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Via E-Mail bzasubmissions@dc.gov

D.C. Board of Zoning Adjustment
Suite 210
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Washington, D.C. 20001

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Re: **BZA Case 18330; FCP Champlain, LLC Application for Special Exception and Variance Relief for 2337 Champlain St., N.W. (Lot 887, Square 2563)**

Dear Members of the Board:

Please accept this pre-hearing statement on behalf of Erie Condominium Association ("Erie") in the above-referenced matter. Erie has applied for party status. This case relates to the proposed development at 2337 Champlain Street, NW (the "Property") by FCP Champlain, LLC ("Applicant" or "FCP"). The Applicant requests special exception and variance relief in order to exceed the permissible height and floor area ratio (FAR) for as-of-right development in the Reed-Cooke Overlay ("RC Overlay").

Erie opposes the zoning relief requested by the FCP. To be clear, Erie is not opposed to development of the Property itself, but is opposed to the pending application before the Board of Zoning Adjustment ("BZA"). FCP cannot meet the zoning requirements for the relief requested, because it can build a condominium on the site without a special exception or variance. Moreover, neighbors at the Erie and elsewhere in the community would be adversely affected by FCP's request.

FCP should comply with the normal requirements for buildings in the RC Overlay, including a height limit of 40 feet.

A. Background

The Erie Condominium is located at 2351 Champlain St., NW in the RC Overlay. It is immediately adjacent to FCP's proposed development site on Champlain Street.

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The Erie was constructed in 2008 and includes 8 units -- four lower and four upper units. The Erie was built matter of right to a height of 40 feet, consistent with the height limitations of the RC Overlay.

FCP purchased the very large, adjacent lot next to the Erie in July of 2011. FCP certainly knew the size, shape, topography and zoning restrictions at the site when it purchased the Property. The zoning requirements were described in the marketing materials for the Property, so FCP was well aware of the established neighborhood restrictions.

Only four months after purchasing the Property, FCP filed an Application for Special Exception and Variance relief (the "Application") with the BZA seeking authorization to exceed the height limit of 40 feet for buildings within the RC Overlay and to exceed the as-of-right floor area ratio ("FAR") for the site.

FCP wants to build a condominium that would rise almost 49 feet in height, exclusive of penthouse structures. The extra height would adversely affect occupants of the Erie and property values in the neighborhood. In addition, FCP proposes massive penthouse structures that would add approximately ten more feet to the overall height of the building.

The Application asks the BZA to depart from the standards established for the RC Overlay community. The neighborhood would lose the intended benefits of the RC Overlay, including lower heights and densities.

B. FCP's request for Special Exception Relief should be Denied

1. The Application fails to meet the requirements for a Special Exception under Sections 1403 and 3104.

The site of the Property is zoned R-5-B and is located within the RC Overlay. The Zoning Regulations of the District of Columbia impose special limits upon development within this Overlay District in order to "maintain heights and densities at appropriate levels." 11 DCMR §1400.2. Unless an applicant is providing extra low and moderate income household units, the maximum height permitted in this Overlay District is forty feet (40 ft.) 11 DCMR § 1402.1. FCP wants to exceed that limit by almost nine feet (9 ft.), excluding penthouses, without providing extra affordable housing.

FCP has the burden of proving to the BZA that a special exception for the additional height is warranted. The legal standard is set forth in 11 DCMR § 1403, which provides that "[a]n exception from the requirements of this chapter shall be permitted only if

granted by the Board of Zoning Adjustment as a special exception pursuant to § 3104 after a public hearing, and subject to the following criteria:

- (a) **The use, building, or feature at the size, intensity, and location proposed will substantially advance the stated purposes of the RC Overlay District;**

- (g) **The use, building, or feature at the size, intensity, and location proposed will not adversely affect adjacent and nearby property or be detrimental to the health, safety, convenience, or general welfare of persons living, working, or visiting in the area.**

11 DCMR § 1403.1 (emphasis added). For the reasons discussed herein and at the hearing in this case, FCP's Application fails under subsections (a) and (g) of Section 1403.

In order to grant a special exception, the BZA must also find that the requested exception "will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and **will not tend to affect adversely, the use of neighboring property** in accordance with the Zoning Regulations and Zoning Maps...." 11 DCMR 3104.1(emphasis added). FCP's Application fails this test as well.

2. **Special Exception relief would adversely affect adjacent and nearby property and would be detrimental to the general welfare of persons living in the area.**

As noted above, subsection (g) of Section 1403 provides that special exception relief may be granted only if "the use, building, or feature at the size, intensity, and location proposed will not adversely affect adjacent and nearby property or be detrimental to the health, safety, convenience, or general welfare of persons living, working, or visiting in the area."

The proposed height of the building would adversely affect the residents of the Erie, by reducing privacy, light, air and rooftop views. Notably, the Erie includes four private rooftop decks that are each assigned for private use by four unit owners. The rooftop decks are deluxe, private spaces with spectacular and expansive views, including a view of the Washington Monument. The decks are accessed from within each condominium unit via a private spiral staircase into a penthouse structure. Each penthouse structure includes usable, interior spaces that are incidental and accessory to the private rooftop decks. The FCP project would adversely affect use and enjoyment of these interior and exterior spaces.

