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April 17, 2012

Via E-Mail bzasubmissions@dc.gov

D.C. Board of Zoning Adjustment
Suite 210
441 4th Street, N.W.
Washington, D.C. 20001

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D.C. OFFICE OF ZONING
2012 APR 17 PM 1:12

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:

The Erie Condominium Association ("Erie") hereby submits proposed findings of fact and conclusions of law in the above-referenced matter.

Thank you for your consideration of the Erie's filing in opposition to the Applicant's request for zoning relief.

Respectfully submitted,



Laurie B. Horvitz, Esq.

On behalf of the Erie Condominium Association

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18330

EXHIBIT NO. 50

Cc: (via mail)

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**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Application No. 18330 of FCP Champlain, LLC, pursuant to 11 DCMR §§ 3103.2 and 3104.1, for a special exception to increase the maximum permitted height from 40 feet to 48 feet, 9 inches in the Reed-Cooke ("RC") Overlay District pursuant to Section 1403.1 of the Zoning Regulations, and for a variance from Section 402.4 of the Zoning Regulations to increase the permitted floor area ratio by 0.25 FAR, at the premises known as 2337 Champlain Street, N.W. (Square 2563, Lot 887).

HEARING DATE: April 3, 2012

DECISION DATE: May 15, 2012

DECISION AND ORDER

This application was submitted on November 18, 2011 by FCP Champlain, LLC ("Applicant"), the owner of the property which is the subject of this application ("subject property"). The application requests a variance to permit the Applicant to construct in excess of the floor area ratio ("FAR") permitted as of right and a special exception to permit a building that would exceed the maximum permitted height.

The Board of Zoning Adjustment ("Board") held a hearing on the application on April 3, 2012. At the Public Meeting on May 15, 2012, the Board decided to **DENY** the application by a vote of ___.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. The Office of Zoning ("OZ") sent notice of the filing of the application to the D.C. Office of Planning ("OP"), the D.C. Department of Transportation, and Advisory Neighborhood Commission ("ANC") 1C, the ANC within which the subject property is located. Pursuant to 11 DCMR § 3113.13, the OZ published notice of the hearing on the application in the D.C. Register on January 13, 2012.

Requests for Party Status. ANC 1C was automatically a party to this application. The Erie Condominium Association ("Erie Association") and Richard Wiedis requested party status in opposition to the application. Mr. Wiedis is the President of the Erie Association and a unit owner in the Erie Condominium ("Erie"). The Board granted party status to the Erie Association and denied party status to Mr. Wiedis, individually. The Erie is located immediately to the north of the subject property.

Applicant's Case. The Applicant presented its case. It testified regarding the relief sought for a variance from applicable FAR requirements and for a special exception from height limitations. The Applicant asserted that, in its opinion, the application meets the requirements for the relief sought. The Applicant explained its design of a condominium building with a proposed garage entrance from the public alley near the northeast corner of the subject property. It further described and graphically depicted the requested height of the building at forty-eight feet and nine inches (48' 9"). The requested height would be eight feet and nine inches (8' 9") in excess of the matter of right height permitted in the Reed-Cooke Overlay District ("RC").

Government Reports. OP filed a report with the Board, dated March 27, 2012, which recommended approval of the variance and special exception. OP expressed the opinion that the requested increase in height "should not substantially affect the neighboring property [to the north]" because the "proposed" height of the building will only be five inches greater than the building to the north." OP further found that the penthouses were set back from the "outer wall" adjacent to the property to the north in a manner

that exceeded required setbacks and that such setback “will allow for privacy and any other negative impact that may result on the adjacent building and residents.”

The D.C. Department of Transportation (“DDOT”) found that the parking provided would be adequate to serve residents and visitors. Exhibit 26.

ANC Report. ANC 1C submitted a letter, dated March 13, 2012, in support of the application. The letter did not include any factual findings or provide any reasoning on which its support was based.

Persons in Support or Opposition. The Erie Association submitted a letter from the developer of the Erie clarifying certain issues relating to the height of the Erie, and zoning restrictions that were communicated to the builder at the time of Erie’s development. The Board of Directors of the Erie Association adopted a resolution finding that the Applicant’s zoning request would have an adverse effect on the residents of the Erie.

