

**BEFORE THE ZONING COMMISSION
OF THE DISTRICT OF COLUMBIA**

In the Matter of Square 766

**APPLICATION TO AMEND THE TEXT OF THE ZONING REGULATIONS TO
INCLUDE SQUARE 766 IN THE CAPITOL SOUTH RECEIVING ZONE**

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Washington Telecom Associates, LLC (“Washington Telecom”), as the long term lessee¹ of 225 Virginia Avenue, LLC, owner of certain real property that is collectively known as Square 766 (inclusive of all lots: 21, 808, 809, 812, 813, 823 and 824), respectfully requests the Zoning Commission (the “Commission”) to accept and set for public hearing its application to amend the text of the Zoning Regulations to include Square 766 in the Capitol South receiving zone. Zoning, D.C. MUN. REGS. tit. 11, § 1709.18 (2006). In support of its application, Washington Telecom states as follows:

1. Square 766 is located in the southeast quadrant of the District of Columbia. It is bordered by Second Street on the West (90 ft ROW), Virginia Avenue on the North (160 ft ROW), Third Street on the East (90 ft ROW) and Eye Street on the South (90 ft ROW). It consists of approximately 92,400 square feet and is improved with a five-story building that was formally known as the “Evening Star Building” and then later as the “Washington Post Building.” The site currently contains 50 off-street surface parking spaces. It is within walking distance of the Navy Yard metrorail station serving the Green Line and five blocks from the Capitol South metrorail station serving the Blue and Orange Lines. There is immediate access to I-395 and to the Southeast/Southwest Freeway (I-295). It is near to the emerging Washington Navy Yard, the M Street Southeast corridor, the Southeast Federal Center and to the new

¹ Washington Telecom leases the entire property until 2059 with an option to renew the lease for an additional 30 years.

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Washington Nationals Baseball Stadium complex. The 13-story Marriott Courtyard hotel and Capitol Hill Towers apartments are nearby.

2. Square 737 is to the immediate west of Square 766 and is currently used as a surface parking lot. Upon information and belief, the owner of that square is contemplating a major retail, residential and commercial “town-center” development of approximately one million square feet, which will include the receipt of transferable development rights (“TDRs”) to enhance its matter-of-right density and height. This level of bulk will be consistent with that which is immediately to the south of Square 737, but substantially more than that which is currently permitted on Square 766. The difference is not due to the underlying zoning, but rather to the beneficial impact of Square 737 being mapped in the Capitol South receiving zone.

3. To the east of Square 766, the old Arthur Capper public housing facilities are being demolished to be replaced by a six-story 147-unit apartment building. Plans call for 1,625 rental and ownership units, 300 of which are reserved for seniors and 525 of which will be “affordable” units. Immediately to the south of Square 766, a six-story 147-unit apartment building is planned, an eleven-story 295-unit apartment building is planned on the next block, Square 768, and a ten-story 107-unit apartment building adjacent to a ten-story office building are planned on Square 769, one block further. Each of these properties is bordered to the west by an area known as Canal Park, a part of which is currently used as a school bus parking lot.

4. Square 766 is included in a “medium to high density” commercial category on the Comprehensive Plan Land Use Map and, accordingly, is zoned C-3-C, a district designed to accommodate “major business and employment centers providing substantial amounts of employment, housing and mixed uses.”

5. This application is brought because there is insufficient past and no current reason to treat Square 766 differently than adjacent properties in the same zone. That is, Square 766 is

the only square in the nearby C-3-C zone district that is not included within the Capitol South receiving zone, an omission which is not only inconsistent with the underlying zoning and the Comprehensive Plan Land Use Map, but which also ignores emerging development trends. The exclusion of Square 766 from the Capitol South receiving zone also translates into a significant loss of economic value to the entire square, unfairly making it less attractive for redevelopment than others that are similarly situated in the same neighborhood.² We have researched the reasons that Square 766 was not included within the Capitol South receiving zone and have found them, as stated, to be at least unsupported and clearly overtaken by development events in the area. It is for this reason that this text amendment is necessary and is therefore requested.

6. On August 21, 1997, at the request of the Commission, the Office of Planning (the "Office") recommended that a series of zoning amendments be made in furtherance of the 1994 Amendments to The District of Columbia Comprehensive Plan. Memorandum from Jill C. Dennis, Director and Nathan W. Gross, Chief of Comprehensive Plan Implementation, to the D.C. Zoning Commission *passim* (Aug. 21, 1997) (Z.C. Case No. 97-14Z, Exhibit No. 1); Comprehensive Plan Amendments Act of 1994, D.C. Act 10-323 (1994). The Office's recommendations included the following language implementing the creation of the Capitol South receiving zone, a new receiving zone for the purposes of receiving TDRs from the Downtown Development District:

1709.18 The Capitol South receiving zone consists of the C-3-C zoned portions of Squares 695 through 697, N697, 698, 699, N699, 737 through 742, N743, 766, 769 and 800.

