

Letter to Board of Zoning Adjustment
April 24, 2012
BZA Case 18330

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Bar Memberships: DC, MD

April 24, 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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2012 APR 24 PM 1:21

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 comments regarding the Applicant's Proposed Findings of Fact and Conclusions of Law, filed on April 17, 2012. The Erie filed its own set of Proposed Findings of Fact and Conclusions of Law on April 17, 2012, and incorporates by reference that earlier submission by the Erie.

In addition, the Erie notes the following:

1. The Applicant's proposed finding at numbered Paragraph 3 includes the finding that the project to the south of the Subject Building at 2329 Champlain Street was approved for additional height and density. The Applicant's proposed finding omits the material fact that the 2329 Champlain Application for special exception relief proved to the Board that the 2329 Champlain project was not economically viable and would not have been constructed had the special exception relief been denied. The Applicant in this case has made no such showing and the Party in Opposition presented undisputed evidence that the Subject Building will be constructed even if the Applicant's requests are denied.

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2. The Applicant's proposed finding at numbered Paragraph 6 is an incorrect statement of the law. The Applicant contends that the "primary purpose of the RC Overlay District is designed to protect existing housing and provide for new housing development." The Applicant cites 11 DCMR § 1400.2(a)(1). In fact, the stated purposes of the RC Overlay District include a longer list of objectives, including maintenance of heights and densities at appropriate levels. 11 DCMR § 1400.2(a)(2). The regulations do not prioritize these objectives or state that the "primary purpose" of the RC Overlay is limited to one of the several items on the longer list of stated objectives.
3. The Applicant's proposed finding at numbered Paragraph 12 is not supported by the record in this case. Moreover, the Applicant presented no documentary evidence to support this material proposed finding at numbered Paragraph 12 despite the fact that there must be ample documentary evidence of this claim if it were, in fact, true.
4. The Applicant's proposed finding at numbered Paragraph 15 a. includes the finding that the Subject Building will only be 5 inches above the top of the parapet of the Erie. The Applicant omits from this Paragraph the fact that the roof of the Subject Building will be 2 feet and 10 inches above the roof of the Erie and that this higher roof, as well as objects and penthouses on the higher roof surface of the Subject Building, will not protect the adjacent building from "damaging . . . social and aesthetic impacts" as required by 11 DCMR Section 1400.2. The Applicant's proposed finding at numbered Paragraph 15 a. also states that the requested increase in height furthers the goals of the RC Overlay District. The Applicant, however, nowhere states how the requested increase in height itself furthers the goals of the RC Overlay. Since the undisputed evidence presented at the hearing demonstrates that the Subject Building will be built even if the Applicant's requests are denied, the Applicant has failed to meet its burden of showing that the requested relief furthers the objectives of the RC Overlay.
5. The Applicant's proposed finding of fact at numbered Paragraph 15 g. includes the finding that the Subject Building will only be 5 inches above the top of the parapet of the Erie and therefore will be consistent with the height of the Erie. The Applicant again omits from this Paragraph the fact that the roof of the Subject Building will be 2 feet and 10 inches above the roof of the Erie and that this higher roof, as well as objects and penthouses on the higher roof of the Subject Building, will adversely affect adjacent property as required by 11 DCMR Section 1403.1(g). While the Applicant's proposed findings do admit in numbered Paragraph 8 that the roof surface of Subject Building will be 2 feet and 10 inches above the roof of the Erie, the Applicant's consistent omission of this fact from later proposed findings fact is indicative of the Applicant's knowledge

that this difference in height will create an adverse effect on the adjacent building.

6. The Applicant's proposed finding at numbered Paragraph 29 is incorrect and corresponding legal conclusions are incorrect. The Association presented testimony from two unit owners concerning the adverse economic impact on the Erie. Property owners may express opinions as to value. *See, e.g., Trueworthy v. Gelman Construction Company*, 455 F.2d 1377 (D.C. App. 1971) (noting "general rule that an owner's opinion as to the value of his real property is admissible."). Moreover, the Erie's prehearing statement asserted that "[a]ppraisers of the units consistently comment upon the exceptional rooftop amenities and the added value of these indoor and outdoor spaces." The Applicant did not direct any questions to the Erie regarding this factual assertion or rebut this evidence in the record. In any event, there is ample evidence to establish that the value of the Erie units will decline and the Erie Unit owners will be adversely affected if the private rooftop amenities on the Erie are adversely affected by the proposed project.
7. The Applicant incorrectly asserts that the adverse impact upon views of an adjacent property owner are irrelevant to the Board's zoning analysis. The zoning laws and regulations do not limit the types of adverse impacts that must be avoided by developers or considered by the Board. If an adjacent neighbor loses a spectacular view, then he has been adversely impacted in several respects. The Applicant fails to cite any relevant case law to support its position. The Applicant's reliance upon *Hefazi v. Stiglitz*, 862 A.2d 901 (D.C. 2004) is misplaced. That case did not interpret or apply the relevant zoning provisions. The District of Columbia has created certain zoning principles and rules that are intended to protect adjacent property owners. Those protections are different from common law judicial doctrines of easement and nuisance. The loss of a unique view can certainly constitute an adverse impact—as the Erie witnesses testified and as shown in the numerous photographic exhibits introduced into the record by the Erie. Assuming *arguendo* that a particular view is not itself protected by an easement or zoning regulation, the adjacent property owner would nonetheless be adversely affected by the corresponding loss of economic value.
8. The Applicant claims in Paragraph 28 that it is not required to show that it is not able to construct a building to a matter of right height. The Applicant also claims that its Architect testified that he was not able to construct a matter of right building without poor light and air and without substandard floor to ceiling heights. Notwithstanding the Architect's self-serving testimony, the Applicant presented no documentary evidence to support the Architect's claims, which are not credible. The record reflects that the Applicant purchased the subject lot in

mid-2011. At the time of purchase the Applicant was familiar with the characteristics of the lot and knew it would experience limitations with the design. Yet, the Applicant knowingly chose to go ahead with the purchase. It is not believable that a sophisticated developer would proceed with a raw land purchase knowing that it would require special exception and variance relief for a successful project. The record clearly reflects that it is the Applicant's choice of design alone (and not the site itself) that is creating the alleged "practical difficulties" leading to the Applicant's request for special exception relief. While it is true that the Applicant may not be required to show it cannot construct a building to matter of right height, it must still show actual practical difficulties, as opposed to difficulties manufactured by its own choices, justify the relief. This is especially true where the preponderance of the evidence shows that granting the special exception will cause adverse effects on the adjacent property. The Applicant has failed to make the requisite showing of need in this this case.

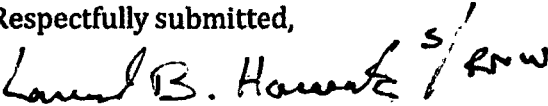
9. With respect to Mr. Wiedis' request for party status, the Applicant incorrectly characterizes the hearing record. Ms. Horvitz acknowledged the overlapping interests of Mr. Wiedis and the Erie, but did not "concede" that those interests were fully aligned. To the contrary, Ms. Horvitz stated that Mr. Wiedis likely would be the most adversely affected resident of the Erie and that he wanted to conduct his own cross-examination. The Board ruled that only one party, i.e., either the Erie or Mr. Wiedis, would be allowed to participate as a party in opposition to the Application. In light of that ruling, Ms. Horvitz elected to proceed on behalf of the Erie.

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Thank you for your consideration of the Erie's filing.

Respectfully submitted,


Laurie B. Horvitz, Esq.
On behalf of the Erie Condominium Association

Cc: (via mail)

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