



# City of Portland, Oregon - Bureau of Development Services

1900 SW Fourth Avenue · Portland, Oregon 97201 | 503-823-7300 | www.portlandoregon.gov/bds



## Type III Decision Appeal Form

LU Number: 16-278621 DZM GW

### FOR INTAKE, STAFF USE ONLY

Date/Time Received 1/11/2018 ; 4:22pm

Action Attached

Received By AP

Fee Amount \$5000.00

Appeal Deadline Date 1/11/2018

[N] Fee Waived

Entered in Appeal Log

Bill # 4248045

Notice to Auditor

[X] Unincorporated MC

Notice to Dev. Review

### APPELLANT: Complete all sections below. Please print legibly.

PROPOSAL SITE ADDRESS 1650 NW Naito Pkwy DEADLINE OF APPEAL 1-11-18

Name Pearl District Neighborhood Association c/o Jeffrey L. Kleinman, Attorney at Law

Address 1207 SW Sixth Avenue City Portland State/Zip Code OR 97204

Day Phone (503) 248-0808 Email KleinmanJL@aol.com Fax (503) 228-4529

Interest in proposal (applicant, neighbor, etc.) ONI Recognized Organization

### Identify the specific approval criteria at the source of the appeal:

Zoning Code Section 33. (SEE EXHIBIT A)

Zoning Code Section 33. \_\_\_\_\_ . \_\_\_\_\_

Zoning Code Section 33. \_\_\_\_\_ . \_\_\_\_\_

Zoning Code Section 33. \_\_\_\_\_ . \_\_\_\_\_

Describe how the proposal does or does not meet the specific approval criteria identified above or how the City erred procedurally:

(SEE EXHIBIT A, ATTACHED.)

I confirm that the vote to appeal in this matter was carried out in accordance with PDNA's bylaws.

Appellant's Signature Stanley Penkin PRESIDENT, PDNA

By: Stanley Penkin, President

### FILE THE APPEAL - Submit the following:

- This completed appeal form
- A copy of the Type III Decision being appealed
- An appeal fee as follows:
  - Appeal fee as stated in the Decision, payable to City of Portland
  - Fee waiver for ONI Recognized Organizations approved (see instructions under Appeals Fees A on back)
  - Fee waiver request letter for low income individual is signed and attached
  - Fee waiver request letter for Unincorporated Multnomah County recognized organizations is signed and attached

The City must receive the appeal by 4:30 pm on the deadline listed in the Decision in order for the appeal to be valid. To file the appeal, submit the completed appeal application and fee (or fee waiver request as applicable) at the Reception Desk on the 5th Floor of 1900 SW 4th Ave, Portland, Oregon, between 8:00 am and 4:30 pm Monday through Friday.

The Portland City Council will hold a hearing on this appeal. The land use review applicant, those who testified and everyone who received notice of the initial hearing will receive notice of the appeal hearing date.

Information about the appeal hearing procedure and fee waivers is on the back of this form.



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## Type III Decision Appeal Fee Waiver Request for Organizations

<b>FOR INTAKE, STAFF USE ONLY</b>		<b>ORGANIZATION NOTIFICATION</b>	
LU Number: <u>16-278621 DZM GW</u>	Date/Time _____	Received By _____	<input type="checkbox"/> Waiver Approved <input type="checkbox"/> Waiver Denied
Date/Time Received <u>1/11/18; 4:22pm</u>			
Received By <u>AP</u>			

**APPLICANT: Complete all sections below that apply to the proposal. Please print legibly.**

**This form is to request a waiver for the fee charged for an appeal. To file an appeal, a separate form must be completed.**

Development Site Address or Location 1650 NWY NAITO PARKWAY

File Number LU 16-278621 DZM GW Appeal Deadline Date JANUARY 11, 2018

### Organization and Appeal Information

Organization Name PEARL DISTRICT NEIGHBORHOOD ASSOCIATION

Person Authorized by the Organization to file the Appeal STANLEY PENKIN

Street Address 1075 NW HORTHRUP ST. #407

City PORTLAND State OR Zip Code 97209

Day Phone 845 417 8755 FAX \_\_\_\_\_ email STANLEYPENKIN@GMAIL.COM

By signing this form, the organization confirms that:

- yes     no    The organization testified orally or in writing at the hearing, and the testimony was directed to a specific approval criterion;
- yes     no    The appeal is being made on behalf of the recognized organization, and not on behalf of an individual; and
- yes     no    The vote to appeal was done in accordance with the organization's bylaws.