FINDINGS OF FACT

The Subject Property and the Surrounding Neighborhood

1. The subject property is located at 2337 Champlain Street, NW. (Square 2563, Lot 887), in an R-5-B Zone District. The subject property also falls within RC Overlay District (.).
2. The surrounding neighborhood is characterized by a mixture of 2-3-story rowhouses and 4-5 story apartment buildings, neighborhood retail and institutional uses.
3. The subject lot is large and generally rectangular. It fronts upon Champlain Street and backs into a public alley. The lot area is approximately 13,853 square feet.
4. The subject lot is presently vacant and is used as a paved parking lot. There is an existing curb cut on Champlain Street.
5. The Erie sits immediately to the north of the subject property at the property line. It contains eight condominium units, an underground garage, and four deluxe rooftop terraces. Those private terraces include expansive views of the Washington D.C. skyline, including views of the Washington Monument.
6. The Erie was built to a height of forty (40) feet from the ground to the underside of the top floor ceiling, measured at the center of the front property line. A parapet extends approximately 3 feet, six inches above the roof for the safety of those standing on the roof and utilizing that space.

The Applicant’s Proposal

7. The Applicant proposes to construct forty (40) condominium units.
8. Parking would be provided by means of 9 surface spaces near the alley and 12 underground spaces in a garage. The garage would be accessed from the alley near the northeast corner of the subject property. The Applicant claims that its particular design of the garage will cause the building to exceed the permissible FAR and height requirements of the R-5-B District and RC Overlay respectively.

9. The Applicant claims that the specific design and placement of its garage ramp will require the Applicant to raise the first level and a portion of the garage above grade by approximately five (5) feet and, consequently, that the above-grade portion of the garage will contribute to a higher overall FAR for the building than permitted as of right.
10. The Applicant also claims that additional height and FAR is sought so that three residential units at the street level on Champlain Street will have ceiling heights that are at or above "average market heights" for residential units.
11. The Applicant requests a FAR of 2.41 and a height of 48.75 feet.
12. According to the Applicant's testimony at the hearing, the roof surface of the proposed building would be approximately two feet ten inches (2' 10") higher than the immediately adjacent roof surface at the Erie. The Applicant's parapet wall would be approximately five inches taller than the Erie's 3 foot, 6 inch parapet wall at the lot line.
13. The height difference between the proposed project and the Erie at the lot line is not limited to five inches, as originally asserted by the Applicant and by OP. The Applicant's filings and direct testimony did not candidly reveal that the roof structure of the proposed building would be two feet ten inches (2' 10") higher than the immediately adjacent roof terraces of the Erie. The Applicant summarily dismissed the likely adverse effects that the Erie will suffer due to this height difference and due to fences, furniture and other objects that will be situated on top of the roof of the proposed building.
14. The Applicant proposes a total of 3,740 square feet devoted to affordable housing. Said square footage is offered to comply with the Inclusionary Zoning ("IZ") requirements.
15. The Applicant has *not* proposed additional affordable housing, in excess of the IZ requirements, in order to justify any additional height of the building pursuant to 11 DCMR § 1402.1.

Adverse Effects Upon Neighboring Properties

16. Owners of the Erie presented testimony and evidence regarding the likely adverse effects upon their units and rooftop terraces, including a loss of privacy, light, air, views and material adverse effects on their property values.
17. On January 31, 2012, the Board of the Erie Association passed a resolution stating that the Applicant's request for a special exception would have an adverse effect on the residents of the Erie.
18. The Erie includes four 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 views of the Washington Monument. The decks are accessed from within each condominium unit via a private spiral staircase into a penthouse structure.
19. The outdoor decks contain furniture, fire pits, barbeque grills, and heat lamps. The owners of the Erie attribute considerable economic value to these rooftop spaces.
20. The Applicant confirmed its plans to place fencing and other objects on its roof to accommodate usage by the Applicant's penthouse occupants. According to drawings in the record, this fencing

would be placed outside penthouse structures near Champlain Street. This fencing is likely to create additional adverse effects upon the Erie. The Applicant's renderings omitted such fencing and, therefore, were inaccurate depictions of the likely adverse impacts upon Erie residents.

21. Mr. Wiedis and another Erie unit owner, Mr. Rouzy Vafaie, testified that when they invested in the Erie, they bought their units with the understanding and expectation that the height limits of the RC Overlay would prohibit any future developer of the adjacent site to the south from building a taller building. They understood that the zoning standards would prohibit such development due to the burdens imposed upon applicants for zoning relief.
22. The additional height sought by the Applicant would adversely affect the Erie. The proposed project would block the rooftop terraces from existing views, light and air. There would be a loss of privacy and economic value.
23. The height difference between the roof surfaces on the proposed building and the Erie would be at least two feet ten inches (2' 10") and that height difference will create adverse effects for Erie residents, including loss of privacy, views and diminished economic values.
24. The proposed height on the subject property will have a negative impact on neighboring properties.

