

Before the  
D.C. Zoning Commission

Re: Case No.17-11, (3200 Pennsylvania Avenue PJV, LLC- Map Amendment Request concerning Sq. 5539 "Lots: 835,383,839 and 840")

Responsive Brief to the Chairman's Question regarding Protection of Views

October 16, 2017

I. BACKGROUND

This Brief seeks to comply with the Hon. Zoning Commission Chairman Anthony Hood's request for a follow up written briefing of the issue of view protection.

**Summary of the Gwendolyn Rose's position<sup>1</sup>:** The Commission has the lawful authority to protect viewsheds given that the MAP change being sought is located at the location that the D.C. City Council determined is an extension of the L'Enfant Plan. The viewsheds within the L'Enfant Plan can be protected against obstruction. The Opposition must not be adversely impacted by alteration of the viewshed at Pennsylvania and Branch Avenue due to planned development. The Commission must enforce rights granted to the adjacent land owners who oppose development of a 50-65 foot building on the rear lot of the existing structure at Pennsylvania and Branch Avenues SE).

Viewshed protection authority is pursuant to Section 701, of Title X of the Commission's regulations. Moreover, the Commission has the power to avoid a MAP grant on the basis of view analysis. It can refuse approval of the proposed development by not granting the MAP amendment if that would protect landowners from interference with the viewshed, and the Opposition's line-of-sight sunlight viewing access, pursuant to 11 DCMR, Title A, Chapter 3, Section 304.3's provisions governing "air" and "light" protections.

The Zoning Commission can rely on its own regulations; the urban design policy to protect the L'Enfant Plan against obstruction of vistas and viewsheds within the L'Enfant Plan, as established by the D.C. Office of Planning; the Commission mandate to protect land and regulate land use; and, the City Council's legislative directive to protect the Pennsylvania Avenue SE at the Branch Avenue node, as an extension of the L'Enfant Plan. This legislation gives the Commission legal authority to protect the site's viewshed and views and vista against adverse impact; and enables the Commission to deny the MAP change to protect the viewshed, and line-of-sight sunlight vistas and views surrounding the site.

Being able to see the sun is healthy, and can conserve energy and enable innovative technologies such as skylights, solar panels and solar shingles to power the homes on O Street, and enable the landowners to avoid an adverse shadowing of their respective properties. The technologies can be a basis for affordability to keep the adjacent landowners in their homes. The Commission has the ability to impose protections based on the notion of sunlight views and

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<sup>1</sup>Julie Rones, on behalf of Gwendolyn Rose, consulted with Laura M. Richards who represents an unincorporated association of homeowners on O Street. As directed, Rones consulted with Richards on certain aspects of the pleading, but due to time constraints, is filing this effort solely on behalf of Gwendolyn Rose. The unincorporated homeowners on O Street, represented by Ms. Richards, were invited to file, separately, in support of this brief, if so compelled.

the viewshed. Existing skylights on several homes on O Street could be adversely affected by development. To avoid an adverse impact and protect the unique character of the Penn-Branch O Street neighborhood that is within the parameters of the L'Enfant Plan extension, as established by D.C. Council Legislation, the Commission can refuse approval of the MAP amendment to enable the building of a residential structure. This will not thwart the Applicant from its goal of providing a grocery store, restaurant, and fitness center, because the Applicant can accomplish those goals within the confines of the existing building in the rear of the existing building that is vacant due to the D.C. Government's exit and due to the cleaner proprietor's vacating the rear shop, as well. Alternatively, a design characteristic and placement might suffice to circumvent the issue of blockage, altogether. Nonetheless, the Commission has the power to protect the viewshed and sunlight access to air and light.

Julie E. Rones, on behalf of Gwendolyn Rose, the landowner of Lots 844 and 843 in Square 5539; and Laura M. Richards, on behalf of an unincorporated association of landowners on O Street, SE, who testified and submitted written testimony in opposition to the map, as well for the record in this proceeding, respectively were asked by the D.C. Zoning Commission Chairman at the October 2, 2017 hearing in this matter, to jointly submit a brief on or by October 16, 2017, addressing the issue of whether views can be protected by law in the District of Columbia. This brief is a timely response to the Chairman's request by Gwendolyn Rose, hereinafter referred to as the Opposition.