Name/Title Stanley Penkin, PRESIDENT

Signature/Date 1-2-18

Please complete all of the information requested below.

See reverse side for additional information on fee waiver requirements.

Date of meeting when the vote to appeal the land use decision was taken : <u>12-27-17</u>
The decision to appeal was made by a vote of (check one of the following):
<input type="checkbox"/> The general membership in a meeting of the organization as listed above.
<input checked="" type="checkbox"/> The board in a meeting of the organization as listed above.
<input type="checkbox"/> The land use subcommittee in a meeting of the organization as listed above.
Please include at least one of the following:
<input type="checkbox"/> A copy of the minutes from the meeting when the vote to appeal was taken.
<input checked="" type="checkbox"/> Vote results to appeal - Number of YES votes to appeal <u>10</u> Number of NO votes to appeal <u>5</u>

To request a waiver of an appeal fee for a land use review take:

- This completed fee waiver request form and any supplemental information necessary to qualify for a fee waiver.

The City must receive the appeal fee waiver request and the appeal by 4:30 pm on the deadline listed in the Decision in order for the appeal to be valid. To file the appeal, submit the completed appeal application and fee waiver application at the Reception Desk on the 5th Floor of 1900 SW 4th Ave, Portland, Oregon, between 8:00 am and 4:30 pm Monday through Friday.

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## Type III Appeal Hearing Procedure

A Type III Decision may be appealed only by the applicant, the owner, or those who have testified in writing or orally at the hearing, provided that the testimony was directed to a specific approval criterion, or procedural error made. It must be filed with the accompanying fee by the deadline listed in the decision. The appeal request must be submitted on the Type III Appeal Form provided by the City and it must include a statement indicating which of the applicable approval criteria the decision violated (33.730.030) or what procedural errors were made. If the decision was to deny the proposal, the appeal must use the same form and address how the proposal meets all the approval criteria. There is no local Type III Appeal for cases in unincorporated Multnomah County.

Appeal Hearings for Type III Decisions are scheduled by the City Auditor at least 21 days after the appeal is filed and the public notice of the appeal has been mailed.

Appellants should be prepared to make a presentation to the City Council at the hearing. In addition, all interested persons will be able to testify orally, or in writing. The City Council may choose to limit the length of the testimony. Prior to the appeal hearing, the City Council will receive the written case record, including the appeal statement. The City Council may adopt, modify, or overturn the decision of the review body based on the information presented at the hearing or in the case record.

### Appeal Fees

In order for an appeal to be valid, it must be submitted prior to the appeal deadline as stated in the decision and it must be accompanied by the required appeal fee or an approved fee waiver. The fee to appeal a decision is one-half of the original application fee. The fee amount is listed in the decision. The fee may be waived as follows:

#### Fee Waivers (33.750.050)

The director may waive required fees for Office of Neighborhood Involvement (ONI) Recognized Organizations and for low-income applicants when certain requirements are met. The decision of the director is final.

##### A. ONI Recognized Organizations Fee Waiver

Neighborhood or business organizations recognized by the City of Portland Office of Neighborhood Involvement (ONI) or Multnomah County are eligible to apply for an appeal fee waiver if they meet certain meeting and voting requirements.

These requirements are listed in the Type III Appeal Fee Waiver Request for Organizations form and instruction sheet available from the Bureau of Development Services Development Services Center, 1<sup>st</sup> floor, 1900 SW 4<sup>th</sup>, Portland, OR 97201. Recognized organizations must complete the Type III Appeal Fee Waiver Request for Organizations form and submit it prior to the appeal deadline to be considered for a fee waiver.

##### B. Low Income Fee Waiver

The appeal fee may be waived for an individual who is an applicant in a land use review for their personal residence, in which they have an ownership interest, and the individual is appealing the decision of their land use review application. In addition, the appeal fee may be waived for an individual residing in a dwelling unit, for at least 60 days, that is located within the required notification area. Low income individuals requesting a fee waiver will be required to certify their annual gross income and household size. The appeal fee will only be waived for households with a gross annual income of less than 50 percent of the area median income as established and adjusted for household size by the federal Department of Housing and Urban Development (HUD). All financial information submitted to request a fee waiver is confidential. Fee waiver requests must be approved prior to appeal deadline to be considered for a fee waiver.