The outdoor decks contain outdoor furniture, fire pits, barbeque grills, heat lamps and full-sized potted plants. Appraisers of the units consistently comment upon the exceptional rooftop amenities and the added value of these indoor and outdoor spaces.

If FCP is restricted to an as-of-right height of 40 feet, then the character and usage of these rooftop spaces on the Erie would be largely preserved. If FCP is granted a special exception to build above 40 feet, then the owners of these Erie units will be adversely affected. The proposed project would block the rooftop terraces from existing views, light and air, including a wall at or near the property line, a higher wall a few feet away and then additional visual obstructions associated with substantial penthouse structures. Moreover, persons on top of the FCP building could peer onto Erie's private rooftop decks.

The additional height of the proposed project may also cast shadows on the patios of several of the Erie's lower units.

FCP has asserted before ANC C1 that it has reduced the height of the project from 50 to almost 49 feet and that this reduction will significantly lessen the adverse impact on neighboring buildings. The new plans do not remedy the adverse effects on the Erie. While FCP wants credit for an alleged reduction in height, most of the building would still rise to almost 49 feet, and substantial penthouse structures would add another 8 or 10 feet in height above the roof elevations. The latest drawing provided to the Erie shows that FCP has revised its plan so that a very small section of the building nearest the Erie has been stepped down in height by a few feet. However, most of the building along Champlain Street would still be approximately nine feet above the RC Overlay restriction and substantially taller than the Erie. The roof of the Erie is not 48 feet, as alleged by FCP in its filings with the BZA.

If FCP's elevations and measurements are correct as to its own project, a person on Erie's rooftop will stand more than five feet below FCP's closest rooftop surface and approximately nine feet below most of the Project. Further, a person standing on the roof of the Erie would be about 18 feet below the penthouse structures of the FCP Project. These height differences between the Erie and the Project will create a substantial visual barrier to Erie residents, blocking views of the Washington Monument and dramatically altering the character of the Erie's rooftop spaces. FCP has not revised its plans in a manner that adequately addresses Erie's legitimate concerns about loss of light, air, privacy, views, and economic value.

The value of the entire Erie building would decline as more than half of the units would be directly affected. On January 31, 2012, the Board of the Erie Condominium Association passed a resolution stating that granting FCP's request for a special exception would have an adverse effect on the residents of the Erie Condominium.

Moreover, the greater RC Overlay community would be adversely affected by the increased height of buildings in the area that do not meet the standards for zoning relief. The development standards for the RC Overlay do not permit buildings in excess of 40 feet if there will be adverse effects on adjacent and nearby properties. A reduction in the value of the Erie units could adversely affect the value of other nearby properties in the neighborhood. Finally, granting FCP's request for relief on such weak grounds would set a dangerous precedent for other developers to use in future projects, thereby diminishing the property values of those who have already invested in the neighborhood.

Accordingly, the project does not meet the special exception standards because it will adversely affect adjacent properties and be detrimental to the general welfare of persons living in the area.

C. FCP seeks relief that is not consistent with the purposes of the RC Overlay

1. Special Exceptions may be granted only when they are necessary to implement the RC Overlay objectives.

As mentioned above, FCP's request does not meet the stated purposes of the RC Overlay. A special exception from the 40-foot height restriction can be granted only if such relief will advance the objectives of the RC Overlay. In this case, FCP can build a residential building without exceeding the height limits imposed by D.C. law. It does not need a special exception to do so.

FCP can build an attractive and fully functional condominium building that satisfies the RC Overlay standards without any special exception or variance. The site is not unusual or exceptional. It fronts a public street and backs into an ally. It is large and fairly regular in shape. The Property can certainly accommodate many residential units and zoning relief is not necessary to add new housing stock to the community at this site. In the past, the Zoning Commission has denied zoning relief when an applicant has simply chosen to design a building in such a way as to create the need for such relief. (ZC Case 02-37 – Dec. 9, 2002).

2. The Application is not justified by special exceptions granted to other buildings under different circumstances.

FCP asserts that it should obtain zoning relief because other buildings are 50 feet in height, including the adjacent "Brass Knob" property to the south of the subject property. FCP must comport with the RC Overlay standards and the District of Columbia's special Letter to the Board of Zoning Adjustment

exception requirements even if another nearby building is 50 feet in height. The BZA must decide each case based upon the unique facts of that particular case.

FCP cannot benefit from the decision in the Brass Knob case (BZA Case No. 18167/17431-B). The developer of that property faced very different circumstances due to an existing, destabilized building on the site and significant costs of foundation and soil remediation. The BZA found that a variance was warranted because of "the nature of the building and its existence on the lot." (BZA Case No. 17431 – May 2, 2006). The need for extra height was required by the "historically-interesting" building on the site. *Id.* By contrast, FCP's site is entirely vacant.

