-3 of 5-23-61)

7501.77 Before approval of the final development plan the Board shall make findings as set forth under Paragraphs 7501.41 and 7501.42. (Case No. 61-3 of 5-23-61)

7501.78 No order of the Board authorizing construction of the planned development shall be valid for a period of more than one year unless within such period the plans therefor are filed for the purpose of securing a building permit. After filing, general Board rules shall apply. (Case No. 61-3 of 5-23-61)

7501.79 The Board shall retain jurisdiction to interpret and apply the terms and conditions of its orders and to make plan corrections and minor modifications of such plans; but no modification of the plan as finally approved by the Board shall be permitted unless processed as a new application in accordance with the procedure set forth in Paragraphs 7501.2 through 7501.5; or unless, after construction of the development plan is completed, in accordance with the provisions of 7501.110. (Case No. 61-3 of 5-23-61)

7501.8 Work on the entire development may be started simultaneously, or the development may be constructed by stages in which case the Board of Zoning Adjustment shall fix the order of construction and shall specify the time limit and conditions for completion of the entire project; but at least partial work on the development shall be started within the time limits specified by this Section and all work so begun shall proceed to completion in accordance with the terms of the permit. Failure to begin any of the approved development within the time limit specified by this Section shall void all rights thereunder unless for good cause shown the Zoning Commission authorizes an extension thereof. Such extension may be authorized without public hearing. (Case No. 61-3 of 5-23-61)

7501.9 Failure to complete the approved development plan in its entirety shall not operate to prevent the use of a completed *building* for the purpose designated in said plan; but before a permit for any portion of the approved plan is issued the owner shall agree that unless the entire development plan is completed within the time specified by this Section, or within the time specified by the Board of Zoning Adjustment, or within any extended period of time approved by the Zoning Commission, the Commissioners of the District of Columbia may after written notice of not less than 30 days to such owner declare him in default and may assign the job of completing the development plan to such other builder or developer as they may deem qualified to carry out the terms of the approved order. This agreement which shall run with the land shall also recite that such owner agrees to sell all land within the approved development plan on which construction has not been started in accordance with such plan at its fair market value existing at the time of notice of default by the said Commissioner that fair market

value shall be determined by the average of appraisals from three disinterested real estate experts selected by the said Commissioners; and that all costs caused by default shall be assessed against the property defaulted. (Case No. 61-3 of 5-23-61)

7501.100 All conditions imposed by the Zoning Commission and the Board of Zoning Adjustment, including those the performance of which are conditions precedent to the issuance of any permit necessary for the development of any part of the entire site, shall run with the land and shall not lapse or be waived as a result of any subsequent change in the tenancy or ownership of any or all of said area. Such conditions shall be a part of any certificate of occupancy issued for any use of *structure* in such development. (Case No. 61-3 of 5-23-61)

7501.110 After completion of the development in toto, and after occupancy in whole or in part for a reasonable period, and from time to time thereafter, adjustment of the facilities approved under the plan may be made if approved by the Board of Zoning Adjustment upon application filed and processed in accordance with general Board procedure. (CaseNo. 61-3 of 5-23-61)

7501.111 The Board shall not have the power to authorize additions to existing *buildings*, nor to authorize construction of any new *buildings*. (Case No. 61-3 of 5-23-61)

7501.112 The Board may, due to change of neighborhood conditions or for other good cause shown in harmony with objectives of this Section and the approved plan, permit:

(a) Extension or reduction of commercial facilities, *apartment* and *hotel* adjuncts, or a change in the type of such uses;

(b) Reduction or increase of *apartment* units, *hotel* rooms or institutional facilities in a specific *building;*

(c) Increase or reduction of required off street *parking spaces* consistent with any action approved under subparagraphs (a) and (b); and

(d) Adjustment of controlled sign requirements. (Case No. 61-3 of 5-23-61)

7501.113 Before approval the Board shall submit the application to the National Capital Planning Commission for review and report. If the report of the said Commission is unfavorable the application shall not be approved unless carried by at least four votes. (Case No. 61-3 of 5-23-61)

Section 7502—Accessory Uses and Accessory Buildings

7502.1 Any *accessory use* or *accessory building* shall be located on the same *lot* with the use or *building* to which it is accessory, except that required accessory *parking space* may be permitted on another *lot* where specifically permitted under other provisions of these regulations.

7502.2 An *accessory building* shall be located only in a *rear yard*, except that an accessory *private garage* may be located in a *side yard* under the special regulations of Section 7401. Not over 30 per cent of the area of a required *rear yard* on any *lot* shall be occupied by an *accessory building* or *buildings*.

7502.3 An *accessory building* in any *district* shall not exceed one *story* or 15 feet in height except in an R-1-A or R-1-B District an accessory *private garage* may have a second *story* used for sleeping or living quarters of domestic employees of the *family* occupying the main *building*. Any such two-*story accessory building* shall not exceed 20 feet in height and shall not be located within the required *rear yard*. Any such two-*story accessory building* shall also be set back from all side *lot lines* for a distance equal to the minimum width of a required *side yard* in the *district* in which located.

7502.31 The height of an *accessory building* permitted in paragraph 7502.3 shall be measured from the finished grade at the middle of the side of the *accessory building* which faces the main *building* to the highest point of the roof of the *building*.

7502.4 An *accessory building* or *structure* shall not be erected on any *lot* prior to the time of construction of the main *building* to which it is accessory.

