JORDAN & KEYS, LLP
ATTORNEYS AT LAW
SUITE 520
1400 SIXTEENTH STREET, N.W.
WASHINGTON, D. C. 20036-2217
(202) 483-8300
FACSIMILE (202) 328-6153

KATHLEEN A. CAREY+
RACHEL C. EVANS+
GEORGE R. KEYS, JR.+
O'NEIL S. KING+
+Also Admitted in Maryland

OF COUNSEL:
HAROLD E. JORDAN

E-mail: gkeys@jordankeys.com

May 14, 2004

HAND-DELIVERED

Carol J. Mitten, Chairperson
Zoning Commission for the District of Columbia
441 Fourth Street, N.W. - Room 210 South
Washington, D.C. 20001

Re: Request for Contested Case Status for
ZC Case No. 04-02 - Map and Text Amendment for
East M Street SE, Capitol Gateway Overlay District II

Dear Ms. Mitten:

This firm represents Washington Gas Light Company ("WGLC") and Lincoln Property Company ("LPC" and, collectively, the "Developer") in connection with the development of the Maritime Plaza complex, which is situated on an 11-acre parcel lying east of the Navy Yard and roughly bounded by Water Street, 12th Street, M Street and Virginia Avenue, S.E. (the "Project"). The first phase of the Project, consisting of two office buildings aggregating 358,944 square feet of gross floor area on 5.305 acres of land, is completed and the Developer is now in the midst of processing a Large Tract Review ("LTR") application filed with the Office of Planning on March 16, 2004 for the remainder of the site pursuant to Chapter 23, 10 DCMR *Planning and Development* (1994).

This letter is written in response to the Notice of Public Hearing, published by the Zoning Commission (the "Commission") in the D.C. Register on April 23, 2004, at p. 4075-4079 (the "Hearing Notice"), announcing a rulemaking hearing for the above-referenced case under § 3021 of 11 DCMR *Zoning* (February 2003), as amended (the "Zoning Regulations"). Pursuant to § 3010.7 of the Zoning Regulations, on behalf of the Developer and for the reasons more fully set out below, we respectfully request that

ZONING COMMISSION
District of Columbia
CASE NO. 04-02
EXHIBIT NO. 7

ZONING COMMISSION
District of Columbia
CASE NO.04-02
EXHIBIT NO.7

the Commission convert this proceeding to a "contested case" under § 3022 of the Zoning Regulations.

Factual Background

1. The East M Street Area, as defined in the Hearing Notice, consists of all or parts of 10 squares, lying roughly within an area bounded by the Washington Navy Yard, the Southeast Expressway, Water Street, S.E. and the Sousa Bridge and containing approximately 842,675 square feet of land.[1]

2. All of the land within the East M Street Area is owned by the four owners listed below:

WGLC	510,123 square feet
United States/District of Columbia	164,268 square feet
Consolidated Rail Corporation (CRC)	127,704 square feet
1333 M Street SE LLC	40,580 square feet

3. Eighty percent (80%) of the land within the East M Street Area is owned by the three private sector owners.

4. The land owned by CRC within the East M Street Area consists largely of right-of-ways running parallel along the railroad tracks alongside of and beneath the Southeast/Southwest Expressway and is essentially undevelopable.

5. Of the privately-owned land within the East M Street Area that is capable of development, the Developer owns ninety-three percent (93%) of such land.

6. None of the privately-owned land capable of development within the East M Street Area abuts the Anacostia River.

7. The Project is located on land which was the site of the former WGLC coal gasification plant and is a "brownfield" site with an existing active remediation plan overseen by the U.S. Environmental Protection Agency and the D.C. Environmental Health Administration.

---

[1]In estimating the extent of the land area of the East M Street Area, we have relied upon ownership data assembled by the Office of Planning and attached to the OP Report, dated January 30, 2004, as Attachment VI.

8. The Developer began the Project in 1998 and, following a series of meetings with the Office of Planning, filed its Large Tract Review application for the first phase of the Project on August 24, 1999 (the "First LTR").

9. As part of the First LTR review of the Project, the Developer presented a site plan for the entire Project showing how the balance of the 11 acres would be developed, as a matter-of-right in the M Zoning District, into an integrated site plan of office and hotel buildings making use of shared access roads and an above-grade, central parking deck/plaza.