Memorandum from Jill C. Dennis at 14 (emphasis added). The purpose for creating the Capitol South and two other receiving zones was clearly stated:

² There are several other squares in the same C-3-C zone that are also outside of the receiving area: those located to the West of South Capitol Street and parts of those squares along M Street, S.E. that are deemed "too shallow" to accommodate medium to high density development.

The opportunity to create TDRs for residential development is greatly enhanced by...a mandate to create three additional receiving zones for TDRs. The intent of this policy is to provide stronger demand (available sites) for TDRs and enhance the value and feasibility of the use of TDRs.

Id. at 11.

The Commission's Notice of Public Hearing for the February 23, 1998 hearing on Case No. 97-14Z (Remaining Text and Map Amendments – Downtown Development District (DD) – Consistency Case, Part 3) and the February 13, 1998 Report submitted for that hearing by the Office reiterated the proposed language verbatim. District of Columbia Zoning Commission Notice of Public Hearing (Z.C. Case No. 97-14Z, Exhibit No. 2); Jill C. Dennis, Hearing Report, Downtown Development District (DD): Remaining Zoning Text & Map Amendments Based on the 1994 Amendments to the Comprehensive Plan (97-14Z) at 13 (Feb. 13, 1998) (Z.C. Case No. 97-14Z, Exhibit No. 18).

7. In recommending the creation of the new receiving zones, the Office lauded the appropriateness of the areas for the receipt of TDRs:

All three areas are zone C-3-C, having been rezoned within the past three years pursuant to the 1994 amendments to the Comprehensive Plan, which redesignated the official land use policy for these areas. C-3-C is the same zone as the two existing receiving zones...

[The Office] recommends that the full height and bulk formulation...be advertised for public hearing. The three areas in question are all designated office precincts in the Comprehensive Plan, with good to excellent vehicular and public transit access and little potential for adverse affect on adjacent areas from high density office buildings rather than medium-high density office buildings.

Memorandum from Jill C. Dennis at 14. Further, none of the witnesses at the hearing provided testimony in opposition to the proposed amendments, including the language creating and delineating the Capitol South receiving zone. Witness List (Z.C. Case No. 97-14Z, Exhibit No. 20); *see also* Jill C. Dennis, Hearing Summary, Zoning Commission Case No. 97-14Z, Remaining 1994 Comprehensive Plan Related Downtown Development District (DD) Zoning

Text and Map Amendments *passim* (Apr. 9, 1998) (Z.C. Case No. 97-14Z, Exhibit No. 38). In fact, what testimony directly addressed the receiving zones commended their proposed locations and boundaries, as well as their harmony with nearby neighborhoods. *See, e.g.*, Testimony of Nate Gross, Zoning and Land Use Specialist, Arnold & Porter, via letter to the D.C. Zoning Commission *passim* (Feb. 23, 1998) (Z.C. Case No. 97-14Z, Exhibit No. 22) (advocating expansion of the receiving zones); for summary of public comment, *see* Jill C. Dennis, Hearing Summary. In response to the Commission's request that "the Office of Planning...provide further information on...[t]he geographic limits of the proposed Capitol South receiving zone," the Office attached to its memorandum a map identifying the specific boundaries thereof, *clearly including Square 766 in the zone*. Jill C. Dennis, Response to Commission Questions Re: Zoning Commission Case No. 97-14Z, Remaining 1994 Comprehensive Plan Related Downtown Development District (DD) Zoning Text and Map Amendments at 4 (Mar. 31, 1998)

8. In the absence of opposition to the Capitol South receiving zone's boundaries, the Commission met to consider the case at a Special Public Meeting on May 18, 1998. After limited discussion, the Commission voted "intentionally" to "leave out square[s] 766, 769, and 800." Transcript of District of Columbia Zoning Commission Special Public Meeting at 14 (May 18, 1998). The sole explanation offered for the action was:

"[T]he north and south limits of that overlay in the Capitol South receiving zone...with a potential of 110 to 130 feet in height[,] was cheek to jowl, really, with two story residential dwellings...even though 90 feet is no bargain, which is what *existing zoning* would allow, to go beyond that seems like going in the wrong direction next to those houses."