7502.5 An *accessory building* shall not obstruct light and ventilation required by other regulations.

Section 7503—Projections Into Required Open Spaces

7503.1 Except for the following specified projections and encroachments, every part of a required *yard* or *court* or other required open space shall be open and unobstructed to the sky:

7503.11 Cornices and eaves may project over any required *yard* or *court* for a distance not to exceed two feet; (2-28-61)

District of Columbia Code/DIVISION V LOCAL BUSINESS AFFAIRS/TITLE 29 CORPORATIONS/CHAPTER 10 LIMITED LIABILITY COMPANIES/§ 29-1060.

Transactions not constituting doing business [Formerly § 29-1360].

§ 29-1060. Transactions not constituting doing business [Formerly § 29-1360].

(a) The following activities of a foreign limited liability company, among others, do not constitute transacting business within the meaning of this chapter:

(1) Maintaining, defending, or settling any proceedings;

(2) Holding meetings of its members or carrying on any other activities concerning its internal affairs;

(3) Maintaining bank accounts;

(4) Maintaining offices or agencies for the transfer, exchange, and registration of the foreign limited liability company's securities or maintaining trustees or depositaries with respect to those securities;

(5) Selling through independent contractors;

(6) Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside the District before they become contracts;

(7) Creating or acquiring indebtedness, deeds of trust, and security interests in real or personal property;

(8) Securing or collecting debts or enforcing deeds of trust and security interests in property securing the debts;

(9) Owning, without more, real or personal property; or

(10) Conducting an isolated transaction that is completed within 30 days and that is not one in the course of repeated transactions of a like nature.

(b) The list of activities in subsection (a) of this section is not exhaustive. This section does not apply in determining the contracts or activities that may subject a foreign limited liability company to service of process or taxation in the District or to regulation under any other law of the District.

(1981 Ed., § 29-1360; July 23, 1994, D.C. Law 10-138, § 61, 41 DCR 3010.)

§ 29-1058. Transaction of business without registration.

(b) The failure of a foreign limited liability company to register in the District shall not impair the validity of any contract or act of the foreign limited liability company or prevent the foreign limited liability company from defending any action at law or in equity in any court of the District.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

CERTIFICATE

THIS IS TO CERTIFY THAT
MONUMENT RESIDENTIAL LLC

A Limited Liability Company organized and existing under and by virtue of the laws of the state of **Delaware** has been duly authorized to transact business as a foreign Limited Liability Company in the District of Columbia by virtue of the Certificate of Registration issued by the Department of Consumer and Regulatory Affairs, Corporations Division on the **10th** day of **March , 2004 .**

The above entitled Limited Liability Company is at the time of issuance of this Certificate in **Good Standing** according to the records of this office.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of this office to be affixed this **30th** day of **March ,2004 .**

David Clark
DIRECTOR

John T. Drann
Administrator
Business and Professional Licensing Administration

Patricia E. Grays
Superintendent of Corporations
Corporations Division

Anthony A. Williams
Mayor

10606

BOOK 12585 PAGE 177

MAR 29 2 35 PM '66

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY
Lessor

AND

WATERGATE IMPROVEMENT ASSOCIATES
Lessee

Lease

Stage I—Commercial

Dated as of March 1, 1966

RECEIVED FOR RECORD on the
day of A. D. 19 at
M. and recorded in Liber No. 12585
folio 177 et seq. one of the Land
Records of the District of Columbia
Peter J. Ridley Recorder

R.C.L.

3.00

(Pt 2) of Lot 806 "B"

10606 BOOK 12585 PAGE 178 MAR 29 2 35 PM '66

TABLE OF CONTENTS

Section		Page
1.	Leased Property—Term of Lease	1
2.	Basic Rent	1
3.	Additional Rent	1
4.	No Counterclaim, Abatement, etc.	1
5.	Condition and Use of Property	2
6.	Improvements; Title	2
7.	Maintenance and Repairs, Shoring, etc.	2
8.	Alterations and Additions	2
9.	Lessee's Equipment	3
10.	Utility Services	3
11.	No Claims Against Lessor, etc.	3
12.	Indemnification by Lessee	3
13.	Inspection	3
14.	Payment of Impositions, etc.	3
15.	Compliance with Legal and Insurance Requirements, Instruments, etc.	4
16.	Liens, etc.	4
17.	Permitted Contests	4
18.	Insurance	4
19.	Damage to or Destruction of Property	5
20.	Taking of Property	7
21.	Certificate as to No Default, etc.; Information	9
22.	Right to Perform Lessee's Covenants; New Lease	9
23.	Accounting; Financial Statements and Other Information	10
24.	Events of Default; Termination	11
25.	Repossession, etc.	11
26.	Lessee's Waiver of Statutory Rights	12

BOOK PAGE
12585 179

Section		Page
27.	Estoppel Certificate by Lessee	12
28.	Estoppel Certificate by Lessor	12
29.	No Waiver, etc., by Lessor	12
30.	Remedies, etc., Cumulative	12
31.	Acceptance of Surrender	12
32.	No Merger of Title	12
33.	Conveyance by Lessor	13
34.	End of Term	13
35.	Non-Liability of Lessee	13
36.	Definitions	13
37.	Non-Disturbance and Attornment Agreement	15
38.	Notices, etc.	15
39.	Miscelloneous	15
	SCHEDULE A—Description	17
	ACKNOWLEDGEMENTS	19

BOOK PAGE
12585 180

LEASE

LEASE, dated as of March 1, 1966, between JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY ("Lessor"), a Massachusetts corporation, having its principal office and place of business at 200 Berkeley Street, Boston, Massachusetts 02117, and WATERGATE IMPROVEMENT ASSOCIATES ("Lessee"), a District of Columbia limited partnership, having its principal office and place of business at 1028 Connecticut Avenue N. W., Washington, D. C. 20036.

