

Appendix D: Correspondence regarding the Kalivas Property

APR 08 2009

DEVELOPMENT REVIEW

April 7, 2009

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VIA EMAIL AND HAND DELIVERY

Mr. Elza Hisel-McCoy
M-NCPPC, Development Review Division
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Studio Plaza, Silver Spring (the "Project") – Project Plan Application No. 920070010
(the "Application") – Options for Ingress/Egress/Loading Access to 902 Thayer Avenue
(the "Kalivas Property")

Dear Mr. Hisel-McCoy:

On behalf of Michael, L.L.C. (the "Applicant"), and in response to comments received at a number of meetings with Staff and the Kalivas family, we hereby submit the enclosed plans and materials which reflect various options for accommodating loading to the Kalivas Property. The Applicant's post-Development Review Committee (DRC) submission, dated March 16, 2009, explains the current loading configuration of the Kalivas Property and details the efforts made by the Applicant to accommodate the owners of the Kalivas Property. As previously indicated in the post-DRC submission, the Applicant has spent considerable time and effort to work with the Kalivas family (also utilizing involvement of Planning Staff). Let it be stated clearly that the Applicant very much wants to ensure that the commercial use of the Kalivas Property remains successful and viable with the proposed public/private redevelopment of the Project known as Studio Plaza, and the Applicant has been acting and will continue to act, utilizing commercially reasonable efforts, to accommodate the Kalivas Property in order to perpetuate successful operations. The purpose of this current submission is to present the Applicant's best and final offer for accommodating loading access to the Kalivas Property in advance of the May 7th Planning Board hearing date on the Project Plan Application.

During the course of the past year, the Applicant has designed and presented a number of options for loading to the Kalivas Property. [As you know, but we do not intend to repeat beyond this mention, the Applicant had every reason to believe that an agreement relative to future loading operations for the Kalivas Property had been reached between the Applicant and an attorney representing himself to be acting for the owners of the Kalivas Property prior to the Applicant's submission of the Abandonment Petition – the "Kalivas/Cooney Agreement"]. In evaluating options that will provide the Kalivas Property with adequate and lawful means of loading, we are mindful and are attempting to address the inadequacies that currently exist. The delivery and

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trash trucks currently serving the Kalivas Property cannot physically drive within the existing 16-foot-wide alley south of the Kalivas Property and the existing 20-foot-wide public alley south of The Adele property, as demonstrated by the AutoTURN studies prepared by VIKA, Inc, and previously submitted to you as part of the Applicant's post-DRC submission. Furthermore, the loading door to the Kalivas Property is not on the alley system. In order to provide loading operations for the existing tenant of the Kalivas Property, service trucks are using Public Parking Lot #3 for both ingress and egress and to provide loading operations to the rear of the improvements on the Kalivas Property (which use of the County parking lot is not permitted under County law).

As a result of further refinement of these options by the Applicant's design team and discussions with Planning Staff, the Applicant has designed and hereby presents two final options for ingress/egress and loading access to the Kalivas Property. The first option (Attachment 1) is essentially that which was the subject of the Kalivas/Cooney Agreement. Under this option, the Applicant would relocate approximately 400 square feet of space in the Kalivas building from the west side of the Kalivas Property to the east side of the Kalivas Property. The resulting area on the west side would be paved, and could be used for loading, parking, or trash at the Kalivas' discretion. This option would allow loading access from the west side of the Kalivas Property via the 16-foot-wide public alley remaining to the west of the Kalivas Property and the proposed 25-foot turning radius to be provided at the western end of this public alley at Street 'A' (which will permit a WB-40 tractor-trailer to lawfully access the Kalivas Property by use of Studio Plaza's Street 'A' and the 16-foot-wide public alley, with access to both Thayer Avenue and Silver Spring Avenue, as demonstrated by the AutoTURN Study prepared by VIKA, Inc. and previously submitted to you as part of the Applicant's post-DRC submission). Tenants of the Kalivas building would have access to a community trash and recycling center within the Studio Plaza Project in Building #3 (similar to the community trash and recycling centers on the Applicant's property to serve the Mayor Lane businesses). A pedestrian connection has also been added from Studio Plaza's Street 'A' to the Kalivas building consisting of a 5-foot-wide sidewalk located on the north side of the 16-foot-wide public alley, adjacent to the existing GranDesign and Siman buildings.