Id. at 13-14 (emphasis added). However, despite the Commission's vote, no change to the proposed amendments was advertised. In fact, the Notice of Proposed Rulemaking published three months later still included Square 766 in the Capitol South receiving zone. 45 D.C. Reg. 5824, 5826 (Aug. 24, 1998). Subsequently, then, without the correct notice, and thus without the

appropriate opportunity for public comment on the actual language proposed, the Commission adopted a redefined Capitol South receiving zone in a final action at a special public meeting on October 19, 1998, amending the Zoning Regulations and Map to include a new section 1709.18: "The Capitol South receiving zone consists of those portions of Squares 695 through 697, N697, 698, 699, N699, 737 through 742, and N743, each zoned C-3-C." Notice of Final Rulemaking, 46 D.C. REG. 1016, 1018 (Feb. 5, 1999); D.C. MUN. REGS. tit. 11, § 1709.18.³ Square 766 and the three residentially-zoned squares likewise removed were all previously published and thought to be included in the Capitol South receiving area. We do not contest the Commission's authority to take that action but do cite the attenuated circumstances that supported that action and the development events that have since occurred as adequate justification to restore Square 766 to the status of similarly situated squares in the development area in which it is a part.

9. **The exclusion of Square 766 from the Capitol South receiving zone had only limited rationale, the basis for which has since been overtaken by active market conditions and redevelopment.** The record for Case No. 97-14Z evidences but one justification for removing square 766 from the Capitol South receiving zone: incompatibility with the surrounding neighborhood. The transcript of the May 18, 1998 Commission meeting shows the Commissioners' concern that a building as tall as 130 feet would unduly tower over the existing two-story housing structures, mostly public housing projects located to the east of the square. Transcript of Special Meeting at 13-14. At the time, the Arthur Capper/Carrollsborg housing complex and assorted townhouses occupied the three squares to the south southeast of Square 766 (767, 768, and 769), the immediately adjacent property to the east (797), and nearby Squares

³ See also the attached "Notice and Comment Timeline" for more detail on the progression of public notice and Zoning Commission action on Case No. 97-14Z.

798, 799, 824 and 825, southeast of 766. None of these properties was then taller than three stories.

Today, however, the area's redevelopment plans are dramatically different. The public housing units are being razed. Squares 767, 768 and a portion of 769, *directly to the south southeast of 766*, have received preliminary approval by the Commission, as part of a PUD, to be rezoned from R-5-B to CR. Zoning Commission Order No. 03-12/03-13 (February 6, 2004) (Z.C. Case Nos. 03-12 and 03-13) (minor correction to Order made by Z.C. Order No. 03-12C/03-13C, October 3, 2005). This change in zoning will increase the matter-of-right height for those properties—situated, like Square 766, between 2nd and 3rd Streets, just west of the former public housing site—from fifty feet to ninety feet. Preliminary plans for the sites include six-, eleven- and ten-story apartment buildings as well as a ten-story office building. The rest of the demolished projects area will be replaced by nearly 300 three- and four-story rowhouses. The south side of the redeveloped projects area will border the existing seven-story office building at 300 M Street (Square 800) and the seven-story Carroll Apartments on Square 825S. Already up and operating are the thirteen-story Marriott Courtyard hotel and the Capitol Hill Tower apartments on Square 742, and, on Square 737, adjacent to the west of Square 766, current plans include a one million square foot mixed-use “town-center” development. Clearly, the character and nature of the neighborhood have intensified as the area has become more dense and adapted to a higher concentration of taller structures in the vicinity (especially just west of Second Street—in the core of the Capitol South receiving zone) than when reviewed in 1998. A building constructed on Square 766 to the maximum height and bulk allowed in the Capitol South receiving zone will not alter or now be inconsistent with the development that has occurred and is occurring in the area. Indeed, under the recently passed MIZ text, even residentially-zoned properties that are near to Square 766 may be built up to 80 feet in height.