## **RELEVANT APPROVAL CRITERIA**

### **A. River District Design Guidelines:**

A2, A3-1, A4, A5-1-1, A5-1-5, A5-3, A5-4, B4, C4, C5

### **B. Portland Zoning Code Sections:**

33.930.025  
33.825.040.A and B  
33.140.210.B.2,  
33.266.220.C.3.b  
33.510.205.H.2  
33.510.205.H.2.c.2  
33.510.210.C.1.a.2.  
33.510.210.C.8  
33.510.251.C.3  
33.510.251.D.3.b and c  
33.440.350.A  
33.266.130.G.2.c

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## **REASONS FOR APPEAL (HOW THE PROPOSAL DOES NOT COMPLY WITH THE LISTED APPROVAL CRITERIA)**

### **I. INTRODUCTION**

For the reasons explained below, the Design Commission has ratified the stacking of several modifications, including modifications for excess height and FAR, which the Code did not require it to approve, and which violate several provisions of the Code and relevant Design Guidelines. If the commission's decision is affirmed, it will result in the effective walling off of more than a full city block's length of riverfront and the blotting out of key views of the Fremont Bridge.

Allowing a 17-story structure (plus an additional story for its rooftop mechanicals) and the additional features described in the application would create a precedent for more of the same along this stretch of the Greenway, visually and physically cutting the North Pearl District off from the Willamette

## II. FAILURE TO COMPLY WITH RIVER DISTRICT DESIGN GUIDELINES.

**River District Design Guideline A2.** The building's massing concept does not properly take the view of the Fremont Bridge into account and inappropriately shifts much of the mass to the north. By exceeding the normal height limitation of 100 feet by a total of 85 additional feet, the proposed structure actually obliterates a key view of the bridge itself from the Fields Park and elsewhere, which would not be impaired if the applicant complied with the 100-foot limit. The commission erred in finding otherwise.

**River District Design Guideline A3-1.** The proposal does not respect Portland's typical 200-foot block pattern. The placement of the building so close to the southern property line violates the typical 200-foot Portland block pattern, setting a precedent for future development on the adjacent parcel to create a combined development far in excess of 200 feet in length along NW Naito Parkway.

**River District Design Guideline A4.** The proposed design does not use unifying elements but, as noted by the commission's chair, creates a visual mishmash.

**River District Design Guideline A5-1-1.** The applicant's proposal does not reinforce the identity of the Pearl District Neighborhood, but serves to substantially detract from it. It creates its own neighborhood along the river almost entirely for the benefit of high-rent tenants.

**River District Design Guideline A5-1-5.** The proposal detracts from rather than reinforcing the identity of the Waterfront Area. In particular, it does not integrate an active mix of uses along the waterfront or make development open and accessible in order to maintain the publicness of the greenway.

Compare the wall-like design proposed by the applicant, with a narrow open space area confined to one end, with the design of what we would previously have considered a significant, large development on this stretch of the Willamette—the Waterfront Pearl condominiums. These are comprised of two large, landmark 10-story structures, which are surrounded by open space on all sides and by a large water feature wrapping around and between the buildings, creating a broad space between the structures and the Greenway trail. The Waterfront Pearl provides the city with the amenity of a true water feature, with moving water in ponds large enough to attract ducks.

In this case, however, the applicant contends that the Willamette is its water feature and it need not do more. The developer of the Waterfront Pearl did not have the nerve or the desire to try to hoodwink the commission in this manner. Thus far, it has worked for the applicant in this case.

This project in no way integrates an active mix of uses along the waterfront and fails to make development open and accessible in order to maintain the publicness of the Greenway. Instead, it turns the riverfront into a private benefit and amenity.

**River District Design Guideline C4.** This proposal fails to complement the context of existing buildings. It fails to use and add to the local design vocabulary, as described above with particular respect to the Waterfront Pearl, or as to McCormick Pier condominiums or any other relevant development.