Additional Findings of Fact

25. The Erie presented evidence that the Applicant has not been entirely forthcoming with the Board about the stated grounds for zoning relief. Mr. Wiedis testified that the Applicant's representative, Mr. Charlie Keeler, admitted in their conversations that the Applicant did not need the zoning relief in order to build a condominium building on the site. Mr. Keeler admitted to Mr. Wiedis that the Applicant would build a condominium even if the zoning relief is not granted by the Board. At the hearing, the Applicant did not deny or rebut the accuracy of Mr. Wiedis' testimony regarding this issue.
26. During hearing testimony, the Applicant's architect admitted that the Applicant chose a building design in order to provide a courtyard layout for the residents of the proposed project. He admitted that this design prompted the request for a variance and special exception.
27. The Applicant's architect also admitted that the Applicant never tried to create any other designs that would comport with the height and FAR requirements of the RC Overlay or that would further reduce the adverse effects on the neighboring buildings associated with the proposed height of the project.
28. The Applicant is requesting zoning relief in order to build a condominium that would satisfy the Applicant's design aesthetics and architectural preferences.
29. The Applicant will proceed with the project even if the requests for special exception and variance relief are denied.

CONCLUSIONS OF LAW AND OPINION:

The Variance Request

The Board is authorized to grant variances from the strict application of the Zoning Regulations to relieve difficulties or hardship where, by reason of exceptional or extraordinary conditions, the strict application of the Zoning Regulations would result in particular and exceptional practical difficulties to or exceptional or undue hardship upon the owner of the property. D.C. Code § 6-641.07(g)(3); 11 DCMR § 3103.2. 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. D.C. Code § 6-641.07(g)(3); 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 the Applicant wants to exceed the bonus density as well.

The Applicant in this case is requesting an area variance; therefore, it had to demonstrate an exceptional situation or condition of the property and that such exceptional condition results in a practical difficulty in complying with the Zoning Regulations. Lastly, the Applicant had to show that the granting of the variance would not impair the public good or the intent or integrity of the Zone Plan and Regulations.

The subject lot does not exhibit any extraordinary or exceptional situation or conditions. It is regularly-shaped, with no significant oddities of shape, contour, or gradient. There was no evidence of any exceptional or extraordinary conditions on the site, such as environmental factors, unusual soil conditions, or existing historic structures. The Applicant has offered no evidence regarding specific economic hardships associated with alternative designs of the building. In fact, the Applicant did not present any evidence suggesting that it ever pursued or explored other design alternatives that would have comported with the as of right standards for the subject property. According to un-rebutted and uncontradicted testimony from the Erie Association, the Applicant admitted that it could construct a condominium without zoning relief.

Notably, the application does not state that it needs relief from the strict zoning regulations in order to build a condominium at the site. Instead, the Applicant cites a sloping terrain and an irregular shape as the basis for variance relief, but the Board does not find that the record establishes an extraordinary or exceptional condition or situation warranting variance relief.

OP acknowledged in its Report that access to the garage from Champlain Street would, for example, not require the additional FAR or the elevated height of the garage that is requested by the Applicant.

Thus, the Board concludes that the application fails to meet the first prong of the variance test.

The Board also finds that the application would fail with respect to the second prong of the variance test. The Applicant did not demonstrate that there were practical difficulties in complying with the Zoning Regulations. To the contrary, there is no evidence that the Applicant attempted to comply with the Zoning Regulations by considering alternative designs that would have obviated the need for zoning relief. According to hearing testimony, the Applicant wants zoning relief in order to build the project in accordance with its preferred design standards and principles. This testimony is insufficient to support a finding of practical difficulty.

As the D.C. 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 Board 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.*

The Applicant also fails the third prong of the variance standard insofar as the project would be inconsistent with the intent, purpose and integrity of the zone plan. The subject property falls within the RC Overlay. One important purpose of that overlay is to “maintain heights and densities at appropriate levels.” 11 DCMR § 1400.2(a)(2). The proposed project would be inconsistent with that purpose.

The Special Exception Request

The Applicant also requests a special exception to build above the as-of-right height of forty (40) feet in the RC Overlay. The applicable 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).

In order to grant a special exception, the Board 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).

The development standards for the RC Overlay do not permit buildings in excess of 40 feet if there will be adverse effects on adjacent or nearby properties.

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

The Applicant’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, the Applicant has presented no evidence that the Special Exception furthers the purposes of the RC Overlay. This legal requirement is illustrated in the King’s Creek case (BZA Case No. 17431 – May 2, 2006), in which the developer of that property required height relief in order to successfully complete his project. The Board found that costs of stabilizing the existing historically interesting building on the property and removing contaminated soil made the height relief necessary for the financial viability of the project. The addition of new housing, which would not exist if the project did not move forward, advanced the purposes of the RC Overlay. Further, removal of contaminated soil protected nearby housing from potentially damaging environmental impacts and justified the special exception relief. *Id.*

Here, the Applicant can build a residential building without exceeding the height limits imposed by District of Columbia laws and regulations. It does not need a special exception to do so. The Applicant can build an attractive and fully functional condominium building that satisfies the RC Overlay standards without any special exception. The subject 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).