10. The Office of Planning concluded the First LTR on December 22, 1999, attaching certain conditions to its Final Report related to pedestrian access through the site to the Anacostia Waterfront, the provision of a traffic circle entry to the site from M Street, S.E. and the ultimate design of the central plaza "to ensure the development of a pedestrian scale attractive to visitors and employees and appropriate to its waterfront location." In addition, the Developer committed to design and construct a "signature plaza" for the Project at the corner of 12th and M Streets, S.E. for the purpose of welcoming pedestrians to site and visually announcing the Project's connection to the Anacostia waterfront.

11. In 2000, the Developer obtained the closure of two "paper" streets within the first phase of the site, the 1200-block of N Street and the 1200-block of 13th Street, S.E., and, at the insistence of the National Capitol Planning Commission ("NCPC"), the Developer agreed to maintain view corridors along the closed street beds and adjusted its site planning accordingly.

12. On March 16, 2004, the Developer filed its LTR application for the second and final phase of the Project (the "Second LTR"). This filing was preceded by another series of meetings with the Office of Planning during which the site plan for the Project was discussed and further modified to respond to design considerations advanced by the Office of Planning and responsive to the Anacostia Waterfront Initiative.

13. On February 6, 2004, the Commission determined to set-down for public hearing a map amendment for the East M Street Area rezoning the land from M, C-M-1 and C-M-2 to W-3, or in the alternative to rezone a portion of the Developer's land to W-2,

and to apply a modified Capitol Gateway Overlay to the East M Street Area, identified for such purposes as the CG Overlay District II.

Standards for Contested Case vs. Rulemaking Proceedings

The Zoning Regulations carry a clear presumption that applications to amend the Zoning Map are rulemaking cases in which the Zoning Commission is acting in a quasi-legislative capacity, as opposed to "contested case" status for those occasions when the Zoning Commission acts in a quasi-adjudicative role.[2] Specifically, when an agency, like the Office of Planning in the instant case, petitions to rezone an area of the city encompassing multiple properties, the case is ordinarily a rulemaking proceeding under § 3021.[3] In spite of this general presumption, the Zoning Commission may "upon the motion of any person" review the classification of any case based on the standards contained in §§ 3010.2 and 3010.4.

It is our contention that the rezoning of the East M Street Area and the accompanying CG Overlay District II are directed almost entirely at the Project and, as such, the proposed action by the Commission uniquely affects the property rights, duties and privileges of an easily defined, identifiable and finite set of property owners within the East M Street Area. This is especially true in the case of the Developer which is actively engaged in the development process of the second phase of the Project, a process that will be significantly affected by the proposed rezoning.

In a series of rulings in the 1970's, the District of Columbia Court of Appeals established the substantive judicial boundary between "contested cases" and "rulemaking cases."[4]

---

[2]Section 3010.4(a) of the Zoning Regulations.

[3]Section 3010.5(b) of the Zoning Regulations.

[4]Schneider v. D.C. Zoning Commission, 383 A.2d 324 (D.C. App. 1978); Capitol Hill Restoration Society v. D.C. Zoning Commission, 380 A.2d 174 (D.C. App 1977); Dupont Circle Citizen's Ass'n. v. D.C. Zoning Commission, 343 A.2d 296 (D.C. App. 1975); The Citizens Ass'n of Georgetown, Inc. v. Washington, 291 A.2d 699 (D.C. App. 1972); Capitol Hill Restoration Society v. D.C.

> However we have eschewed any bright-line analysis and have instead opted for a functional test in determining whether on a specific set of facts, a trial type hearing is required before an amendment to the zoning map may be adopted.[5]

One obvious limitation on the use of "contested case" classification is both prudential and practical. Since parties to a "contested case" hearing are entitled to a number of procedural rights (presentation of witnesses, cross-examination of witnesses and other parties, formal findings of fact, preclusion of *ex parte* contact, etc.), situations which present a multiplicity of potential parties bring with them the threat of bogging the administrative process down in lengthy and confusing hearings which ultimately may frustrate the interests of the public in an orderly planning process.[6] Therefore, the case law stresses that the delineation of a few affected parties, whose rights can be reasonably be said to be determined by the map amendment at issue, is the hallmark of a "contested case."

For example, in Schneider, the Court of Appeals reasoned that 50 parcels within 6 city squares (and presumably representing 50 different ownership entities) was a general and wide enough application of zoning to justify a rulemaking proceeding. The Court relied on its reasoning in a prior case involving the rezoning of the Georgetown Waterfront and identified the critical determination to be made:

> The Zoning Commission's evaluation of the area would not rest upon the status of any particular property, nor would the peculiar problem of any one individual in the area be of paramount concern. It is difficult to conceive that factual findings would be required on the

---

Zoning Commission, 287 A.2d 101 (D.C. App. 1972).