The Penn-Branch Shopping Center or Penn Hill is located in the "Hillcrest" community of the City. The hills and valleys aspect is the reason for the Hillcrest name. Historically, since the early 1900s, when Colonel Arthur E. Randle sought to develop the area and owned the entire parcel known as 5539, through his United States Realty Company. The entire parcel or Square 5539 is the subject of this MAP amendment rulemaking. Hillcrest has been known for its scenic views of the City, its monuments and picturesque vistas. The fireworks at the Monument during the fourth of July can be seen from many vantage points in Hillcrest. Relative to the Oppositions' respective land lots, the Shopping Center's elevation is high on a hill overlooking the Oppositions' respective land lots in the valley. (See, Appendix A, hereof containing pictures of the site and homes that can be viewed from the site, including one reflecting the addition of skylights.)

At the October 2, 2017 hearing, the Commission also ordered the Applicant to conduct a "Shadow Study" of the adjacent properties within the 200-foot perimeter of the proposed MAP change to ensure against a shadow effect that could result from imposition of a new structure on the existing landowners.

## II. ISSUE

The Opposition contends that the award of a MAP Amendment change to enable the Applicant to erect a 50-65 foot building in the adjacent landowners' respective back yards could result in blocked views that would violate the rights of the Opposition and could have economic implications, and impact their health, safety, and peaceful enjoyment of their respective properties by blocking their respective line-of-sight to sunlight, and enable obstruction of their respective air, light and viewshed .

The National Capitol Planning Commission's planning glossary defines "viewshed " as follows:

"A viewshed is the geographical area that is visible from a location. It includes all surrounding points that are in line-of-sight with that location and excludes points that are beyond the horizon or obstructed by terrain and other features. Viewsheds are

commonly used in terrain analysis, which is of interest to urban planning, archaeology, and military science. . .”<sup>2</sup>

The Merriam-Webster Online Dictionary defines "viewshed" as: "the natural environment from one or more viewing points."<sup>1</sup>

### III. JURISDICTION

D.C. Code Section 6-62l.01 establishes the D.C. Zoning Commission: "To protect the public health, secure the public safety, and to protect property in the District of Columbia." Pennsylvania Avenue, SE Corridor: Land Development Plan (January 2008)(Approved by the D.C. City Council on July 15, 2008) specifically affords protection of the Penn-Branch site. Page 25 of measure provides that the median of Pennsylvania Avenue SE, at the Branch Avenue node is an extension of the L'Enfant Plan. See, Penn Hill PA SE Small Area Plan Final Revised 111-03-08.pdf

The D.C. Office of Planning, Urban Design Element, at <https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/Chapter%25209%2520Comp%2520Plan%2520Updates%2520Opti.pdf>, addresses the District's physical design and visual qualities (Id. at p.9-1). That publication says that: "Urban design is important to all American Cities but has particular significance and importance in the Nation's Capitol (Id. at p. 9-1). Policy UD-1.1.2 concerns: "Reinforcing the L'Enfant Plan, by restoring obstructed vistas or viewsheds (Id. at p. 9-5). See, [https://www.ncpc.gov/heightstudy/docs/District's%20Height%20Master%20Plan%20FINAL%20Recommendations%20Report\\_Nov%2020%202013.pdf](https://www.ncpc.gov/heightstudy/docs/District's%20Height%20Master%20Plan%20FINAL%20Recommendations%20Report_Nov%2020%202013.pdf)

11 DCMR, Title A, Chapter, 3, Section 304.3 affords residents Zoning Commission protection of "Air" and "Light", *inter alia*, DCMR Title 11, Subtitle X, Chapter 7, Section 701, addresses general rules for airspace development. The provision enables the Zoning Commission to protect landowners from violation of the "viewshed." The source of Section 701 is Final Rulemaking & Order No. 08-06A published at 63 DCR 2447 (March 4, 2016 -Part 2);

#### **The text of Section 701 is as follows:**

701.1: No development of airspace may occur without approval of the Zoning Commission.