10. The removal of Square 766 from the Capitol South receiving zone is inconsistent with the Comprehensive Plan, with the effect of making it a uniquely disadvantaged property. To implement the 1994 amendments to the Comprehensive Plan, the Office followed the D.C. Council's mandate creating the three new receiving zones in the areas designated "Medium-High Density Commercial" on the Generalized Land Use Map. Comprehensive Plan Amendments Act of 1994, D.C. Act 10-323, D.C. Law 10-193 § 2(a)(9)(X)(iii)(7)(B)(iii) (Aug. 8, 1994). Each of these areas is, and was then, designated as zoned C-3-C, the same as the then-existing receiving zones—the New Downtown and the Downtown East receiving zones. Memorandum from Jill C. Dennis at 12. Though the Home Rule Act requires that zoning "shall not be inconsistent with the comprehensive plan for the national capital" (D.C. CODE ANN. § 5-414(2)(2006)), the Office's recommendation was for the zoning changes to "eliminate inconsistencies between zoning and the Downtown Element of the Comprehensive Plan," thus furthering the intent of the Comprehensive Plan Amendments. *Id.* at 2. However, despite overwhelming testimony to the contrary, and little previous discussion of concern with Square 766's inclusion in the zone, the Commission changed the receiving zone boundaries "by just drawing up the boundary straight down Second Street, rather than going east of Second Street on those few properties that...are across Second Street and that are zoned C-3-C." Transcript of Special Public Meeting at 14. This action left Square 766 at a marked disadvantage in the market, being the only property east of Second Street zoned C-3-C, yet ineligible to accept TDRs to increase height and density (other than those portions of Squares 769 and 800 fronting on M Street, described by the Office as "very slender, very, very, very shallow properties" (*Id.*)). Square 766 is adjacent to a park, but that cannot justify its exclusion from the receiving zone. Squares 739, 741 and 742, are all included within the Capitol South

receiving zone and also abut that same park. The ongoing MIZ case furthers the uniquely disadvantaged character of Square 766. As the MIZ case map shows, the Capitol South receiving zone is excluded from inclusionary zoning requirements. With the receiving zone's current boundaries, this has the effect of leaving Square 766 as the sole higher density square subject to inclusionary zoning, with a TDR receiving zone to its west and lower density areas to its south and east. The effect is to "spot zone" Square 766 by, contrary to the Council's intent in the Comprehensive Plan Amendments, exclude this Medium-High Density Commercial, C-3-C property from the TDR zone, and then subject it to inclusionary zoning requirements.

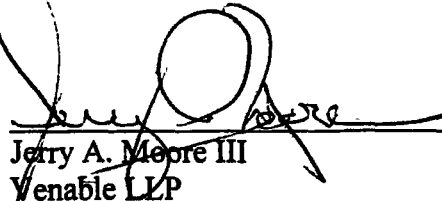
11. **The Zoning Commission should exercise its authority, as it has in the past, to amend the Zoning Regulations to correct for inconsistencies in text rulemaking.** The instant case presents remarkably similar facts and questions to those brought to the Commission by Case No. 00-11MM/97-14Z in 2000. By Order No. 860A, the Commission included Lot 61 of Square 435 in the Southwest receiving zone after it had been excluded from the final rulemaking of Case No. 97-14Z. Notice of Final Rulemaking and Order No. 860A, Case No. 00-11MM/97-14Z (Minor Modification to the DD Text Amendments) 47 D.C. REG. 6230 (Aug. 4, 2000). The Commission found that when establishing the Southwest receiving zone, "the intent was to include all C-3-C zoned squares located in the Southwest Urban Renewal Area north of the Southeast-Southwest Freeway within the Southwest receiving zone. All other such squares except square 435 were included." *Id.* at 6231. Amending the regulation to include Square 435 in that zone, therefore, was considered "minor in nature." *Id.* Though the omission in that case likely resulted from much of the square remaining unzoned due to federal government ownership, the principles readily apply to the instant case. Here, the amendments originally included in the receiving zone all C-3-C zoned properties east of South Capitol Street between M

Street and the Southeast Freeway, but were edited at the last minute with little discussion or debate—leaving a C-3-C zoned property protruding into an otherwise residential area with none of the rights to receive TDRs accorded to its similarly situated neighbors. As it did in 2000, the Commission should correct this zoning irregularity which started out as questionable but has since become outdated and in need of change with respect to Square 766.

12. **The applicant will provide further research and justification timely before the public hearing.**

Respectfully submitted,

Dated: June 20, 2006



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BEFORE THE ZONING COMMISSION
OF THE DISTRICT OF COLUMBIA

In the Matter of Square 766

[Proposed] ORDER

This matter comes before the commission on the Application for Text Amendment filed herein. Having considered the Application and concluding that the Application should be granted, it is this ____ day of _____ 2006,

ORDERED, that Chapter 17 of the Zoning Regulation, Title 11 of District of Columbia Municipal Regulation, is amended by including Square 766 in Subsection 1709.18:

1. Amend Subsection 1709.18 as follows:

The Capitol South receiving zone consists of those portions of Squares 695 through 697, N697, 698, 699, N699, 737 through 742, N743 and 766, each zoned C-3-C.

It is further **ORDERED** that the Zoning Map be amended in accordance with the approved amendment to Subsection 1709.18.

District of Columbia
Zoning Commission

Carol J. Mitten, Chairperson

Anthony Hood, Vice Chair

Gregory N. Jeffries, Commissioner

Kevin Hildebrand, Commissioner

John Parsons, Commissioner