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November 19, 2004

By Hand Delivery

Carol J. Mitten
Chair, District of Columbia Zoning Commission
441 4th Street, NW
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**Re: Case No. 04-18: Proposed Mount Vernon Triangle Subarea of the
Downtown Development ("DD") District – Impact on Development of
the Former Wax Museum Site – Supplemental Letter**

Dear Ms. Mitten

We are writing on behalf of L5K, LLC (collectively, "L5K"), the developer selected by the National Capital Revitalization Corporation ("NCRC") to develop Square 515, Lot 158, at 5th and K Streets, N.W. (the "Subject Property"). This property is more commonly known as the old Wax Museum site. The Zoning Commission determined at its July 2004 meeting to set this proposal for hearing. No hearing date has been scheduled.

As acknowledged by the Commission at setdown, the proposed overlay is both complicated and confusing. Several provisions of the proposed overlay pose a serious impediment to the successful completion of the Wax Museum project. Other design provisions are perhaps theoretically achievable, were L5K starting from scratch, but the project design is currently well underway based upon NCRC's approvals. As discussed below, we have attached a detailed memorandum from the architect noting all of the various differences between the currently approved design and the provisions of the proposed overlay. Under the "set down" rule (§ 3202.5(b) of the Zoning Regulations) an application for a building permit may be processed only in accordance with the most restrictive zone classification being considered. Because of this, the Wax Museum project is in jeopardy and the timely resolution of these issues is critical to the viability of the Wax Museum project.

For the reasons provided herein, we respectfully request that the Zoning Commission, should it proceed with this overlay, specifically exempt the Wax Museum site from any of its provisions and issue a revised hearing notice to that effect. We note

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CASE NO. 04-18
EXHIBIT NO. 8

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that Section 170x 6(b) specifically exempts the Wax Museum site from the proposed height restriction because “[t]his square is already covered by the ERA [the Exclusive Right Agreement] for the disposition of the Wax Museum site.” A similar logic should be applied to the remainder of the overlay restrictions. Should the Zoning Commission determine not to exempt the Wax Museum from the overlay, we ask that the Zoning Commission modify the overlay as outlined in this letter and accompanying letter from Torti Gallas (Exhibit A), and issue a revised hearing notice to that effect.

Background

The Wax Museum site has had a long, relatively rocky history. It has been vacant for many years. As testimony to the difficulty inherent in developing this property, the Wax Museum site has been the subject of three (3) different Requests for Proposals (RFPs) issued by the RLA Revitalization Corporation (“RLARC”), a subsidiary of NCRC, and its predecessors. The original two (2) selected developments did not proceed. The third RFP to develop the site was issued on July 7, 2003. After numerous submissions and presentations, L5K was selected on February 26, 2004. (Press Release attached as Exhibit B). NCRC and L5K have subsequently executed an Exclusive Rights Agreement (“ERA”) which is currently in effect and governs the development of the Subject Property, including the review and approval of the plans. L5K has also been working closely with the Office of Planning in terms of its plans for the Wax Museum project.

Review of Proposed Overlay and Impacts on Wax Museum Redevelopment

The proposed overlay places the corner of the Wax Museum site at 5th and K Streets, N W, within “The Special Entertainment Use Area” (Section 170x.15). (See Exhibit C). The Special Entertainment Use Area would establish severely restrictive use provisions for the ground floor of the development. The entire remaining site frontage on 5th and K Streets is located within the “Primary Use Area,” so that all of the 5th and K Street frontages are governed by the most restrictive use areas of the overlay. (See Exhibit D). Even though the Special Entertainment Use Area appears to be limited to an area 36 feet to the east and north of the intersection of 5th and K Streets, originally the Office of Planning took the position that once any part of the building is subject to the overlay, then those restrictive use provisions applied to the entire ground floor. In a subsequent October 15, 2004 meeting, the Office of Planning now indicates that only the more narrow view of the Overlay’s reach is applicable (that is, the Special Entertainment Use Area is limited to the 36 foot area east and west of the 5th and K intersection). In any event, the specific applicability of the Special Entertainment Area needs to be clarified, as does its effect on the Wax Museum project.

Under the proposed overlay, certain use restrictions (Section 170x.12) apply from the effective date allowing only Section 170x 23 and 170x 24 uses to be established. More troubling, the so-called “trigger point” for the most preferred use provisions is five (5) years after the Zoning Administrator¹ certifies that 3.5 million gross square feet of new space has been occupied within the defined Mount Vernon Triangle area and publishes a notice in the D.C. Register.² At that point, and assuming that the Special Entertainment Use Area is limited to the 36 foot area east and west of the 5th and K intersection, within the Special Entertainment Use Area only section 170x 25 uses are permitted: restaurant, bookstore (including restaurant), cabarets, and drinking places (Section 170x.20 and 170x 25). All §§ 170x 23 and 170x.24 uses must be discontinued if they were established. Clearly, any such section 170x.25 use will extend beyond the 36-foot area making the net impact of this restrictive use provision even larger. Special exception relief for one five-year extension period only is provided in Section 170x 22.

Furthermore, after the trigger point is reached, the larger Primary Use Subarea limits the potential users to §170x.23 uses. The § 170x 24 uses must be discontinued. The Primary Use Subarea occupies all of the remainder of the Wax Museum’s K Street (and 5th Street) frontage (See Exhibit D).

Section 170x 24 uses, although normally associated with vibrant retail areas, would not be permitted. These include:

Architect

Attorney

Bank, Loan Officer or Financial Institution

Consultant – General

Dentist, Doctor or Medical Officer

¹ We do not address the capacity of the Zoning Administrator to certify the 3.5 million trigger, but we do note the ongoing issues with respect to similar use restrictions on the amount of restaurants in Cleveland Park and elsewhere.