1. **Leased Property—Term of Lease.** Upon and subject to the conditions and limitations set forth below, Lessor leases to Lessee, and Lessee rents from Lessor, for a term commencing on March 1, 1966 and expiring at midnight on February 28, 2065, unless this Lease shall sooner terminate as hereinafter provided, the following realty:

(a) all the land and space described in Schedule A hereto, subject, however, to (*i*) unfiled liens of mechanics and materialmen, if any, against which Lessor has been insured to its satisfaction and (*ii*) such of the Permitted Exceptions (as such term and certain other terms used herein are defined in section 36), if any, set forth in such Schedule A as shall at the time be in effect and applicable to such land and space;

(b) all rights of way or use, servitudes, licenses, easements, tenements, hereditaments and appurtenances now or hereafter belonging or pertaining to any of the foregoing.

2. **Basic Rent.** Lessee will pay to Lessor a net annual basic rent ("Basic Rent") of $93,575 payable in equal monthly instalments in advance on March 1, 1966 and on or before the first day of each successive calendar month. If the term hereof shall expire other than on the last day of any month, the Basic Rent and Additional Rent becoming due on the last instalment date hereunder shall be prorated.

The Basic Rent and other sums payable to Lessor hereunder shall be payable in such coin or currency of the United States of America as at the time of payment shall be legal tender for the payment of public and private debts and shall be paid to Lessor at Lessor's address set forth above or to such agent or person or persons or at such other address as Lessor from time to time may designate. The Basic Rent shall be absolutely net to Lessor so that this Lease shall yield to Lessor the full amount of the instalments of Basic Rent throughout the term of this Lease without deduction except as otherwise expressly provided in section 20.3.

3. **Additional Rent.** Lessee will also pay, from time to time as provided in this Lease or on demand of Lessor, as additional rent ("Additional Rent"), (*a*) all other amounts, liabilities and obligations which Lessee herein assumes or agrees to pay, (*b*) interest at the rate of 8% per annum on such of the foregoing amounts, liabilities and obligations as are payable to Lessor and are not paid within 10 days of the date of such demand, such interest to accrue from the date of such demand, until payment thereof, and (*c*) interest at the rate of 8% per annum on all overdue instalments of Basic Rent, such interest to accrue from the due date thereof until payment. In the event of any failure on the part of Lessee to pay any Additional Rent, Lessor shall have all the rights, powers and remedies provided for in this Lease or at law or in equity or otherwise in the case of non-payment of the Basic Rent.

4. **No Counterclaim, Abatement, etc.** Except as otherwise expressly provided in section 20.3, the Basic Rent, Additional Rent and all other sums payable by Lessee hereunder shall be paid without notice, demand, counterclaim, setoff, deduction or defense and without abatement, suspension, deferment, diminution or reduction, and the obligations and liabilities of Lessee hereunder shall in no way be released, discharged or otherwise affected (except as expressly provided herein) by reason of: (*a*) any damage to or destruction of or any Taking of the Property or any part thereof, except as otherwise provided in sections 19.3 and 20.4 in the case of destruction during the last 5 years of

the term hereof or a Total Taking; (*b*) any restriction or prevention of or interference with any use of the Property or any part thereof; (c) any title defect or encumbrance or any eviction from the Property or any part thereof by title paramount or otherwise; (*d*) any bankruptcy, insolvency, reorganization, composition, adjustment, dissolution, liquidation or other like proceeding relating to Lessor, or any action taken with respect to this Lease by any trustee or receiver of Lessor, or by any court, in any such proceeding; (*e*) any claim which Lessee has or might have against Lessor; (*f*) any failure on the part of Lessor to perform or comply with any of the terms hereof or of any other agreement with Lessee; or (g) any other occurrence whatsoever, whether similar or dissimilar to the foregoing; in each case, whether or not Lessee shall have notice or knowledge of any of the foregoing. Except as expressly provided herein, Lessee waives all rights now or hereafter conferred by statute or otherwise to quit, terminate or surrender this Lease or the Property or any part thereof, or to any abatement, suspension, deferment, diminution or reduction of Basic Rent, Additional Rent or any other sum payable by Lessee hereunder.

5. **Condition and Use of Property.** Lessee is fully familiar with the physical condition of the Property and has received the same in good order and condition. Lessor makes no representation or warranty with respect to the condition of the Property or its fitness or availability for any particular use, and Lessor shall not be liable for any latent or patent defect therein. Lessee shall use the Property for the operation of the Improvements and will not do or permit any act or thing which is contrary to any Legal Requirement or Insurance Requirement, or which might impair the value or usefulness of the Property or any part thereof, or which constitutes a public or private nuisance or waste.

6. **Improvements; Title.** Fee simple title to the Improvements and any additions, alterations, restorations, repairs and replacements thereto shall be and is hereby confirmed as being vested in Lessee, *provided* that the terms of this Lease shall apply to such Improvements, additions, alterations, restorations, repairs and replacements and that fee simple title thereto shall revert to and the same shall be surrendered to and shall become the sole and absolute property of Lessor at the expiration or earlier termination of the term hereof, except that if a new lease is delivered pursuant to section 22.5 subsequent to any such expiration or termination, title to such Improvements shall be in the lessee under such new lease.