In this instance, the applicant proposes a gated, walled stair entrance to a second floor roof terrace. The developments north of the Fremont Bridge have residential entries, gardens and balconies opening directly onto the Greenway trail. There is no visual connection to the Greenway trail in this proposal.

The above defects indicate noncompliance with River District Design Guidelines A5, A5-1, A5-1-1, A5-1-5, and C4.

**River District Design Guideline A5-3.** As explained above, the proposed project does not incorporate water features which enhance the quality, character and image of the River District. The stormwater planters are not a legitimate water feature and in no way form the focal point for integrated open spaces. They do not take cues from the river, bridges, or the historic industrial character in the design of structures and/or open spaces. No legitimate water feature is incorporated into this project.

**River District Design Guideline A5-4.** The project fails to integrate any works of art, as required. The supposed structural effects of the proposed benches should not and do not comprise works of art in compliance with this guideline by any rational definition of the term.

**River District Design Guideline B5.** The proposed plazas, parks and open space are not successful. The proposed plaza/open space has minimal engagement with the existing 3-story office building to the north, and a planter and grade change between the proposed plaza and existing sidewalk adjacent to the office building would block off all but one connection point on NW Naito Parkway.

**River District Design Guideline C5.** Due To its FAR-maximizing, unharmonious mix of design features and wall-like cutting off of the riverfront and Greenway, the proposed project is not designed for coherency.

### III. MISCONSTRUCTION OF SITE AREA FOR PURPOSES OF CALCULATING FAR

PZC 33.930.025 provides in material part as follows:

#### **“33.930.025 Measuring Development Standards**

Unless otherwise stated below or elsewhere in this Title, all measurements involving development standards are based on the property lines and area of the site after dedication of public rights-of-way and/or designation of private rights-of-way. Standards include, but are not limited to, building coverage, floor area ratio, setbacks, and landscaping requirements. \* \* \*” (Emphasis added)

Under this section, for the purposes of calculating site area in order to determine allowable Floor Area Ratio (FAR), it was necessary to omit the square footage of the 25-foot public Greenway strip and the 60-foot wide public open space connection between SW Naito Parkway and the river. The result is a base permissible floor area of approximately 40,000 square feet rather than the 72,080 square feet accepted as fact by the commission. Thus, even if all requested modifications were allowed, the permissible square footage for this project would have to be reduced by 44 percent.

### IV. MODIFICATION REQUESTS.

**PZC 33.825.040.** This provision allows *only* “modifications that will better meet Design Review requirements.” For the reasons explained above and which will be explained further at your hearing, the proposed modifications do not provide for better compliance with the Design Review requirements. In addition, consideration of such modifications outside the adjustment process is strictly permissive (“The review body may consider modification of site-related development standards \* \* \* as part of the design review process.”) It was therefore in no way mandatory for the Design Commission to approve any of the requested modifications. These should instead have been reviewed through the more formal adjustment process, and held to the strict approval criteria for adjustments. Indeed, under this code section, “[a]djustments to use-related development standards (such as floor area ratios, intensity of use, size of the use, number of units, or concentration of uses) are required to go through the adjustment process.”

Even if held to the apparently less strict requirements of Design Review, the proposed modifications violate PZC 33.825.040.A because they do not better meet the applicable design standards, and 33.825.040.B because they are utterly inconsistent with purpose of the standards in question. With respect to proposed Modification #1 for height under PZC 33.140.210.B.2, appellant notes that the normal maximum height for this site (excluding bonuses) is 100 feet. With all the requested bonuses approved, the maximum

height would be 175 feet.

However, the applicant does not stop there but seeks a further modification to allow rooftop mechanical equipment screening to extend in an additional 10 feet, further obstructing the view of the Fremont Bridge. How does this better meet the applicable design guidelines than adhering to a 100-foot or 175-foot limit? It does not. It results in further violation of the River District Design Guidelines we discuss above.

By the same token, this modification fails in any way to comply to be consistent with the purpose of the standard. The proposed Modification #1 for height is an abuse of both the applicable design guidelines and the purpose of the height standard.

**PZC 33.266.220.C.3.b.** This modification was for the purpose of spacing long term bicycle racks closer than required by this standard, and may have been withdrawn. Appellant notes this modification only to point out that the discussion of it reflects the creation of 275 long-term bicycle parking spaces in the residential units, *i.e.*, at least one per living unit, thus obviating the need for the bogus locker room and bicycle parking area discussed below.