The second option (Attachment 2) would require no renovations to the existing building on the Kalivas Property. This option would allow loading access from the west side of the Kalivas Property via the existing 16-foot-wide public alley connecting to Studio Plaza's Street 'A' and 25-foot turning radius at the western end of this public alley at Studio Plaza's Street 'A'. Under this option, the Applicant would create an approximately 7-foot-wide secured, exterior corridor for handtruck access from the eastern end of the 16-foot-wide public alley to the existing Kalivas Property service door located at the rear of the building on the Kalivas Property. This serviceway would lie partially on the Kalivas Property and partially on the Applicant's property, requiring a shared access agreement between the parties. The Applicant would provide two

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parking spaces at the eastern end of the public alley on the Applicant's property for tenants of the Kalivas building, and tenants would also have access to a community trash and recycling center within the Studio Plaza project in Building #3. A pedestrian connection from Studio Plaza's Street 'A' to the Kalivas building would be provided via a 5-foot-wide sidewalk located on the north side of the 16-foot-wide public alley, adjacent to the existing GranDesign and Siman buildings.

It is our understanding that you intend to evaluate these options and meet directly with the Kalivas family and their attorney, David Brown. By copy of this letter to David Brown, we again offer to meet with him and his clients either separately or with the Planning Board Staff to reach an amicable agreement. Thank you for your consideration of the Application and these revised materials, and please do not hesitate to contact us if additional information is necessary prior to the Planning Board hearing scheduled for May 7, 2009.

Sincerely,

LINOWES AND BLOCHER LLP

C. Robert Dalrymple / HB

C. Robert Dalrymple

Heather Dlhopsky

Heather Dlhopsky

Enclosures

cc: David W. Brown, Esq. (*Via Overnight Mail*)
Mr. Robert Hillerson (*Via Email and First-Class Mail*)
Mr. Brian Dayhoff (*Via First-Class Mail*)
Mr. Chris Kabatt (*Via First-Class Mail*)
Mr. William Landfair (*Via First-Class Mail*)
Ms. Trini Rodriguez (*Via First-Class Mail*)

**KALIVAS PROPOSAL FOR ACCOMMODATION OF BUILDING #3
WITH 902/908 THAYER AVENUE BUILDING**

**(Recommended conditions for inclusion in Planning Board approval of
Project Plan)**

1. Open up and finish, inside and outside, a new loading entrance to the 902/908 Thayer Avenue Building (“Building”) on the west side of the Building, adjacent to the public alley where the trucks will unload.
2. Replace the existing loading door at the rear of the Building with a finished entryway designed for pedestrian use, such as the doors at the front of the Building.
3. At the time of construction of Building 3, finish the area between Building 3 and the Building as a pedestrian walkway in a way that unifies the Building with Studio Plaza.
4. Confirm the practicality of the public alley as an offloading area, including assurances that (a) temporary blockage of parking on the Siman property or of the entryway to Gran Design will not be a problem, and that (b) the narrow clearances (4’ on either side) will not be a problem for delivery trucks or walkway pedestrians.
5. Due to the loss of access to 3 parking spaces on the east side of the Building, provide 3 parking spaces dedicated to the Building in Building 3 parking, upper level, with direct access to the rear of the Building.
6. All work to be coordinated with Building 3 construction so that there is no interruption in existing off-street loading capability prior to completion of replacement capability.
7. Studio Plaza will assume responsibility for securing the permission of the Kalivas’ tenant(s) to the work, including financial responsibility to Kalivas for any reduction in rent to Kalivas made necessary due to disruption of tenant(s)’ operations.
8. Studio Plaza will assume financial responsibility for all costs associated with implementing changes to Building required as a condition of project approval, including, but not limited to, fees of attorneys, architects, permitting authorities and the like; materials; demolition; and installation.

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DAVID W. BROWN

May 12, 2009

Elza Hisel-McCoy, Assoc. AIA, LEED-AP
Senior Planner
Development Review Division
MNCPPC-MC
8787 Georgia Avenue
Silver Spring, MD 20910

Re: **Project Plan # 920070010, Studio Plaza**

Dear Mr. Hisel-McCoy:

This letter will serve to place on the record of the above-referenced proceeding the efforts made by my clients, the Kalivases, to resolve with the Applicant, Michael, LLC, issues of ingress/egress to the Kalivas Property, 902/08 Thayer Avenue, adjacent to the Studio Plaza Project that will arise if the Project is to go forward.

Preliminarily, I wish to note that before I was retained in this matter in March 2009, the Kalivases had been briefly represented by another attorney. According to my clients, that attorney sought to "cut a deal" with the Applicant under terms and conditions that my clients had not approved, and they disavowed his offer and ceased further reliance on his representation. Further, the offer he submitted on behalf of the Kalivases was modified by Michael, LLC, resulting in a counteroffer that was never acted upon. I have accordingly taken the position with the Applicant's counsel that there is no legally enforceable agreement in place between our respective clients regarding the matters discussed below.