701.2: The Zoning Commission shall determine the use to be permitted in the proposed airspace consistent with regulations applicable to the abutting privately owned property, including limitations and requirements respecting the height of any structure to be erected in such airspace, off-street parking and development standards applicable to such structure, and easements of light, air, and access.

701.3: Airspace cases may be processed as a part of a design review, PUD, or project-specific rezoning application and shall be subject to the evaluation criteria and follow the procedures of the relevant chapter, except as provided in this section.

701.4: The Zoning Commission may impose any conditions or restrictions on airspace development that it deems necessary to ensure:

- (a) Compatibility with surrounding private property;
- (b) The accessibility of the public to traverse as appropriate the public space;
- (c) A high -quality design of any building, landscape or public realm;
- (d) Appropriate treatment and protection of viewsheds; and
- (e) No undue adverse impacts on the surrounding area.<sup>2</sup>

#### IV. ARGUMENT

The Commission has a duty to ensure no adverse impact upon the Opposition regarding protecting their respective sun view line-of-sight access from development, pursuant to 11 DCMR ,Title A, Chapter 3, Section 304.3; and to protect the "viewshed " of the Opposition, pursuant to 11 DCMR, Title X, Chapter 7, Section 701; and the legislation established by the District of Columbia extending the L'Enfant Plan to the Penn-Branch site; and the urban design policy of the D.C. Office of Planning.

The District of Columbia was perhaps the earliest City in the United States to take protection of views into consideration. Recently, when the City had to rethink the Height of Buildings Act established in 1910, it performed views analysis studies with the intent of "preserving the visual preeminence of the Capitol and other national monuments and protecting their views, minimizing impact of the nationally significant historic resources, and maintaining the horizontality of the skyline."<sup>3</sup> See, 2013 D.C. Office of Planning Report that establishes the proposition of the need to protect the viewshed for streetscapes within the L'Enfant Plan; and also protect the "unique character of local neighborhoods. " The Penn-Branch neighborhood is unique and entitled to unique protections. <sup>4</sup>

The Pennsylvania Avenue, SE Corridor: Land Development Plan (January 2008) was approved by the D.C. City Council on July 15, 2008. Page 25 of measure provides that the median of Pennsylvania Avenue SE, at the Branch Avenue node is an extension of the L'Enfant Plan. The Penn-Branch Shopping Center or The Shops at Penn Hill are located on Pennsylvania Avenue SE at the node of Branch Avenue. The MAP change would impact the Branch Avenue node off of the Pennsylvania Avenue SE streetscape.

According to the D.C. Office of Planning, Urban Design Element, at [https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/Chapter %25209%2520Comp%2520Plan%2520Updates%2520Opti.pdf](https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/Chapter%25209%2520Comp%2520Plan%2520Updates%2520Opti.pdf) , the Office of Planning specifically is tasked with addressing the District's physical design and visual qualities (Id. at p.9-1). The Office of Planning says in that publication that: "Urban design is important to all American Cities but has particular significance and importance in the Nation's Capitol (Id. at p. 9-1). Policy UD-1.1.2 concerns: "Reinforcing the L'Enfant Plan, by restoring obstructed vistas or viewsheds (Id. at p. 9-5).

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[https://www.ncpc.gov/heightstudy/docs/District's%20Height%20Master%20Plan %20FINAL%20Recommendations%20Report\\_Nov%2020%202013.pdf](https://www.ncpc.gov/heightstudy/docs/District's%20Height%20Master%20Plan%20FINAL%20Recommendations%20Report_Nov%2020%202013.pdf)  
Id. at p.3, and at pages 1-2 for the urban planning design.

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Id. at p. 1-3.

The Office of Planning advises the Zoning Commission on Urban Design Policy. Given that the District of Columbia City Council has extended the L'Enfant Plan to Pennsylvania Avenue SE at the node of Branch Avenue, SE, the location of the MAP change, the Zoning Commission has a duty to protect the viewshed at that location, both in the front and the rear. Therefore, this viewshed protection must be addressed in the Commission's analysis for approval of the Applicant's MAP amendment. 11 DCMR Title X, Chapter 7, Subsection 701 requires the Commission to undertake an analysis of altering the viewshed and the adverse impact to the adjacent landowners. Therefore, the Commission may be under a lawful duty to ensure that the viewshed of the Opposition.