[5]Schneider, 383 A.2d at 326. In Schneider, the Court of Appeals rejected a challenge to a rulemaking hearing where the rezoning, although not covering an entire area of the city, did affect 50 parcels of land within six city squares and had a significant impact on the Dupont Circle neighborhood.

[6]Chevy Chase Citizens Ass'n. v. District of Columbia Council, 327 A.2d 310, 317 (D.C. App. 1974)

> particular status of specific individuals. In short, a proceeding before the Zoning Commission on amendments relating to an area of the city lacks the specificity of subject matter and result, indicative of an adjudicatory proceeding.[7]

Another aspect of the "contested case" determination is whether the case involves particular information affecting the rights of specific individuals. In Capitol Hill Restoration Society v. D.C. Zoning Commission, 380 A.2d 174 (D.C. App 1977), the property in question was a 2.2 acre parcel owned by three separate entities, one of whom wanted to rezone its land from R-4 to C-2-B. Even though the cited case arose in the context of a private landowner seeking a map amendment, the reasoning in the case reinforces an essential element of "contested case" classification, that is, whether the decision will rely on specific rather than general fact-finding.

> We agree with petitioners that an assessment of those factors with respect to property such as that on which Graham intends to build depends not upon broad legislative policy judgments but, rather, upon the presentation of specific evidence concerning the nature of the property and the use of the land surrounding an applicant's property.[8]

In Dupont Circle Citizen's Ass'n v. D.C. Zoning Commission, the issue was an amendment of the Zoning Regulations to permit halfway houses to be located in R-4 and less restrictive districts. In denying the challenge to the Commission's decision

---

[7]The Citizens Ass'n of Georgetown, Inc., at 704-705.

[8]Capitol Hill Restoration Society, at 180. The D.C. Court of Appeals cited with approval a decision of the Supreme Court of Washington State which held:

> The parties whose interest are affected are readily identifiable. Although important questions of public policy may permeate a zoning amendment, the decision has a far greater impact on one group of citizens than on the public generally. Fleming v. City of Tacoma, 81 Wash.2d 292, 296, 502 P.2d 327, 331 (1972)(*en banc*).

to hold a public hearing under § 3021, the Court admitted the difficulty in finding the dividing line between the adjudicative and the legislative function by cautioning:

> We recognize, of course, that zoning regulations affect all property owners in some manner and that the distinction between legislative and adjudicative proceedings is not always precise ... Naturally, the Zoning Commission may not adjudicate the legal rights, duties or privileges of specific parties under the pretense of legislative action.[9] (emphasis added)

Application of the Legal Standards to Developer's Interests

The East M Street Area is an isolated, distinct and confined area of the city with only a very few private landowners. Only two of those owners have properties that are likely to be developed in any foreseeable future. Both owners have pending well-advanced development proposals before the Zoning Commission (Z.C. Case No. 03-22 filed by 1333 M Street SE LLC) and before the Office of Planning (the second phase of the LTR filed by the Developer) that will be directly affected (and we contend, on behalf of the Developer, adversely affected) by the proposed map amendment and the application of the CG Overlay. This is particularly true for the Developer as the first phase of the Project was developed as a matter-of-right under the M Zoning District regulations, anticipating the further development of future phases to complete the scheme of common facilities and amenities. The proposed rezoning will retroactively apply to the completed first phase and will prospectively govern the completion of the final phase of the Project. As the owner of ninety-three percent (93%) of the developable land subject to the rezoning, the map amendment uniquely and almost exclusively has as its object the control and direction of the future development of the Project.

Under these circumstances, the functional effect of the proposed map amendment implicates private and specific interests of a few private owners (the Developer and 1333 M Street SE LLC) in a narrow geographical and factual context. Based on the foregoing discussion of the facts of this case and the applicable legal standards in the District of Columbia, we request that the

---

[9] Dupont Circle Citizen's Ass'n., at 300.

Zoning Commission reconsider the Hearing Notice in Case No. 04-02 and re-advertise the public hearing as a "contested case" under § 3022 of the Zoning Regulations.

Respectfully submitted,

George R. Keys, Jr.
Counsel for the Developer

cc: Mary Jean Brady
William Hickey
D.C. Office of Planning