I met with the Applicant and his counsel, with you in attendance, on April 28, 2009, and provided the Applicant with a list of eight conditions that the Kalivases believe are minimally necessary to be imposed in the event the Project were approved, all in furtherance of ameliorating the impact of the Project on the continued efficacious operation of the businesses that lease the Kalivases' Property. Exhibit 1. This was discussed at some length, resulting in a response from the Applicant that in part accepted, rejected and modified the Kalivas proposal. Exhibit 2. I have discussed the Applicant's response at length with my clients. We reviewed the particulars in detail, with special attention to the proposals made in meetings with the Kalivases prior to my representation of them, inclusive of drawings of proposed ingress/egress solutions attached to an April 7, 2009 letter to you from the Applicant's legal counsel. As a result of this discussion, I am reporting that the Kalivases do not fully agree to the modifications proposed by the Applicant.

I will not burden you with the details of what is or is not acceptable, and why that is so, because resolving those differences is beside the point in the current posture of the matter. The Applicant has made clear that its willingness to accommodate the Kalivases as it has proposed is contingent upon the withdrawal by the Kalivases of any and all objections to the Project, as well as surrendering their property interest in the use of the 16' public alley between their Property and the platted 20' alley into Parking Lot #3 from Fenton Street. By separate letter, I have explained what the Kalivases' property interest in that alley is, and that they do not intend to surrender that interest in order to facilitate the Project, to which they remain opposed. Under these circumstances, the Applicant has advised that its only proffered condition relative to the Kalivas ingress/egress issue is the following:

"The applicant will provide for the benefit of the Kalivas property adequate and legal means of access and loading utilizing the alley to remain on the west side of the Kalivas property, with further details to be provided at site plan."

A copy of the email conveying this proffer is attached as Exhibit 3.

The Kalivases prepared a proposal intended to avoid burdening the Applicant either financially or practically, one that assumes completion of the Project as intended by the Applicant. Accordingly, while it is clear from Exhibit 3 that the Applicant obviously feels otherwise, the Kalivases do not feel it is necessary for there to be any "quid pro quo" action by them in exchange for the requested commitments. Rather, leaving some room for discussion to fine-tune the details, they regard their suggestions as nothing more than what should be minimally expected in the way of a proffer from a developer who is undertaking to redevelop large portions of a commercial city block with a project from which their property has been excluded. Their suggestions are all the more reasonable considering that what is before the Board is a project that reflects no serious effort to create any positive inter-business integration or synergistic interaction with the excluded businesses in the block.

If you would nevertheless like a more detailed reaction to the gap between the specific Kalivas and Michael proposals, I will be happy to oblige, either in advance of the hearing before the Board on May 28th, or during the hearing itself.

Sincerely yours,



David W. Brown

/enclosures: Exhibits 1-3

**KALIVAS PROPOSAL FOR ACCOMMODATION OF BUILDING #3
WITH 902/908 THAYER AVENUE BUILDING**

**(Recommended conditions for inclusion in Planning Board approval of
Project Plan)**

1. Open up and finish, inside and outside, a new loading entrance to the 902/908 Thayer Avenue Building ("Building") on the west side of the Building, adjacent to the public alley where the trucks will unload.
2. Replace the existing loading door at the rear of the Building with a finished entryway designed for pedestrian use, such as the doors at the front of the Building.
3. At the time of construction of Building 3, finish the area between Building 3 and the Building as a pedestrian walkway in a way that unifies the Building with Studio Plaza.
4. Confirm the practicality of the public alley as an offloading area, including assurances that (a) temporary blockage of parking on the Siman property or of the entryway to Gran Design will not be a problem, and that (b) the narrow clearances (4' on either side) will not be a problem for delivery trucks or walkway pedestrians.
5. Due to the loss of access to 3 parking spaces on the east side of the Building, provide 3 parking spaces dedicated to the Building in Building 3 parking, upper level, with direct access to the rear of the Building.
6. All work to be coordinated with Building 3 construction so that there is no interruption in existing off-street loading capability prior to completion of replacement capability.
7. Studio Plaza will assume responsibility for securing the permission of the Kalivas' tenant(s) to the work, including financial responsibility to Kalivas for any reduction in rent to Kalivas made necessary due to disruption of tenant(s)' operations.
8. Studio Plaza will assume financial responsibility for all costs associated with implementing changes to Building required as a condition of project approval, including, but not limited to, fees of attorneys, architects, permitting authorities and the like; materials; demolition; and installation.