7. **Maintenance and Repairs, Shoring, etc.** Lessee at its expense will keep the Property and the adjoining sidewalks, curbs, vaults and vault space, if any, and ways in good and clean order and condition and will promptly make all necessary or appropriate repairs, replacements and renewals thereof, whether interior or exterior, structural or non-structural, ordinary or extraordinary, foreseen or unforeseen. All repairs, replacements and renewals shall be equal in quality and class to the original work. Lessee at its expense will do or cause others to do all shoring of foundations and walls of any building or other Improvement or of the ground adjacent thereto, and every other act, necessary or appropriate for the preservation and safety thereof by reason of or in connection with any excavation or other building operation upon the Property or any adjoining property, whether or not the owner of the Property shall, by any Legal Requirement, be required to take such action or be liable for failure to do so.

8. **Alterations and Additions.** If not at the time in default under this Lease, Lessee at its expense may make reasonable alterations of and additions to the Property or any part thereof, *provided* that any alteration or addition (*a*) shall not change the general character of the Property, or reduce the fair market value thereof below its value immediately before such alteration or addition, or impair the usefulness of the Property, (*b*) is effected with due diligence, in a good and workmanlike manner and in compliance with all Legal Requirements and Insurance Requirements; (c) is promptly and fully paid for by Lessee, and (*d*) is made, in case the estimated cost of such alteration or addition exceeds $100,000, under the supervision of an architect or engineer satisfactory to Lessor and in accordance with plans, specifications and cost estimates approved by Lessor and only after Lessee shall have furnished to

Lessor, if requested, a performance bond, or other security, satisfactory to Lessor. Notwithstanding the foregoing, the terms of clause (d) shall not be applicable if and so long as the Trustee or a nominee acting for it shall be the Lessee hereunder.

9. **Lessee's Equipment.** All Lessee's Equipment shall be the property of Lessee, *provided* that (*a*) upon the occurrence of an Event of Default Lessor shall, to the extent permitted by law, have (in addition to all other rights) a right of distress for rent and a lien on all Lessee's Equipment then on the Property as security for all Basic Rent, Additional Rent and other sums payable under this Lease, and (*b*) any Lessee's Equipment not removed by Lessee at its expense within 30 days after any repossession of the Property (whether or not this Lease has been terminated) shall be considered abandoned by Lessee and may be appropriated, sold, destroyed, or otherwise disposed of by Lessor without notice to Lessee and without obligation to account therefor, and Lessee will pay Lessor, upon demand, all costs and expenses incurred by Lessor in removing, storing or disposing of Lessee's Equipment. Lessee will immediately repair at its expense all damage to the Property caused by any removal of Lessee's Equipment therefrom, whether effected by Lessee or Lessor. Lessor shall not be responsible for any loss of or damage to Lessee's Equipment.

10. **Utility Services.** Lessee will pay or cause to be paid all charges for all public or private utility services and all sprinkler systems and protective services at any time rendered to or in connection with the Property or any part thereof, will comply with all contracts relating to any such services, and will do all other things required for the maintenance and continuance of all such services.

11. **No Claims Against Lessor, etc.** Nothing contained in this Lease shall constitute any consent or request by Lessor, express or implied, for the performance of any labor or services or the furnishing of any materials or other property in respect of the Property or any part thereof, nor as giving Lessee any right, power or authority to contract for or permit the performance of any labor or services or the furnishing of any materials or other property in such fashion as would permit the making of any claim against Lessor in respect thereof.

12. **Indemnification by Lessee.** Lessee will protect, indemnify and save harmless Lessor from and against all liabilities, obligations, claims, damages, penalties, causes of action, costs and expenses (including, without limitation, attorneys' fees and expenses) imposed upon or incurred by or asserted against Lessor by reason of (*a*) ownership of the Property or any interest therein, or receipt of any rent or other sum therefrom, (*b*) any accident, injury to or death of persons or loss of or damage to property occurring on or about the Property or any part thereof or the adjoining sidewalks, curbs, vaults and vault space, if any, streets or ways, (*c*) any use, non-use or condition of the Property or any part thereof or the adjoining sidewalks, curbs, vaults and vault space, if any, streets or ways, (*d*) any failure on the part of Lessee to perform or comply with any of the terms of this Lease, or (*e*) performance of any labor or services or the furnishing of any materials or other property in respect of the Property or any part thereof. In case any action, suit or proceeding is brought against Lessor by reason of any such occurrence, Lessee, upon Lessor's request, will at Lessee's expense resist and defend such action, suit or proceeding, or cause the same to be resisted and defended by counsel designated by Lessee and approved by Lessor. Such obligations of Lessee under this section as shall have accrued at the time of any termination of this Lease shall survive any such termination.

13. **Inspection.** Lessor and its authorized representatives may enter the Property or any part thereof at all reasonable times for the purpose of inspecting the same. Lessor shall not have any duty to make any such inspection nor shall it incur any liability or obligation for not making any such inspection.