State and local zoning law and regulation is derived from the U.S. Constitution's 10th Amendment policing power; and from state and local constitutions, statutes, ordinances, zoning regulations, common law protections, and lawful private agreements. States and local jurisdictions can therefore regulate and protect land use within its jurisdiction.

Some local California ordinances might protect beach front properties views or mountain views. Other jurisdictions might enact ordinances to protect against the erection of "spite fences" whereby the fence is merely erected to spite a neighboring landowner. Ordinances to protect against trees that block views have been lawfully enacted and enforced, or private nuisance actions in certain U.S. jurisdictions have been allowed. Some jurisdictions in the United States will not allow buildings to be erected which block views, whereby the buildings that were built have no purpose.

The District of Columbia uses a variety of tools to protect landowners, such as setoff and building height restrictions under zoning regulations and in planning policy to protect the views and distances between buildings and heights for health and safety purposes. The federal government also regulates building heights in the District of Columbia. Further, the D.C. zoning regulations afford protection of "air" and "light", which is a form of view protection. The Commission seems to recognize this as being necessary and mandated this in its regulations. See, 11 DCMR Title A, Section 304.3.

Line-of- Sight views of Sunlight must be protected. In fact, the Commission ordered the Applicant to conduct a "Shadow Study" to ensure against adverse impact upon the immediate landowners within the 200-foot perimeter of the planned MAP change. While use of solar technology may be a future option or for some of these landowners, a current option, the property owners are entitled to current protection to preserve this right to statutorily protected sunlight, pursuant to 11 DCMR Title A, Section 304.3.

Line-of-sight access to sunlight is even more important today, given the establishment of innovative technology such as solar panels and solar shingles to enable sun light powered energy to make natural use of the sun power source. Hence the protection granted in the Zoning Commission's own regulations, e.g., 11 DCMR, Title A, Chapter 3, Section 304.3; and 11 DCMR, Title X, Chapter 7, Section 701. In addition to serving as a natural power source, this form of energy might make electric bills more affordable for residents, so that the Opposition can use this option to conserve energy, live affordably, and healthily, and remain in their homes. The benefits of solar are widely recognized in the District of Columbia. Otherwise, the Commission would not have imposed a Shadow analysis be conducted by the Applicant. The District of Columbia Zoning Commission must expressly regard the statutory regulations protecting air and light and building height and set back to protect the views of the neighbors. This is mandated by law. The Commission is also expressly restricted from allowing a deviation, here that might mean enabling a sixty-five-foot penthouse height structure, if it would interfere

with the neighbors' reasonable enjoyment of their property. See, specifically, 11 DCMR Title A, Subsection 304.3.

The Opposition testified that they need to have the consistency of the current flow of the sunlight for their respective health, safety, and enjoyment of their respective properties. Thus, seeing the sun and also affording technology that requires line-of-sight to the existing sunlight configuration is a form of view protection. Solar panels and solar shingles require line-of-sight access to sunlight, so that the technology must see the sun and not be unreasonably hampered by artificial blocking of the existing views of the sunrises and existing configuration.

A Shadow Study would enable the Opposition assurance of whether their existing access to sunlight would be blocked by the proposed building on the rear lot of the Penn-Branch/Penn Hill Shopping Center. Mrs. Rose is planning new single-family homes to be built on her lot, which adjoins the lot that is the subject of this proceeding. The argument to protect the sun view also holds for the other neighbors who would be similarly situated inside the 200-foot perimeter of the newly planned building. A 50-65-foot structure overhanging her lot, which is in the valley of the Hill on which the shopping center sits, might well lose sight of considerable sunlight, if the 50-65-foot structure on the high elevation overhanging her property is built.

The Applicant's parking lot is well above the height of the landowner's property on a Hill.<sup>5</sup> Thus, the 50-65-foot structure would tower over the landowner's property and could impact the sun access, air and light of the Opposition. The Commission has the lawful ability to protect against this consequence and should use its power to ensure against adverse impact. The Opposition is, respectfully, requesting that the Commission afford the Opposition protect the rights of the Opposition pursuant to 11DCMR, Title A, Chapter 3, Section 304.3; and, 11 DCMR, Title X, Chapter 7, Section 701, Subsection (d) ("appropriate treatment and protection of viewsheds").<sup>4</sup> The Opposition, respectfully, requests that the Commission use the provisions of that regulation under all relevant sections of Section 701, especially Subsections 704(a) ("compatibility with surrounding private property") and (e) (No undue adverse impacts on the surrounding area) to enforce the provisions of Subsection (d); Subsections 701.1; and 701.2; etc.