FCP also tries to rely upon BZA Case No. 16931, in which the BZA granted a variance to the property to the south of the Brass Knob building. In that case, the applicant established exceptional circumstances relating to potentially dangerous soil contamination and the substantial costs of remediation. The BZA relied upon that unique situation as a primary basis for granting zoning relief. FCP has not advanced any comparable arguments.

Most importantly, FCP misstates the height of the building to the north of the subject Property. The Erie is not 48 feet in height, as suggested by FCP in its filing with the BZA. It is 40 feet. That fact is central to the zoning analysis in this case.

D. FCP's Request Does Not Meet the Test for Variance Relief

1. FCP Cannot Demonstrate Practical Difficulties or Hardship.

FCP cannot satisfy the onerous requirements for a variance of the FAR requirements. D.C. law sets forth the rigorous standard for a variance as follows:

[w]here, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations, or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation adopted under D.C. Official Code §§ 6-641.01 to 6-651.02 would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, to authorize, upon an appeal relating to the property, a variance from the strict application so as to relieve the difficulties or hardship; provided, that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

11 DCMR § 3103.2.

The RC Overlay does not provide for additional density for preferred uses. It does provide for bonus density from Inclusionary Zoning, but FCP wants to exceed the bonus density as well.

Notably, FCP's Application does not state that it needs relief from the strict zoning regulations in order to build a condominium at the site. FCP's Application does claim that the "unique topography and irregular shape" of the lot on which it plans to build the proposed project will result in practical difficulty for FCP without the variance. Specifically, FCP claims that, in order to provide rear vehicular access and comply with the code requirements, the overall structure of the building must be raised.

On information and belief, the reasons set forth in FCP's Application do not actually create practical difficulties that would require a variance in order to construct the proposed project. FCP's representative, Charlie Keeler, has admitted in a meeting with Erie's President that FCP does not need the requested variance or special exception to construct the proposed project. Further, the lot on which the proposed project is to be built is exceptionally large compared to lots on which other nearby buildings, such as the Erie, have been constructed within the zoning limits of the RC Overlay. Knowledgeable witnesses interviewed by Erie have confirmed this fact and state that the lot is easily large enough to build on and stay well within the requirements of the RC Overlay. Thus, FCP cannot demonstrate practical difficulties in order to obtain the variance relief.

As the Zoning Commission explained when reviewing another proposal for Champlain Street, "[a] variance must not be granted lightly and never on the basis that a project is popular or has exceptional merit. Before granting a variance, the [BZA] must seriously consider only the legally relevant aspects of the request...." (ZC Case No. 02-37 – Dec. 9, 2002). The BZA must reject an application for variance if the "practical difficulties, which it claims justify variance relief, arise out of the design of the addition to the structure" *Id.*

In the past, the Zoning Commission has rejected self-serving claims that a property is "irregularly shaped." Such assertions must be supported by credible evidence. *Id.* The subject property is not particularly narrow, shallow, or irregular in any way.

2. Granting Variance Relief to FCP will cause Substantial Detriment to the Public Good and will Impair the Intent, Purpose and Integrity of the Zone Plan.

Under Section 3103, relief can be granted only "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the

zone plan as embodied in the Zoning Regulations and Map." See 11 DCMR § 3103.2; (BZA Case. No. 17431 - May 2, 2006).

As explained above, the adverse effects on the adjacent buildings will be immediate, substantial and irreparable. This development project is likely to have adverse consequences on many residents of the RC-Overlay who invested in and have been members of the community long before FCP even considered coming to Champlain Street.

E. Conclusion

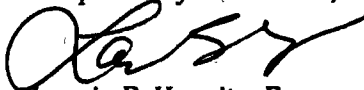
The Erie asks the BZA to deny the special exception and variance requests due to the adverse effects upon the Erie and the neighborhood in general. The owners of the Erie, and many other residents in the RC Overlay, purchased their homes with an expectation that the BZA would apply and enforce the published RC Overlay zoning standards. If developers cannot meet the requirements for zoning relief, then their BZA applications should be denied.

FCP's request does not satisfy the purposes of the RC Overlay. FCP purchased the property with full knowledge of the Property's characteristics and the adverse effects that exceeding the matter of right height and FAR maximums would have on the adjacent properties and the neighborhood. According to the Zoning Commission, "[m]atter-of-right lot occupancy, FAR and height maximums are just that – maximums. Variance relief is provided to avoid unfair situations, ... but must be exercised reasonably, keeping in mind that the matter-of-right standards set forth in the regulations are considered the maximum optimal conditions in the particular zone." (ZC Case No. 02-37 – Dec. 9, 2002). FCP has not demonstrated any exceptional or sufficient circumstances to warrant zoning relief. Receiving such relief under these circumstances would be utterly unfair to the residents of the Erie and the members of the neighborhood.

The BZA should protect the objectives of the RC Overlay and the rights of its residents to live in a community with reasonable limits on development.

The Erie respectfully asks the BZA to deny FCP's request for zoning relief.

Respectfully submitted,



Laurie B. Horvitz, Esq.

On behalf of the Erie Condominium Association

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