The Applicant has asserted 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. The Applicant must comport with the RC Overlay standards and the District of Columbia’s special exception requirements even if another nearby building is 50 feet in height. The Board must decide each case based upon the unique facts of that particular case.

The Board finds that the Erie would be adversely affected by the proposed special exception. The Applicant has not met its burden of proof with respect to this issue. According to the Applicant, the roof of the adjacent building (the Erie) is approximately three feet lower than the Applicant’s proposed rooftop surface. In addition, the parapet wall for the project is five inches higher than the existing parapet on the Erie. There is also a one-foot architectural embellishment on the front of the building along Champlain Street that would block light and views to the southwest of the Erie. These characteristics of the project are likely to create adverse effects as to light, air, privacy, views and economic value to the Erie units.

Erie residents testified that fencing, structures, fixtures and objects on the project’s roof would also adversely affect the Erie. This testimony is supported by the record in this case.

The Applicant submitted a rendering of the purported “View from East Side of [Erie] Terrace Looking South.” This rendering demonstrates that the penthouse structures will block considerable light, air and views from the Erie’s rooftop decks. According to this same rendering, the Washington Monuments sits exactly above the roofline of the project. The Applicant’s planned railings, structures, fixtures, and personal property on the roof would further obstruct views, but the Applicant did not include such details or fencing in its drawings. The fencing is, however, depicted on the shadow studies that were attached to the same filing by the Applicant on April 3, 2012, at page 9.

The Board concludes there will be adverse effects to the Erie units associated with the height difference between the two buildings, the higher parapet wall on the project, the one-foot architectural embellishment on the front of the building, and the planned structures, fixtures, and fencing on the project’s rooftop.

The Board further finds that the diminished views, privacy, light and air will reduce enjoyment and use of the Erie’s rooftop decks and will diminish the economic value of the Erie units. The Applicant did not rebut testimony from Erie’s owners regarding the adverse economic consequences of the proposal before the Board.

The law is clear that a special exception may not be granted if the proposal will 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 Board gives little weight to the shadow studies that were offered by the Applicant at the hearing. Those studies compared an “as of right” project with the proposed project, but made certain flawed assumptions about the “as of right” development. Specifically, the Applicant chose to depict an “as of right” project at forty (40) feet in height with a penthouse structure of 18 feet, 6 inches. That penthouse structure extended to the lot line with the Erie and seemingly occupied the entire roof, with the exception

of the required setback along Champlain Street. The Applicant incorrectly depicted this "as of right" building in the shadow studies because it did not treat the Erie's lot line as an "exterior wall" for purposes of 11 DCMR §400.7(b) and, therefore, did not provide for any setback of penthouse structures at that lot line. The Applicant's shadow studies failed to include this setback for penthouse structures and thereby understated the likely adverse effects upon the Erie of the proposed project.

The Applicant's shadow study also assumed that "as of right" penthouse structures could occupy most of the roof's surface. Throughout the District of Columbia, penthouses are restricted to one-third of the roof area on forty-foot buildings. See 11 DCMR § 411.8. The Board finds that this provision should apply to buildings within the RC Overlay in order to prevent an improper circumvention of the height limits in that Overlay.

The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendations made by OP. D.C. Code §§ 1-309.10(d) and 6-623.04. However, "great weight" is only to be given if the affected ANC (herein referred to as the "Commission") meets specific requirements:

The written rationale of the decision shall articulate with particularity and precision the reasons why the Commission does or does not offer persuasive advice under the circumstances. In so doing, the government entity must articulate specific findings and conclusions with respect to each issue and concern raised by the Commission. Further, the government entity is required to support its position on the record.

Section 13(b) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10 (d)(3)(A)). Here, the ANC's letter failed to articulate any specific findings or conclusions and did not in any way support its position on the record before the Board. Accordingly, the Board has no basis with which to find that the recommendation was based upon an accurate understanding of the facts or law. (See BZA Case 17127-A, Sept. 1, 2009).

OP's Report asserted that there was a five-inch difference in height between the proposed project and the Erie. This was an incorrect factual assertion that was predicated upon a misunderstanding of the application. OP also applied an incorrect legal standard when it found that the application would not "substantially affect" the Erie. The applicable standard does not require a substantial adverse effect.

Accordingly, the Board has considered the issues and concerns of the affected ANC and OP, but has reached different conclusions.

For all the reasons stated above, the Board concludes that the application fails to satisfy the burden of proof for a variance from the floor area ratio requirements and for a special exception of the RC Overlay height limits, pursuant to 11 DCMR §§ Section 402.4, 1402.1, 1403.1, 3103.2 and 3104.1. Accordingly, it is hereby **ORDERED** that the application is **DENIED**.

VOTE: