Testimony of Ellen M. McCarthy

BZA Case #Application No. 18285

Application by Verizon/Eastbanc for Zoning Relief to Permit the Construction of an Addition to an Existing Building at 1045 Wisconsin Avenue, N.W.

Good afternoon, Chairperson Moldenhauer and members of the Board. My name is Ellen McCarthy. I am the Director of Planning and Land Use at Arent Fox, LLP, and I am here today to testify on the planning and zoning issues involved in this case, a request by Verizon and Eastbanc for zoning relief necessary to construct a mixed-use, residential and retail structure as an addition to an existing utility building on the site. In terms of my qualifications, I have over thirty-five years of planning experience, including five years spent at the DC Office of Planning as the Deputy Director for Development Review and Historic Preservation, and an additional two years as the Director of that office, in addition to more than 10 years as a zoning consultant. I live in the District, and my office is at 1050 Connecticut Avenue, NW.

The Site

The address of the proposed project is 1045 Wisconsin Avenue in Georgetown, Square 1189, lot 830. It is bounded by Wisconsin Avenue to the west, and the C&O Canal to the north. It is separated from Grace Church to the south by a fifteen foot wide alley, named Walters Alley. To the east is a five story office building. Along Wisconsin Avenue to the north and west are predominately two and three story buildings, with retail at the ground level and office space or residential space above.

NOV 29

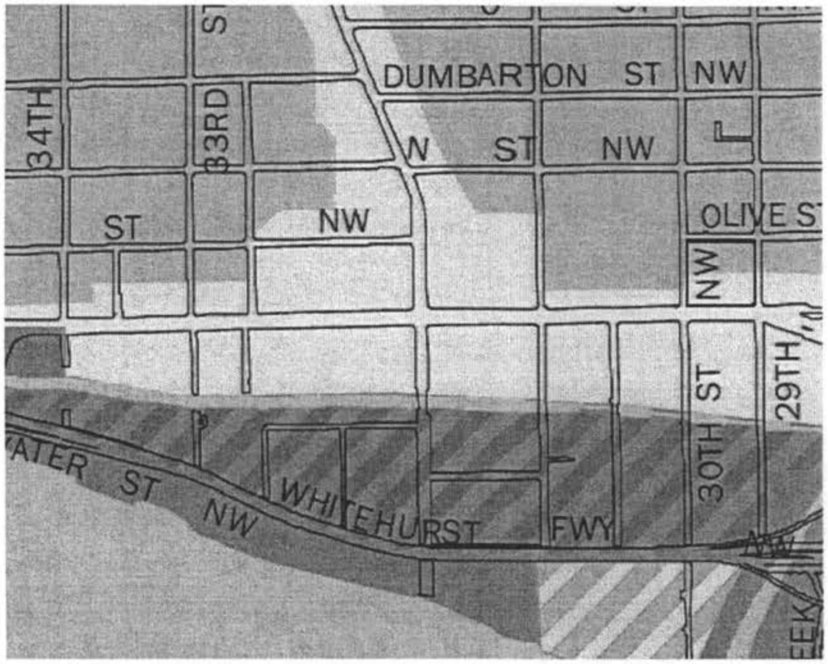
BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 18285
EXHIBIT NO. 29

GENBUS/841307.1

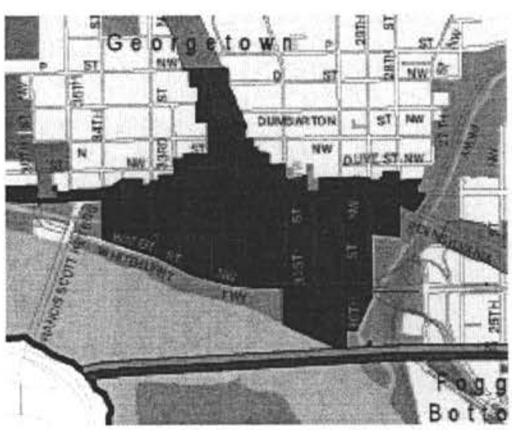
The property is approximately 28,500 sf, and is long, somewhat narrow rectangle, with a width of 100 feet where it fronts along Wisconsin Avenue, but a length of 283 feet, more than twice the width, along the C &O Canal ("the Canal"). It currently consists of a utility building, which is a Verizon telephone switching station constructed in 1954, and a surface lot which provides parking for service vehicles associated with the switch .

The site was rezoned to W-1 in 1973 from the M and CM zoning which had previously characterized the Georgetown waterfront. The switch is non-conforming in several ways: it is constructed along the rear lot line, directly abutting the office building and thus does not meet the rear yard requirement. Also, it contains approximately 1.2 FAR of non-residential space, in a zone which limits commercial space to a maximum of 1.0 FAR.

The general vicinity has undergone considerable redevelopment over the past decade, with the former city incinerator, located across South Street on the other side of Grace Church transformed by Eastbanc into a mixed-use project with a cinema, hotel, retail and residential uses. South of that project is the new Georgetown Waterfront Park, a lovely and dramatic redevelopment of a former parking lot and staging area for road equipment. Just to the northeast, across the Canal, is the Georgetown Park shopping mall, which is in the process of being redeveloped. The bulk of the structures in the area are a mixture of uses, with ground floor retail helping to create a lively pedestrian character, and either offices or residential uses above, making it even more important to achieve retail continuity along Wisconsin Avenue.



The site is currently categorized on the Future Land Use Map as "mixed use, medium density residential, moderate density commercial". The Generalized Land Use Policy Map characterizes the area as a "Regional Center", which is described as having "the largest range of commercial functions outside the Central Employment Area", typically drawing patrons from throughout the city as well as from suburban areas, and having a "large office component," although it does acknowledge that heights and density should be "appropriate" to the scale and function of adjacent areas.



The project being proposed for the site is certainly not inconsistent with the medium density residential designation on the Future Land Use Map, and the Regional Center designation on the Future Land Use Map.

Requested Relief

The relief requested includes: an area variance from the restrictions on the expansion of a non-conforming structure devoted to a conforming use found in Section 2001.3, a use variance from the requirements of Section 931.2 to allow the expansion of already nonconforming non-residential floor area ratio, an area variance from the lot occupancy requirements of Section 932.1, and an area variance from the rear yard requirements of Section 933.2 to allow the construction of an addition to an existing building in the W-1 Zone District.

Zoning Context and History

Before I go into the various tests that must be met to justify the variances and how this project meets those tests, it is very important to understand the zoning history of the site, and the context for the W zones. Though it is difficult to fully imagine now, the Georgetown Waterfront, until approximately thirty to forty years ago, was a dirty, smelly, smoke-belching, gritty industrial area. Hoffenmeyer's rendering plant perfumed the air, and a power plant right on the water used coal transported by rail. Flour and paper mills, along with lime kilns, had been the order of the day, but they were gradually being phased out.

The M and CM zoning that had been appropriate for a busy industrial sector prohibited residential use, but it permitted office use, in the case of M zones, up to 6.5 FAR. Two proposals had been floated for very large office buildings that planned to take advantage of that FAR, and it caused a huge storm of controversy. Proponents of making the waterfront similar in scale and character to the remainder of Georgetown north of M Street wanted to severely downzone, while many property owners wanted to be able to proceed at the full commercial density to which they felt they were entitled. The Zoning Commission called for a massive and detailed study. In the end, the Commission declined to dramatically downzone, and instead proposed the W zones as mixed-use zones. The W zones are described in the Zoning Regulations as applied to waterfront areas that "are also (1) geographically, historically, or locationally unique; (2) adjacent to well-established residential areas...or (3) where the public health, safety, general welfare, and amenity would be promoted and protected by the encouragement of mixed uses." 11 DCMR § 900.1. The purpose of the Waterfront Zones is to "encourage a diversity of compatible land uses at various densities, including combinations of residential, offices, retail, recreational, arts and cultural, and other miscellaneous uses." 11 DCMR § 900.4. The W-1 Zone is specifically designed to provide a variety of housing, service, employment, and recreational opportunities in one location. 11 DCMR § 900.5.

While the Commission agreed with those who felt that the industrial uses and zoning were no longer appropriate to the Georgetown Waterfront in 1973, it argued in its orders for Cases No. 73-20 and 73-21 (attached as Exhibit A to our prehearing statement) that a reasonable amount of density should be permitted, to encourage the redevelopment of the industrial uses.

> We believe greater reductions in height and density than are adopted herein would limit the economic opportunities for the redevelopment of this area. There would be this paradox: industrial property owners might hold

> on to marginal operations rather than redevelop the area to remove blighted conditions. *Ugly industrial structures and parking lots could remain* if there is no incentive for redevelopment.

Id., at pp. 7-8 (emphasis added).

Indeed, up to this point, despite the "incentives" in the W zones, the matter of right zoning, with its obstacles which we are discussing today, has provided so many stumbling blocks that the redevelopment envisioned above by the Commission has not been able to be accomplished. The requested zoning relief will clear the last barriers to accomplishing what was begun by the zoning change in 1973 to redevelop a less than lovely industrial structure and its parking lot.

Further, the Commission added:

> We agree basically with [the view that reductions in potential commercial development are needed to preserve the ambiance and stability of the entire Georgetown area] and have reacted to it by sharply reducing the potential for the construction of *large office buildings* .... It is also our view, however, that the adopted zoning will provide a *moderate* level of the desired mixed use development including apartments, offices, shops, hotels, and restaurants, as well as townhouses, giving the Georgetown Waterfront a distinct and special 24 hour character.

Id., at pp. 13-14 (emphasis added).

The W zones were articulated to provide that mixture of uses, with W-1 being imposed along the Canal at a lower height (45 feet) and density (maximum of 2.5 FAR), with residential development encouraged by permitting housing to fill the full envelope, but limiting non-residential development to no more than 1.0 FAR. Unfortunately, the Commission did not draw a distinction between the commercial office space they were attempting to discourage and other non-residential uses, such as the existing industrial facilities and retail uses. In most cases, this mixture of permitted densities has been sufficient to eliminate the industrial uses. The majority of the formerly industrial buildings have long since ceased their manufacturing operations. Those that are contributing buildings to the historic district and could be converted have been adaptively reused, and many were able to take advantage of the historic preservation tax credit as part of their redevelopment. Those which were not historic buildings were generally razed and replaced with sympathetic new construction.

Unfortunately, the public utility use of the non-conforming Verizon switch, which is not a contributing building in the historic district, has not been and cannot be abandoned. It plays a continuing vital role in assuring telecommunications service to the District. Nor can it be truly adaptively reused, because structurally it is not possible to build above the building or reinforce the structure to permit that, without disturbing on-going operations. In addition, the amount of non-residential space required for switching operations already exceeds the matter of right limit, and therefore allows for no additional retail at the street level along Wisconsin Avenue, as the Commission contemplated when it created the W zones and as OP, CFA, and the ANC have asked the applicants to include in any addition to the Switch.

DC Zoning Regulations and Area Variances

There are three tests, which must be met to qualify for a variance. The applicant must show:

(1) The property is unique because, *inter alia*, of its size, shape, or other extraordinary or exceptional situation or condition relating to the property;

(2) The owner would encounter practical difficulties if the zoning regulations were strictly applied; and

(3) The variance would not cause substantial detriment to the public good and would not substantially

impair the intent, purpose and integrity of the zoning plan.

Uniqueness

The site is truly unique. It is steeply sloped from the apex, at the southwest corner at Wisconsin and Waters Alley, down to the Canal, a difference of 11 – 14 feet, depending on the measuring point. The lot is oddly configured, being more than twice as long as it is wide, but despite its length, it borders on only one public street, and that is only along its narrow side. The fact that the Canal constitutes the grade at the long side of the building creates a situation that makes a high percentage of the lowest level of the existing utility building "chargeable" to FAR (76%), yet there is no vehicular direct access and very limited pedestrian access on that side of the Canal – the towpath is on the northern edge. So the FAR "counts", but it derives virtually no value from being at grade, particularly since the Wisconsin Avenue side of the building is higher, and renders a substantial portion of the lower level unsuitable for residential space as it is underground.

The existing utility building contributes to the uniqueness of the property. As was explained by Verizon's representatives, it is not practical to move the facility, and it is not possible to build on top of it. It takes up 60% of the lot occupancy, leaving only 5,800 sf on which to build the proposed mixed-use project, if it were to meet matter of right standards. In order to build upon the current parking lot, the proposed new structure must accommodate the trucks necessary to service the switch. This further erodes the useful footprint at the street level, exacerbating need to expand the base of the new building beyond the lot occupancy limitations. Because of the grade differential, the square footage that must be devoted to that truck parking is counted as FAR.

The Switch building as it exists is nonconforming in two respects. having been built along the property line with no rear yard, and having an FAR of 1.2, exceeding the limit of 1.0 FAR for non-residential space by 20%. In addition, because of its height, and the height limitation in the W-1 zone, combined with the extraordinarily high ceilings required in the first level of the garage (more than 18 feet) in order to accommodate the Verizon bucket trucks, the building exceeds the lowest level of residential in the new structure by 5 feet . Were the utility building lower, the lot occupancy could be measured from the plane where residential use begins in the new building, and it could easily meet the 80% lot occupancy requirement; however, given the height of the utility building, a portion of the second floor of the Switch occupies the level where residential use begins, and thus is included in the lot occupancy calculations. This anomaly is clearly shown on the South Elevation drawing included at Tab B, page 15 of Exhibit 23 in the record. If the floor heights of the two portions of the proposed structure aligned, the second floor of the Switch would not be counted at all and the building's lot occupancy, measured from the first floor on which residential uses start (2), would be significantly less than 80%.

Last, while it is not residential, neither is the Switch a truly commercial use, in the same sense that office or retail space would be. The owner of the property will not derive a commercial value from the space – it is simply providing a necessary public service. I would argue, in fact, that the current public utility use of the existing building is neither commercial nor residential, and should be considered a "neutral", subtracted from the overall consideration of non-residential space. It is a public service, and in that respect, is akin to "mass transit facilities" or parking lots for car sharing vehicles, both of which are permitted even in the most restrictive residential zones, or PEPCO substations, which appear in many low density residential neighborhoods.

While the W-1 zoning and future land use map encourage these types of industrial uses that do not contribute to the vibrancy and vitality of the street to be phased out, this site cannot be "phased out." It is a public service use. The next best thing is to wrap the existing structure as much as possible, and to add the uses that create the effects the Zoning Commission was trying to achieve through the W-1.

The Strict Application of the Zoning Regulations Would Result in a Undue Hardship or Serious Practical Difficulty

The aforementioned confluence of factors creates serious practical difficulties in complying strictly with several of the applicable requirements of the W-1 Zone District as follows:

<u>Expansion of Existing Nonconforming Structures Devoted to Conforming Uses</u>

The Zoning Regulations do provide flexibility to expand existing nonconforming structures that are devoted to conforming uses. However, expansion is only permitted if the proposed structure will comply with lot occupancy requirements, and the addition or enlargement will not increase or extend any existing nonconforming aspect of the structure. 11 DCMR § 2001.3 Because the existing building is nonconforming with respect to both the rear yard setback and the maximum permitted non-residential FAR, any expansion of the Building requires a variance under § 2001.3. It is clear that this would constitute a serious practical difficulty -- if the property complied strictly with the maximum permitted non-residential FAR requirement, it would mean that no change could be made to the existing Switch, which is entirely devoted to non-residential uses and already exceeds the permitted FAR. This would create great difficulty in attempting to modernize the structure and maximize the building's interaction with the street. In particular, since any redevelopment of the vacant parking lot will require incorporation of the trucks in structured parking, and since the grade makes that an expansion of the non-residential use, these factors would make it impossible to redevelop the property as the W zones anticipate, without relief from the restriction on expansion of non-conforming uses.

Rear Yard Setback

The Property is already nonconforming with respect to rear yard setback. The W-1 Zone District requires a rear yard equal to three inches per foot of vertical height of the adjacent building measured at the rear of the structure, but no less than twelve feet. 11 DCMR § 933.2. The Proposed Development cannot reasonably comply with the rear yard setback requirement because the Building is already in place in a zero lot line condition and cannot be relocated or demolished.

Lot Occupancy

The existing Building occupies approximately 59% of its lot; the W-1 Zone permits up to 80% lot occupancy. Since the proposed building cannot be constructed over the Switch, in order to adhere strictly to the Zoning Regulations, the new structure would have to utilize no more than 21% of the lot, or approximately 5,800. It is virtually impossible to fit any portion of the ground floor program (a lobby and any amount of retail space) into such a small space, A 5,800 gsf area would not allow for the simultaneous coexistence of the three critical program requirements that need to be accommodated on the first floor of this building in order for it to be redeveloped at all:

- adequate vertical circulation to the upper floors
- sufficient horizontal circulation for vehicular access to the lower parking levels via ramps; and

- requisite parking for the Verizon motor pool and space for maneuvering their fleet

The architects have indicated that the proposed design of these elements is consistent with typical mixed use buildings and is neither too generous nor excessive. The building core has been designed to be compact and includes only two elevators, two fire stairs (comply with code), and two vertical shafts for pressurization and other mechanical elements. The parking ramps have also been minimized to only 20 feet wide, which is less than ideal for two way traffic. Lastly, the Verizon vans and bucket trucks are far larger than standard vehicle dimensions and therefore have larger turning radius requirements that must be accommodated on the first floor.

Attempts to minimize the building below the proposed footprint and meet programs requirements have been unsuccessful. To accommodate the program requirements within the matter of right remaining 20% lot coverage (5,800 gsf) would not be possible.

A further obstacle is the need to relate to Wisconsin Avenue if the goals of the W zones and the Comprehensive Plan to create lively, walkable, mixed-use streets are to be accomplished. Since the Switch cannot be moved, the new construction must meet Wisconsin Avenue, and the existing Switch must be connected to the Avenue because that is the only public street, it would not be possible to meet these constraints without exceeding the lot occupancy requirements.

Finally, there is the issue of the height of the existing Switch building, which is too tall to take advantage of §932.3, which would permit the lot occupancy to be calculated from a horizontal plane located at the lowest level where residential uses begin, on the second floor of the new structure. But the second floor of the existing Switch extends 5 feet above this point, and intrudes into that plane, meaning the entire footprint of the Switch must be counted in lot occupancy. If the second floor of the new portion of the structure and the roof of the Verizon Switch aligned, the lot occupancy could be calculated solely on the 35% of the property occupied by the mixed-use structure.

Undue Hardship

Use variances require a showing of hardship, a greater burden than that required of area variances, because while an area variance can be granted without altering the character of the zoned district, a use variance ordinarily seeks a use prohibited in the particular district. *Palmer v. Board of Zoning Adjustment,* 287 A.2d 535, 541 (1972). In order to prove hardship, the Applicant must show that a reasonable use cannot be made of the property in a manner consistent with the Zoning Regulations. *Id.,* at 542.

As mentioned above, the Building currently occupies approximately 60% of the Property on two floors, but rises just over one story (17') above the grade of Wisconsin Avenue. Half of the existing floor area is located on the lower level, which is actually below the adjacent finished grade on three sides of the site (south, west, and east); however, the extraordinary depth of the remaining side, which is exposed fully along the C&O Canal at a lower grade, renders both stories of the existing building currently chargeable to floor area ratio.

Floor area ratio is calculated by dividing the gross floor area of the structure by the land area. Gross floor area is "the sum of the gross horizontal areas of the several floors of all buildings on a lot, measured from the exterior faces of exterior walls and from the center line of party walls separating two buildings." 11 DCMR § 199.1. In the case of a building that has a difference in grade, resulting in floors that are by definition part basement (which is included in the calculation of gross floor area) and part cellar (which is not), the gross floor area is measured by taking the total perimeter of the floor in question, calculating the percentage of that perimeter area that is more than four feet above the adjacent finished grade, and multiplying that percentage by the floor area in question to determine the gross floor area of that floor. In the instant case, although the lowest level of the Proposed Development is completely below grade on three sides, due to the low adjacent finished grade along the C&O Canal Wall and the exceptional depth of the lot, 76% of the lower level (G1 Floor), most of which is devoted to parking and Switch uses, is chargeable to gross floor area. [*SLIDE 40 in BBB powerpoint]*. Relief is required from the overall FAR requirements in the W-1 Zone, as the entire development will result in an FAR of 2.56, a 2.3% increase over the maximum permitted.

Given the existing nonconformity as to non-residential FAR, the addition of any nonresidential space above grade, such as ground-floor retail, violates the maximum permitted floor area devoted to non-residential uses pursuant to 11 DCMR § 931.2. While other properties in the area are somewhat similarly affected by the manner in which FAR must be calculated where there is a significant change in grade from the street level to the canal level, due to the amount of floor space required for the Switch, and the parking facilities that must be provided within the Proposed Development to serve Verizon vehicles and the new uses, this method of calculation uniquely burdens the Property.

For example, but for the exposed north wall of the Building along the C&O Canal, only one story of the Switch would be chargeable as FAR. If the Property were not located on the canal, more than 54,000 square feet (1.9 FAR) of new residential uses, and up to 11,400 square feet (.4 FAR) of non-residential uses could be added to the Property without violating 11 DCMR § 931.2. Instead, all 34,222 square feet of existing floor area devoted to the Switch are chargeable to FAR, rendering the

Building nonconforming at 1.2 FAR (all non-residential); no more than 1.0 of non-residential use is permitted. Moreover, the parking on the first floor level, AND the new parking proposed on the G1 level, which is for all intents and purposes below-grade, is chargeable to gross floor area and counted in the calculation of FAR. Exclusive of parking, the Proposed Development includes a total of 4,997 square feet (approximately .18 FAR) of new non-residential uses. Because a significant portion of parking uses included on the G-1 level and all of the parking on the 1St Floor level of the Proposed Development (approximately .3 FAR) must be charged to gross floor area, however, the resulting non-residential FAR is 1.24, a 3.3% increase over the existing condition and 24% greater than the maximum permitted in the Zone. What is proposed is a .04 FAR increase in non-residential uses, and a .06 FAR increase in overall FAR, simply to overcome the burden created by the way that FAR must be calculated on this complex site. Without the minor variances from overall and non-residential FAR, it is clear that the only way to redevelop the site would be to provide a residential-only building, which is neither consistent with the W-1 Zoning, compatible with the existing retail uses along Wisconsin Avenue, nor in conformance with the design recommendations and approval of the Old Georgetown Board/Commission of Fine Arts, which recommended even more storefront glass and retail uses than are being proposed.

Although it is clear that the intention of limiting non-residential uses in the Waterfront Zone was to limit the potential for high rise office buildings, this Property is uniquely impacted and heavily burdened by the restriction. The Property cannot reasonably be converted to mixed use within the constraints of the W-1 Zone due to the inability to interrupt a public utility function. While the inability to put the Property to a more profitable use or loss of economic advantage is not sufficient to warrant a variance, the premises must be able to be put to a conforming use with a fair and reasonable return. *Palmer, supra,* at 542. The fact is that the existing use is a public one, not a commercial one, and there is simply no marketable use of the Property, other than what has been proposed, that would leave the Switch in place and which would assure a fair and reasonable economic return to any owner. Indeed, this is precisely the kind of Property that the Zoning Commission aimed to incentivize for redevelopment when instituting the Waterfront zoning, yet it has remained underutilized, isolated from the streetscape, and virtually invisible to all for more than 50 years, creating a desolate patch of Wisconsin Avenue for pedestrians, with no "eyes on the street" to create a sense of safety and security for pedestrians on the east side of the Avenue. The Proposed Development would provide an opportunity to fill in this gap in the streetscape, while maintaining the status quo with respect to the Switch; however, because of the way the Switch is treated for purposes of FAR, there is no way to provide any marketable street front retail without exceeding the maximum permitted nonresidential FAR. Similarly, to comply with the overall permitted FAR in the Zone, while maintaining the Switch in place, an entire residential floor would have to be eliminated.

No Harm to the Integrity of the Zone Plan and No Adverse Impact on Neighboring Property

As is evident from reading the Zoning Commission order which created the W zones, the project as proposed, with retail at the street level and residential above, is fully consistent with the Zone Plan. The Commission created the proportions of uses prescribed to encourage the change in character of the Georgetown Waterfront from industrial to a mixed-use environment. It wished to see the withering away of industrial buildings such as the one currently occupying the site. While it is not possible to do that, given the importance of this facility to the provision of an essential public service, the proposed project comes as close as possible to achieving that end, by reducing the visibility of the Switch from the only public street, and by introducing retail and residential use to an area which has been a gap for more than 50 years.

There will be no adverse impact on neighboring property. The relief requested is minor, and most of the conditions for which relief is sought have existed for more than 50 years with no apparent negative effects. The addition of nine units of residential, plus less than 5,000 sf of retail is not likely to introduce traffic congestion. The relief from lot occupancy will not have an adverse impact, given the proximity of the project to the open space of the Canal, and the delightful green space in front of Grace Church, immediately across the alley. The rear yard condition has existed since the Switch was built in 1954, and is not being changed by the proposed new construction.

Conclusion

To recap, the site is uniquely, severely constrained due to the inability to move or demolish the existing utility building, which is non-conforming as to non-residential FAR and rear yard, the steep slope, the presence of the Canal at a substantially lower elevation and positioned on the long side of the site, rendering most of the existing building, and even the parking/circulation area in the new building as chargeable to FAR. These constraints constitute a serious practical difficulty, and in the case of the minor FAR variance, an undue hardship in complying with the letter and the spirit of the zone classification in which the site is located. The relief requested will not have an adverse impact, as it is minor in scope, does not worsen the rear yard situation, improves the appearance of the property and its contribution to the vitality of the area, and the presence of two large blocks of open space immediately adjacent to the site provide sufficient light and air.