14. **Payment of Impositions, etc.** Subject to section 17 relating to contests, Lessee will pay all Impositions before any fine, penalty, interest or cost may be added for non-payment, and will furnish

to Lessor, upon request, official receipts or other satisfactory proof evidencing such payments. So long as no proceedings are begun for the collection of any Imposition, Lessee will not be deemed to have defaulted under this section if it has paid its share of such Imposition in accordance with the agreement relating thereto approved by Lessor, between Watergate East, Inc., a Delaware Corporation, and Watergate Improvement Associates. Unless Lessee is in default hereunder, upon the expiration of the term hereof, all Impositions provided to be paid by Lessee hereunder, accrued or prepaid, as the case may be, shall be apportioned by Lessor and Lessee.

15. **Compliance with Legal and Insurance Requirements, Instruments, etc.** Subject to section 17 relating to contests, Lessee at its expense will promptly (*a*) comply with all Legal Requirements and Insurance Requirements, whether or not compliance therewith shall require structural changes in the Improvements or interfere with the use and enjoyment of the Property or any part thereof, (*b*) procure, maintain and comply with all permits, licenses and other authorizations required for any use of the Property or any part thereof then being made, and for the proper erection, installation, operation and maintenance of the Improvements and Lessee's Equipment or any part thereof, and (*c*) comply with any instruments of record at the time in force affecting the Property or any part thereof.

16. **Liens, etc.** Lessee will not directly or indirectly create or permit to be created or to remain, and will discharge, any lien, encumbrance or charge on, pledge of, or conditional sale or other title retention agreement with respect to the Property or any part thereof, Lessee's interest therein or the Basic Rent, Additional Rent or any other sum payable under this Lease, other than (*a*) this Lease and any assignment hereof or sublease hereunder, (*b*) mortgages or deeds of trust, (*c*) liens for Impositions not yet payable, or payable without the addition of any fine, penalty, interest or cost for nonpayment, or being contested as permitted by section 17, (*d*) Permitted Exceptions, and (*e*) liens of mechanics, materialmen, suppliers or vendors, or rights thereto, incurred in the ordinary course of business for sums which under the terms of the related contracts are not yet due but will become due within 60 days after completion, *provided* that such reserve or other appropriate provision, if any, as shall be required by generally accepted accounting principles shall have been made therefor. Notwithstanding the foregoing, the proviso to clause (c) shall not be applicable if and so long as the Trustee or a nominee acting for it shall be the Lessee hereunder.

17. **Permitted Contests.** Lessee, at its expense, and, if legally required, in the name of Lessor, may contest (in the case of any item of importance, after prior written notice to Lessor), by appropriate legal proceedings conducted in good faith and with due diligence, the amount or validity or application, in whole or in part, of any Imposition or lien therefor or any Legal Requirement or the application of any instrument of record referred to in section 15, *provided* that (*a*) in the cases of unpaid mechanics' liens or Impositions or liens therefor, such proceedings shall suspend the collection thereof from Lessor and the Property, (*b*) neither the Property nor any part thereof or interest therein would be in any danger of being sold, forfeited or lost, (*c*) in the case of a Legal Requirement, Lessor would not be in any danger of any additional civil or any criminal liability for failure to comply therewith and the Property would not be subject to the imposition of any lien as a result of such failure, and (*d*) Lessee shall have set aside on its books adequate reserves with respect thereto and shall have furnished such security, if any, as may be required in the proceedings or reasonably requested by Lessor. Notwithstanding the foregoing, the terms of clause (d) shall not be applicable if and so long as the Trustee or a nominee acting for it shall be the Lessee hereunder. Lessor, at the expense of Lessee, will cooperate with Lessee and execute any documents or pleadings legally required for any such contest *provided* that any such cooperation or execution will not impose any obligation on Lessor.

18. **Insurance.** 18.1. *Risks to be Insured.* Lessee, at its expense, will maintain with insurers approved by Lessor: (*a*) insurance with respect to the Improvements against loss or damage by fire, lightning, and other risks from time to time included under "extended coverage" policies, in

amounts sufficient to prevent Lessor or Lessee from becoming a co-insurer of any partial loss under the applicable policies, but in any event in amounts not less than 80% of the then full insurable value (actual replacement value without deduction for physical depreciation) of the Improvements as determined at the request of Lessor and at Lessee's expense by the insurer or insurers or by an expert approved by Lessor, (*b*) public liability and property damage insurance, applicable to the Property in such amounts as are usually carried by persons operating similar properties in the same general locality, (*c*) explosion insurance in respect of any steam and pressure boilers and similar apparatus located on the Property in amounts approved by Lessor, (*d*) war risk insurance when and to the extent obtainable from the United States Government or any agency thereof, (*e*) appropriate workmen's compensation insurance in respect of any work on or about the Property, (*f*) rent insurance against loss of rent due to fire and the risks now or hereafter embraced by "extended coverage" (and, to the extent obtainable, against loss covered by war risk insurance), in an amount not less than the full rental value of the Property for 2 years but in any event in an amount sufficient to prevent Lessor or Lessee from becoming a co-insurer of any partial loss under the applicable policies, *provided*, that the terms of this clause (f) shall not be applicable if and so long as the Trustee or a nominee acting for it shall be the Lessee hereunder, and (*g*) such other insurance with respect to the Property in such amounts and against such insurable hazards as Lessor from time to time may reasonably require.