**KALIVAS PROPOSAL FOR ACCOMMODATION OF BUILDING #3
WITH 902/908 THAYER AVENUE BUILDING**

(Recommended conditions for inclusion in Planning Board approval of Project Plan)

1. Applicant to make minor modifications (interior and exterior) to the Kalivas Property in order to create a new loading entrance to the 902/908 Thayer Avenue Building ("Building") on the west side of the Kalivas Property, adjacent to the public alley where the trucks will unload.
2. To create pedestrian access from the Studio Plaza redevelopment, Applicant will construct a sidewalk along the alley to the west of the Kalivas Property and add a door (similar to that existing on the front of the building) at the end of said alley similar to Applicant's proposed Option-02 in the April 7, 2009 letter from Linowes and Blocher to M-NCPPC relating to the Kalivas Property.
3. Confirm the practicality of the public alley as an offloading area, including assurances that (a) temporary blockage of parking on the Siman property or of the entryway to Gran Design will not be a problem. See Applicants proposed Option-02 in the April 7, 2009 letter from Linowes and Blocher to M-NCPPC relating to the Kalivas Property.
4. Applicant will provide, at no cost to the Owners of the Kalivas Property 2 parking spaces dedicated to the Kalivas Property on the Studio Plaza property, south of the public alley at the West of the Kalivas Property and as shown in Option-02 in the April 7, 2009 letter from Linowes and Blocher to M-NCPPC relating to the Kalivas Property.
5. The Applicant shall coordinate construction in such manner as to provide the Kalivas Property with adequate and continuous means of loading to the Building on the Kalivas Property throughout construction of the Project.
6. The Owners of the Kalivas Property will not bear any costs associated with implementing changes described herein and incorporated as a condition of Project Plan approval, including costs and fees attributable to Applicant's designer, demolition and construction and occupancy of the Kalivas Property consistent with the other terms of Project Plan approval. Owners of the Kalivas Property shall be responsible for costs associated with consultants retained by the Owners of the Property).

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X-Spam-Flag: NO
X-Envelope-From: bdalrymple@linowes-law.com
Subject: Studio Plaza - conditions of approval
Date: Wed, 29 Apr 2009 17:38:13 -0400
X-MS-Has-Attach: yes
X-MS-TNEF-Correlator:
Thread-Topic: conditions of approval
Thread-Index: Acnl+EcmeaEvbWi3TcCM0PEXVmFu8QAGWWRw
From: "Dalrymple, C Robert - CRD" <bdalrymple@linowes-law.com>
To: "David W. Brown" <brown@knopf-brown.com>, <Elza.Hisel-McCoy@mncppc-mc.org>
Cc: "Rose Krasnow \ (E-mail)" <rose.krasnow@mncppc-mc.org>,
"Bob Hillerson \ (E-mail)" <RHillerson@aol.com>
X-MMR: 0
X-Antivirus: Scanned by F-Prot Antivirus (<http://www.f-prot.com>)

Dave/Elza: as we were requested to do during our meeting yesterday (April 28), we have reviewed and responded (attached) to the conditions of approval proposed by Mr. Brown on behalf of the Kalivas family that would be acceptable to the Applicant as a substantial compromise to facilitate an approval of the project plan without objections from the Kalivases. In the event that there is continued opposition to our plan, and thus no quid pro quo giving reason for the Applicant to commit substantial resources to the benefit of those opposing the plan (especially when the current loading operations for the Kalivas property, as determined by the recent MCDOT letter, are not in accordance with the recorded easements and are unlawful), this is not to be considered to be a proffer of conditions by the Applicant; rather, the condition of approval that is proffered by the Applicant is as follows: The Applicant will provide for the benefit of the Kalivas property adequate and legal means of access and loading utilizing the alley to remain on the west side of the Kalivas property, with further details to be provided at the time of site plan approval.

As for the changes to the conditions proffered by Mr. Brown on behalf of the Kalivases, we have deleted Mr. Brown's proposed condition 3 as it has now been incorporated into condition 2. We have also deleted condition 7 as the Applicant is unable to determine the responsibilities relating to tenant permission for the improvements that are sought to be transferred to the applicant by reason of having been denied on all requests to review the existing lease with the tenant. As such, it is not possible to agree to an open-ended assumption of unknown responsibilities. The other changes are consistent with the comments we made during our April 28 meeting.

Please let me know if you have any questions. Thanks. Bob

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