## V. CONCLUSION

The Commission has the lawful authority to protect viewsheds given that the MAP change being sought is located at the location that the D.C. City Council determined is an extension of the L'Enfant Plan. The viewsheds within the L'Enfant Plan are to be protected against obstruction. The Opposition must not be adversely impacted by alteration to the viewshed at Pennsylvania and Branch Avenue due to planned development. The Commission must enforce rights granted to the Opposition to protect the viewshed, pursuant to Section 701 of Title X of its regulations. Moreover, the Commission should not approve of development by granting the MAP amendment that would interfere with the viewshed, and the Opposition's line-of-sight sunlight view access, pursuant to 11 DCMR, Title A, Chapter 3, Section 304.3's provisions governing

5. Ms. Richards testified for the Unincorporated landowners on O Street who are opposed to the MAP Change, at the October 2, 2017 hearing, that the land to be rezoned would be in the rear of the land owners who were within the 200-foot perimeter of the proposed MAP change. She provided that those properties immediately adjacent to the Shopping Center are behind a retaining wall at the existing parking lot of the land proposed for rezoning; and that the Shopping Center parking lot facing the rear adjacent land lots towers over the O Street SE neighbors' land lots at a significant higher elevation. She said that these landowners could be directly adversely impacted by the development of a 50-65 foot height building to the rear of the landowners' respective adjacent lots.

“air” and “light” protections. The Zoning Commission's own regulations; urban design policy to protect the L'Enfant Plan against obstruction of vistas and viewsheds within the L'Enfant Plan, as established by the D.C. Office of Planning; the Commission mandate to protect land; and, the City Council's legislative directive to protect the Pennsylvania Avenue SE at the Branch Avenue node as an extension of the L'Enfant Plan, gives the Commission legal support to protect the Opposition's viewshed and views and vista against adverse impact; and arguably enables the Commission to deny the MAP change to protect the viewshed, and line-of-sight sunlight vistas of the Opposition.

Respectfully submitted,

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/s/ Julie E.Rones

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## TABLE OF SIGNIFICANT AUTHORITIES

- D.C. Code Section 6-62l.01 establishes the D.C. Zoning Commission: "To protect the public health, secure the public safety, and to protect property in the District of Columbia ."
- 11 DCMR, Title A, Chapter, 3, Section 304.3 affords residents Zoning Commission protection of "Air" and "Light", inter alia.
- DCMR Title 11, Subtitle X, Chapter 7, Section, 701, regards general rules for airspace development. The provision enables the Zoning Commission to protect landowners from violation of the "viewshed ."The source of Section 701 is Final Rulemaking & Order No. 08-06A published at 63 DCR 2447 (March 4, 2016 -Part 2).
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- D.C. Office of Planning, Urban Design Element, at <https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/Chapter%25209%2520Comp%2520Plan%2520Updates%2520Opti.pdf>, addresses the District's physical design and visual qualities (Id. at p.9-1). That publication says that: "Urban design is important to all American Cities but has particular significance and importance in the Nation's Capitol (Id. at p. 9-1). Policy UD-1.1.2 concerns: "Reinforcing the L'Enfant Plan, by restoring obstructed vistas or viewsheds (Id. at p. 9-5).
- D.C. Office of Planning, Government of the District of Columbia, "Height Master Plan for the District of Columbia: Final Evaluation & Recommendations (Nov. 20, 2013), at:  
[https://www.ncpc.gov/heightstudy/docs/District's%20Height%20Master%20Plan%20FINAL%20Recommendations%20Report\\_Nov%2020%202013.pdf](https://www.ncpc.gov/heightstudy/docs/District's%20Height%20Master%20Plan%20FINAL%20Recommendations%20Report_Nov%2020%202013.pdf)