18.2. *Policy Provisions.* All insurance maintained by Lessee pursuant to section 18.1 shall: (*a*) except for workmen's compensation insurance, name Lessor and Lessee as insureds, as their respective interests may appear, (*b*) provide that all insurance proceeds for losses of less than $50,000 shall be adjusted by Lessee and, except in the case of public liability and workmen's compensation insurance, be payable to John Hancock Mutual Life Insurance Company, a Massachusetts corporation, Depositary (such John Hancock Mutual Life Insurance Company and any successor, appointed pursuant to the terms hereof being herein called the "Depositary") under this Lease on behalf of Lessor, Lessee and the Trustee, as their respective interests may appear, and all insurance proceeds for losses of $50,000 or more, except for workmen's compensation insurance which shall be adjusted by Lessee, shall be adjusted by Lessor and Lessee jointly and shall, except in the case of public liability and workmen's compensation insurance, be payable to the Depositary, (*c*) provide that any losses shall be payable notwithstanding any act or negligence of Lessor or Lessee, (*d*) provide that no cancellation thereof shall be effective until at least 10 days after receipt by Lessor and Lessee of written notice thereof, and (*e*) be satisfactory to Lessor in all other respects.

18.3. *Delivery of Policies; Insurance Certificate.* Lessee will deliver promptly upon request, (*a*) to the Depositary, the originals of all insurance policies (or, in the case of blanket policies, certificates thereof) with respect to the Property which Lessee is required to maintain pursuant to this section 18, together with evidence as to the payment of all premiums then due thereon, and (*b*) to Lessor, a Certificate setting forth the particulars as to all such insurance policies and certifying that the same comply with the requirements of this section 18.

18.4. *Apportionment of Premiums.* Unless Lessee is in default hereunder, upon the expiration of the term hereof the unearned premiums upon any insurance required hereunder then in effect shall be apportioned between Lessor and Lessee.

19. **Damage to or Destruction of Property.** 19.1. *Lessee to Give Notice.* In case of any material damage to or destruction of the Property or any part thereof, Lessee will promptly give written notice thereof to Lessor, generally describing the nature and extent of such damage or destruction.

19.2. *Restoration.* In case of any damage to or destruction of the Property or any part thereof, other than a damage or destruction resulting in the expiration of this Lease pursuant to section 19.3, Lessee, whether or not the insurance proceeds, if any, on account of such damage or destruction shall

be sufficient for the purpose, at its expense will promptly commence and complete (subject to Unavoidable Delays) the restoration, replacement or rebuilding of the Property as nearly as possible to its value, condition and character immediately prior to such damage or destruction, with such alterations and additions as may be made at Lessee's election pursuant to and subject to the terms of section 8 (such restoration, replacement, rebuilding, alterations and additions, together with any temporary repairs and property protection pending completion of the work, being herein called "Restoration").

19.3. *Destruction Near End of Term.* In case of any damage to or destruction of the Property or any part thereof, during the last 5 years of the term hereof such that the same cannot be repaired without the demolition and replacement of the Improvements, Lessee, if it is not in default hereunder, may elect to terminate this Lease by giving to Lessor written notice of such election within 30 days after such damage or destruction shall have occurred. Upon the giving of such notice the term of this Lease shall expire on the thirtieth day following the date of the giving thereof.

19.4. *Application of Insurance Proceeds.* All insurance proceeds received by or payable to the Depositary on account of any damage to or destruction of the Property or any part thereof (less the actual costs, fees and expenses incurred in the collection thereof) shall be applied or dealt with as follows:

(a) All such proceeds (except rent insurance proceeds) actually received on account of any such damage or destruction, other than a damage to or destruction of the Property resulting in the expiration of this Lease pursuant to section 19.3, shall, unless Lessee is in default hereunder, be paid over to Lessee or as it may direct from time to time as Restoration progresses to pay (or reimburse Lessee for) the cost of Restoration, but only upon the written request of Lessee accompanied by evidence satisfactory to Lessor and the Trustee, that the sum requested has been paid or is then due and payable and is a proper item of such cost. Upon receipt by Lessor and the Trustee of evidence satisfactory to them that Restoration has been completed and the cost thereof paid in full and that there are no mechanics' or similar liens for labor or materials supplied in connection therewith, the balance, if any, of such proceeds shall, unless Lessee is in default under the Deed or hereunder, be paid over or assigned to Lessee or as it may direct.

(b) All rent insurance proceeds actually paid to the Depositary on account of any such damage or destruction, other than a damage to or destruction of the Property resulting in the expiration of this Lease pursuant to section 19.3, shall be held by it for the payment of (and disbursement as necessary to pay), when and as due and payable, the Basic Rent, Additional Rent and the payments on the indebtedness secured by the Deed on a non-accelerated basis, and other payments due under this Lease, until Restoration of the Property has been completed. The balance, if any, of such proceeds shall, unless Lessee is in default under the Deed or hereunder, be paid over or assigned to Lessee or as it may direct.

(c) All such proceeds received or payable on account of a damage to or destruction of the shall be Lessor, there shall be allocated to Lessor an amount equal to $1,871,500, reduced by any amounts previously allocated to Lessor in connection with any Taking.

19.5. *Depositary Protected, etc.* The Depositary shall be protected in acting upon any Certificate believed by it to be genuine and to have been signed by the proper party and shall receive such Certificate as conclusive evidence of any fact or matter therein set forth. Such Certificate shall be full warrant, authority and protection to the Depositary in acting upon the faith thereof. The Depositary shall be under no duty to take any action other than as specifically set forth in this section 19 and in section 20, or to appear in or defend any suit unless requested in writing by Lessor, Lessee or the Trustee and indemnified to its reasonable satisfaction.