**PZC 33.510.205.H.2.** Modification #3 addresses the North Pearl Subarea Height Opportunity Area, seeking authorization for a 175-foot height, exceeding the normal maximum base height of 100 feet. The proposed modification would also allow the length of the facades above 100 feet to exceed 120 feet in length, with the proposed facade length on the southwest and northeast facades of the building to be 125 feet 2 inches long, and the southeast and northwest facades to be 142 feet 8 inches long.

Each of the above modifications is substantial and, under the applicable code provisions, need not have been considered at all by the Design Commission, or could simply have been denied. Instead, Modification #3 was approved, resulting in the maximum adverse impact upon the North Pearl Subarea and the River District. The Purpose Statement of this code section states that in “the North Pearl Subarea, additional building height *may* be appropriate to support the goals of the North Pearl Plan.” Thus, the proposed building height may also serve to defeat the goals of the North Pearl Plan, and may not be appropriate. The requested modification would therefore never be mandatory, but would always be discretionary at most. Moreover, contrary to the Design Commission’s conclusion, this provision makes the goals of the North Pearl Plan directly relevant to review of this application.

With respect to the specific purposes set out here, appellant would point out the following:



- The requested additional height will in no way create and support a range of community amenities.
- It will not create a visually permeable skyline and urban form providing visual access to locations in and beyond the subarea, but will have the opposite effect.
- It will not result in a dynamic or varied skyline or urban form contributing to the health, vibrancy, or livability of urban living.
- It will not shape building massings allowing light and air to penetrate the street level, or enhance pedestrian scale, or create a pleasant, versatile and active public realm. It will achieve the opposite result.
- It will not provide a range of building types fulfilling the design objectives of the purpose statement, but create a visual mess instead.

In addition, the proposed additional height will not comply with the purpose statement as to development along the waterfront of the North Pearl Subarea, as follows:

- It will not increase sunlight along the Greenway and within the public and private open space areas developed along the waterfront. It will have the opposite effect.
- It will not create an active urban waterfront with a vibrant public realm. Instead, it will have a suppressive effect.
- It will not work with the open area and waterfront development provisions of the North Pearl Subarea in the creation of well designed public and private urban open space amenities.
- It will not facilitate visual and physical access to and along the riverfront for all members of the public. It will have the opposite effect—that of a great wall.
- It will not create expanded opportunities for views of the river as viewed from Naito Parkway and Front Avenue, landward portions of the subarea, and locations west of the subdistrict. It will have the opposite effect.
- With respect to the specific purpose of ensuring that bonus height granted to sites adjacent to the Fremont Bridge not significantly affect views of or diminish the aesthetic qualities of the bridge or its iconic stature on the

skyline, the proposed additional height will again have the opposite effect.

We note that with respect to the requested bonus height, PZC 33.510.205.H.2.c.2 does not allow bonus height if the length of any facade above 100 feet of building height is more than 120 feet long, unless there is a further modification for facade length. Accordingly, the applicant only achieves the additional, excessive building height by stacking modifications and obtaining permission for excessive facade length. The result is the negative impacts described here.

Appellant also incorporates by reference here its discussion of the applicable Design Guidelines, above.

**PZC 33.510.251.C.3.** Modification #4 proposes to compound the other defects in this proposal through violation of the required open area development standards. In particular, the relevant shadow standard for the plaza area creating the purported open space would be 84% covered by shadow, 34% above the limit of 50% at noon on April 21 of each year. This in no way better meets the applicable design guidelines, addressed at length above. Rather, it again has the opposite effect. It also fails to meet the purpose of the relevant standard, *i.e.*, providing a reasonable amount of sunlight to users of the open area.

**PZC 33.510.251.D.3.b&c.** Modification #5 proposes to exceed the North Pearl Subarea waterfront development standards both as to setback for development from the Willamette River, and maximum building dimension. Again we see a compounding of the accumulated modifications. The applicant proposes to allow portions of the building over 35 feet in height to extend into the Greenway setback area, and for the maximum building dimension to exceed the permitted 200 feet perpendicular to the river by nearly 31 feet. This will not better meet the above design guidelines or be consistent with the purpose of the standard sought to be modified. With all the accumulated, requested modifications, the proposed project is already oppressive with respect to the Greenway and as to its uninterrupted mass. Jamming the sole open area onto one side of the property will not allow for the requisite views and physical connections to the river and its activities.