² Question: What happens if a relatively large user shuts down and the “trigger point” drops below 3.5 million square feet? Is the Zoning Administrator required to make another determination?

Escrow Agent

Insurance Agent

Landscape Architect

Mortgage Broker

Real Estate Agent, Appraiser, Broker, Developer

Stock Broker

Tax Preparer

Title Company

In addition, § 170x 14 prohibits apartments or condominiums entered directly from the street

From a practical standpoint, the impacts on leasing the Wax Museum ground floor created by the proposed overlay are two-fold. In an undeveloped market such as the area where the Wax Museum site is located, any restrictions on the type of use for the ground floor are problematic. This is particularly true for the Wax Museum project. It is intended to be a catalyst for future development in the area, and the project is already subject to numerous use and development restrictions imposed as part of the RFP process. In fact, the Mount Vernon Triangle Action Agenda (October 2003) which is referenced by the Office of Planning in its Report states that “[T]he commitment to the Wax Museum Site Request for Proposals, an NCRC initiative, demonstrates the City’s intent to shape the character of the neighborhood, with a program of our 500 housing units, along with encouraging the inclusion of artists live/work studios, a grocery store, retail and restaurants and a local arts venue. With this project [Wax Museum], the City intends to catalyze the creation of a neighborhood core as well as to support other new development in the Triangle. The Wax Museum site redevelopment will set the bar high for surrounding development with quality architectural design and construction of an abundance of local amenities” (at 6) (emphasis supplied). Further, the Office of Planning report on the proposed overlay states with respect to the Wax Museum site redevelopment, that “The National Capital Revitalization Corporation’s (NCRC’s) request for development proposals for the re-use of this site suggested that respondents place special emphasis on the uses, design treatment, and openings at the corner of 5th and K. The winning proposal responded positively to this suggestion. NCRC and OP are working to help refine design and use details for this corner” (at 7) (emphasis supplied).

If these statements are true, why are additional restrictions, particularly on design and use, being proposed?

Further, the trigger provisions, while providing an indefinite phase-in period theoretically to allow the area to mature, are not practicable in the real world. The trigger is five (5) years after the Zoning Administrator certifies that 3.5 million square feet have been occupied in the Mount Vernon area. In addition to issues of providing effective notice to all owners and tenants after the trigger has been pulled (the Zoning Administrator is to publish a notice in the D.C. Register), the end trigger date is not ascertainable in advance and therefore cannot be predicted at the time of entering a lease. The time frame is the most basic aspect of a lease. Tenants, owners and lenders require certainty in leases and in the financing structure. Why would tenants, and owners invest the costs, time and energy to build out a space and market the use if the tenant who takes the space will be required to vacate at a future unspecified date? How will owners be able to lease the ground floor to a non-preferred user if there is no certainty as to how long such tenant will be entitled to stay?

For instance, under the proposed regulations, an owner could lease the entire building, including the ground floor to a law firm, a permitted use under Section 170x.24. However, the lease for that ground floor would have to be indeterminate in term because of the unknown trigger date. No law firm would be willing to lease the space under such conditions. In the Special Entertainment Use Area, no § 170x.23 and .24 use and would be allowed. In the Priority Use Area, no § 170x.24 uses are allowed. In both areas, the impact is that many potential tenants are effectively eliminated in an area of the District with no proven track record.

Unfortunately, we believe that the more likely impact of the trigger provisions will be that no non-preferred user will sign a lease because of the indeterminate time frame. And because the area is certainly not attractive at this time to the restrictive type of tenants that the Office of Planning is seeking, the ground floor is most likely to remain vacant, thus bringing no change to the character of the area.

Finally, and most fundamentally, because of the unique nature of the Wax Museum project, its history and importance to the City, and the complexity of the deal with RLARC, the Wax Museum site should be completely exempt from the overlay. For instance, the Wax Museum project was required to have a grocery store. There is currently a lease commitment from Safeway; however, a grocery store is not a preferred use under Section 170x.25 and would not be permitted within the Special Entertainment Use Area. (It would be allowed with the Primary Area under § 1704.23)

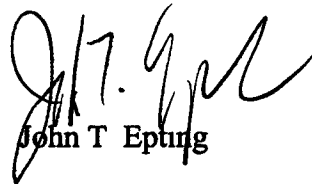
Implications on the Wax Museum's Current Design

Attached is a revised memorandum dated November 2, 2004, from the project architects (Torti Gallas and Partners • CHK) which details the impacts of the proposal on the project's current design (See Exhibit D). These differences between the current design and the overlay proposal include: ceiling heights and location of high ceiling areas of the building, the potential need for grills and/or louvers in the upper zone of the store front to accommodate supply air requirements for the retail space, driveway/private alley location, the impact on direct lobby entrances within 72-feet of the intersection affects the secondary entry to Safeway, and retail parking and mezzanine retail, and the need for exit stair discharges, lobbies and secondary entrances.

Conclusion

Redevelopment of the Wax Museum site has been a long, sometimes bumpy road, and it is far from complete. L5K and the NCRC have devoted an extraordinary amount of time and expense finally to make this project happen and bring new life and vitality to the Mt Vernon Triangle area. Superimposing additional, often conflicting use restrictions (with controversial phase-in trigger provisions for more restrictive uses) and design is inconsistent with NCRC's and the City's goals for developing this site and needlessly complicates an already complex project. We therefore respectfully request, if these provisions are to be adopted, that the Wax Museum site be exempt.

Sincerely,



John T. Epling

cc Marc Dubick
 Eileen Circo
 Lisa Wiersma