19.6. *Successor Depositary.* If at any time the Depositary shall be unable or unwilling to act under this section 19 or under section 20, Lessor, with the prior written agreement of the Trustee, shall

Such values shall be deemed to be the values respectively determined in the proceeding relating to such Taking or if no such separate determination is made, determined by agreement between Lessor and Lessee. If such agreement cannot be reached, such value shall be determined by arbitration in accordance with the terms of section 20.7.

Effective as of the date of the receipt of the awards and proceeds of such Taking, the Basic Rent shall be reduced by an amount per annum equal to 5% of the amount received by Lessor pursuant to paragraph (b) of this section 20.3.

20.4. *Total Taking.* In case of (*a*) the Taking of the fee of the entire Property, (*b*) the Taking (other than for temporary use) of such a substantial part of the Property that, in the judgment of an independent architect retained by Lessee and acceptable to Lessor and the Trustee, the damage or loss from such Taking cannot be repaired, restored or replaced so that the remaining portion of the Property is suitable for use by Lessee in the operation of the Property, or (*c*) the Taking of such a substantial part of the Property during the last 5 years of the term hereof that the same cannot be repaired without the demolition and replacement of the Improvements, and Lessee elects, by giving to Lessor written notice of such election within 30 days of such Taking, not to effect such demolition and replacement, this Lease shall expire as of the date of such Taking. Any taking of the Property of the character referred to above in this section which results in such expiration of this Lease is herein called a "Total Taking."

20.5. *Awards upon Total Taking.* All awards or proceeds of a Total Taking shall be allocated between Lessor and Lessee as set forth in section 20.3 with respect to a Taking other than a Total Taking of the Property, *provided* that any determination of the value of Lessor's or Lessee's interest, referred to in such section, shall be determined as if the term of this Lease had not expired.

20.6. *Taking for Use.* In the event of a Taking of all or part of the Property for temporary use, this Lease shall continue in full force and effect without abatement or reduction in the Basic Rent and Additional Rent and any awards or proceeds of such Taking shall be paid to the Depositary and the Depositary shall reserve therefrom, after deducting the reasonable expenses of Lessor, Lessee, the Trustee and the Depositary incurred in collecting the same, such portion thereof as the Depositary in its discretion considers appropriate to cover the payment of

(a) the Basic Rent and Additional Rent payable and to become payable hereunder during the period of such Taking,

(b) the instalments payable and to become payable on the indebtedness secured by the Deed during such period, and

(c) the costs and expenses of the Restoration, if any, necessary to restore the Property after repossession to its condition prior to the Taking,

and shall apply the same when due to the payment of such Basic Rent, Additional Rent, payment, without acceleration, of the indebtedness secured by the Deed and costs and expenses of such Restoration and shall pay over the balance, if any, to Lessee, to be retained by it.

20.7. *Arbitration.* Whenever, pursuant to section 20.3, any question is required to be determined by arbitration, such question shall be settled and finally determined by arbitration in the City of Washington, D. C. in accordance with the rules then obtaining of the American Arbitration Association or its successor and judgment upon the award rendered may be entered in any court having jurisdiction thereof. Either Lessor or Lessee may, by notice in writing to the other party, request arbitration. Thereupon and within 10 days after receipt of such notice the parties shall agree upon an impartial arbitrator. If the parties fail to agree on an impartial arbitrator within such 10 days, such impartial arbitrator shall be selected by the American Arbitration Association at the request of either party. The fees and expenses of the arbitrator shall be borne equally by Lessor and Lessee.

21. **Certificate as to No Default, etc.; Information.** Lessee will deliver to Lessor, promptly upon request, (*a*) a Certificate stating that no default exists hereunder, or, if any such default exists, specifying the nature and period of existence thereof and what action Lessee is taking or proposes to take with respect thereto, and (*b*) such information with respect to the Property or any part thereof as from time to time may reasonably be requested.

22. **Right to Perform Lessee's Covenants; New Lease.** 22.1. *Notice.* Lessor will give to the Trustee a copy of any notice or other communication from Lessor to Lessee hereunder at the time of giving such notice or communication to Lessee and notice of any rejection of this Lease by any trustee in bankruptcy of Lessee. Lessor will not exercise any right, power or remedy with respect to any default hereunder and no notice to Lessee of any such default and no termination of this Lease in connection therewith shall be effective, unless Lessor shall have given to the Trustee written notice or a copy of its notice to Lessee of such default or any such termination, as the case may be.

22.2. *Forbearance by Lessor of Remedies upon Default.* Lessor will not exercise any right, power or remedy with respect to any Event of Default hereunder until the expiration of any grace period provided with respect thereto, plus an additional period of 30 days after the expiration thereof or after Lessor has given to the Trustee written notice of such default or a copy of its notice to Lessee of such default, whichever is later. Lessor will not exercise any right, power or remedy with respect to any default hereunder if (*a*) the Trustee within such 30-day period shall give to Lessor written notice that either (*i*) such default is not susceptible of being corrected and is therefore subject to the terms of section 22.4 or (*ii*) it intends to undertake the correction of such default or to cause the same to be corrected and (*b*) the Trustee shall thereafter in the case of any default referred to in clause (ii) of this section, prosecute diligently the correction of such default, whether by exercise on behalf of Lessee of its obligations hereunder, entry on the Property, foreclosure, sale or otherwise.