## **V. GREENWAY REVIEW UNDER PZC 33.440.350**

**PZC 33.440.350.A.** Under Issue A, Relationship of Structures to the Greenway Setback Area, Guideline 1, “Structure Design,” the structure design does not complement or enhance the Greenway Setback Area. Rather, as we have explained, it intrudes upon it to the maximum possible extent, and effectively walls it in.

Under Guideline 2, regarding structure alignment, the proposed modification results in a failure to follow the Central City's typical 200-foot grid.

Under Issue B, Public Access, Guideline 1, Public Access Opportunities are not sufficiently integrated along the river. There is just one access point on this project of more than one city block's length.

## **VI. DEVELOPMENT STANDARDS.**

### **PZC 33.510.210.C–Bonus Floor Area.**

The first 144,160 square feet of the project would be allowed through the 2:1 base FAR available for the 72,080 square feet of the site, assuming that were the relevant square footage instead of 40,000 square feet as provided by PZC 33.930.025. The Design Commission has allowed a 100% floor area bonus of an additional 144,160 square feet through the residential bonus provisions of PZC 33.510.210.C.1.a.2.

However, as explained above, the allowance of this bonus FAR would be discretionary and not mandatory, as would be the accommodation of any such bonus FAR by means for modification of the 100-foot height standard. For all the reasons explained above, neither the requested bonus FAR nor the height requested to accommodate it should be allowed, and the commission erred in approving them.

The applicant claims additional FAR of 15,200 feet as a locker room bonus for its supposed locker room/bike storage/shower and dressing area, under PZC 33.510.210.C.8. A review of the history of this bonus provision shows that it has been requested by developers on approximately nine occasions. We believe that, in each instance, this was for office/commercial uses as to which employees would bicycle to work. In other words, this provision is intended to benefit incoming bicycle commuters.

This provision was not intended for residential structures, where residents shower in their own units. With particular regard to this project, there will already be a bicycle storage area in each apartment. After storing their bicycles in their units, will residents then run downstairs to shower in the locker room rather than in their apartments? This is obviously not the case. The locker room proposed for this project is intended not for any real use, but simply to achieve additional, bonus FAR. This request for added FAR must be denied.

**VII. PROPOSED RESTAURANT/RETAIL USE;  
PROPOSED MODIFICATION REGARDING PARKING**

The proposed restaurant and retail use along the Greenway at the northeast corner of the site is intended only to justify the large number of requested underground parking spaces for apartment tenants, which would not otherwise be allowable. The chance of the businesses in question actually succeeding and remaining open for business is substantially less than the chance had by *Lucier* restaurant near the Strand condominiums, which failed in spite of enormous foot traffic from Tom McCall Waterfront Park and nearby residential development and hotels, and never reopened. The relevant condition of approval in this case can assure only empty space which cannot be used for anything else, all to secure the desired indoor parking for tenants.

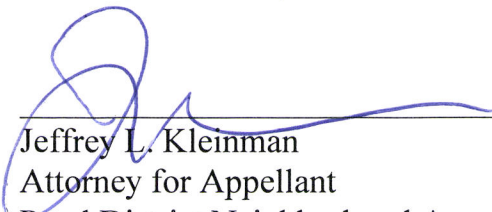
**PZC 33.266.130.G.2.c** Moreover, proposed Modification #7, intended to further enhance the underground parking amenity, does not comply with this provision regarding required landscaping, in part substituting a concrete wall for the required trees, shrubs, and ground cover. It violates the purpose of creating an environment inviting to pedestrians, and does not better meet the design guidelines.

**VIII. CONCLUSION.**

For each of the above reasons, the Design Commission erred in approving the subject project. The City Council should sustain this appeal and deny the application.

To the extent the applicant may still desire any of the requested modifications, the applicant should be required to resubmit through the city's adjustment processes, where an appropriate level of scrutiny would be applied.

Respectfully submitted this 11th day of January, 2018.

  
\_\_\_\_\_  
Jeffrey L. Kleinman  
Attorney for Appellant  
Pearl District Neighborhood Association