22.3. *Performance on Behalf of Lessee.* Lessor or the Trustee may make any payment or perform any act required hereunder to be made or performed by Lessee with the same effect as if made or performed by Lessee (after notice to the Trustee or Lessor, as the case may be), *provided* that no entry by Lessor or the Trustee upon the Property for such purpose shall constitute or be deemed to be an eviction of Lessee and shall not waive or release Lessee from any obligation or default hereunder (except any obligation or default which shall have been fully performed or corrected by such payment or performance by the Trustee). All sums so paid by Lessor and all costs and expenses incurred by Lessor in connection with the performance of any such act shall constitute Additional Rent payable by Lessee hereunder.

22.4. *No Termination of Lease.* So long as the Deed shall be a lien upon the Lessee's interest hereunder, Lessor shall not declare the Lease forfeited, or re-enter, take possession of or relet the Property or similarly enforce performance hereof in a mode provided by law or terminate or take any action which would lead to the termination hereof and this Lease shall not terminate by reason of any condition or event which is not susceptible of being corrected or eliminated by the Trustee. If any such condition or event shall have occurred and be continuing, Lessor may, by notice to the Trustee and Lessee, require Lessee to assign its interest hereunder to the Trustee or its nominee. The happening of any such condition or event (including, without limitation, any rejection of this Lease by the Lessee, or any trustee of the Lessee in any bankruptcy, reorganization, arrangement or similar proceeding) which would, if it were not for this section, cause this Lease to terminate, shall, without any action or consent by Lessor, Lessee or the Trustee, effect the transfer of Lessee's interest hereunder to the Trustee or its nominee. The Trustee may terminate this Lease upon any such transfer upon giving notice thereof to Lessor no later than 30 days after notice from Lessor of such transfer. Upon any such termination the Trustee shall have no further obligations hereunder (including, without limitation, any obligations which may have accrued prior to such termination).

22.5. *New Lease.* In case (*a*) Lessee's interest hereunder shall be sold, assigned or otherwise transferred pursuant to the exercise of any right, power or remedy of the Trustee under the Deed

or pursuant to judicial proceedings or pursuant to section 22.4, or notwithstanding the terms of section 22.4, this Lease is terminated as a result of a condition not susceptible of being cured or eliminated by the Trustee, (*b*) no Basic Rent, Additional Rent or other sums payable hereunder shall then be due and payable to Lessor, (*c*) the Trustee shall have arranged for the correction of any default susceptible of being corrected by the lessee under the new lease referred to below, and (*d*) this Lease shall not have been terminated by reason of default pursuant to the terms hereof, Lessor, upon receipt, within 6 months after the occurrence of any event referred to in clause (a) of this section 22.5, of a written request therefor and upon payment of all expenses (including, without limitation, attorneys' fees and expenses) incident thereto, will execute and deliver a new lease to the Trustee or its nominee, for the remainder of the term of this Lease, with the same terms as are contained hereunder and with equal priority hereto. Upon the execution and delivery of such new lease, Lessor, at the expense of the new lessee, shall take such steps as shall be necessary to cancel and discharge this Lease of record and remove Lessee from the Property.

23. **Accounting; Financial Statements and Other Information.** Lessee will maintain a standard system of accounting established and administered in accordance with generally accepted accounting principles, and will set aside on its books all such proper reserves for each fiscal year for depreciation, obsolescence and amortization and other purposes as shall be required by generally accepted accounting principles. Lessee will deliver (in duplicate) to Lessor:

(a) as soon as practicable after the end of each of the first three quarterly fiscal periods of each fiscal year, and in any event within 60 days thereafter, a balance sheet of Lessee as at the end of such period, and statements of income and of surplus of Lessee for such period and, in the case of the second and third quarterly fiscal periods, for the portion of the fiscal year to the end of such period, setting forth in each case, in comparative form, the figures for the corresponding period of the previous fiscal year, all in reasonable detail and certified as complete and correct, subject to changes resulting from year-end adjustments, by the principal financial officer of Lessee;

(b) as soon as practicable after the end of each fiscal year, and in any event within 120 days thereafter, a balance sheet of Lessee as at the end of such year and statements of income and of surplus of Lessee for such year, setting forth in each case, in comparative form, the figures for the previous fiscal year, all in reasonable detail and certified by independent public accountants of recognized standing selected by Lessee and approved by Lessor, together with (*i*) a Certificate by such accountants stating whether or not their examination has disclosed the existence of any default and, if their examination has disclosed such a default, specifying the nature and period of existence thereof, and (*ii*) a Certificate of Lessee to the effect that each signer thereof has reviewed the relevant terms of this Lease and has made, or caused to be made under his supervision, an adequate review of the transactions and condition of Lessee during the accounting period covered by such financial statements, and that such review has not disclosed the existence during such accounting period nor does any signer thereof have knowledge of the existence, as at the date of such Certificate, of any default, or, if any such default existed or exists, specifying the nature and period of existence thereof and what action Lessee has taken or is taking or proposes to take with respect thereto;

(c) promptly upon receipt thereof, copies of all detailed audits, if any, submitted to Lessee by independent accountants in connection with each annual or interim audit of the books of Lessee made by such accountants;

(d) at the time of each delivery of financial statements pursuant to paragraph (a) of this section, a Certificate of Lessee stating that no default under this Lease has occurred or, if any such default has occurred, specifying the nature and period of existence thereof and what action Lessee is taking or proposes to take with respect thereto; and

(e) with reasonable promptness, such other data and information as from time to time may be reasonably requested.