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Via Email Submission

Board of Zoning Adjustment
for the District of Columbia
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

Re: BZA Case No. 18375 – Florida Avenue Residential, LLC
Response to BZA Inquiry on Application of the DUKE Plan

Dear Board Members:

Introduction

At its hearing on July 10, 2012, in BZA Case No. 18375, the Board of Zoning Adjustment ("BZA" or "Board") requested a briefing on the interplay of the ARTS Overlay, the Zoning Regulations and the DUKE Plan and, specifically, the extent to which the Board may consider the DUKE Plan in evaluating variances and special exception requests. The Board asked for responses no later than July 20, 2012, from the Office of Attorney General, the Office of Planning, the Applicant, and Ms. Dana Jackson, a person in opposition speaking on behalf of the Ninth Street property owners in Square 393. On behalf of Florida Avenue Residential, LLC ("Applicant"), we provide the following analysis.

Summary

The Board's authority in evaluating the merits of variance and special exception applications is limited to the standards set forth in the zoning enabling act and the zoning regulations. See D.C. Code § 6-641.07(g). The Board is not charged with interpreting the Comprehensive Plan or the DUKE Plan. Rather, "[t]he Board's limited function is to assure that the regulations adopted by the Zoning Commission are followed." *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1034 (D.C. 1995) ("the only question before ... [the court] is whether the Board correctly followed the regulations – not the Comprehensive Plan – in granting ... [the] application.").

While the ARTS Overlay does allow the Board some latitude in considering the Comprehensive Plan, that authority is limited to evaluation of special exceptions from the ARTS Overlay requirements and only if an applicant claims that the relief is necessary in order "to

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provide alternative public benefits in lieu of the excepted uses or features that are of comparable value to the public in achieving the purposes of this chapter and of the Comprehensive Plan...." 11 DCMR § 1906.1(b). Here, the Applicant seeks a special exception from the streetwall requirements in order to expand the clear sidewalk width along Florida Avenue and allow a more interactive retail experience. The Applicant has argued that it is difficult, if not impossible, to comply with the streetwall requirements and the countervailing DDOT standards for a ten-foot clear sidewalk width. See Applicant's Prehearing Statement, BZA Exhibit No. 25, at 8. The Applicant has not claimed that the relief is needed to provide alternative public benefits. Nevertheless, had it done so, only those provisions of the Comprehensive Plan relating to safe pedestrian passage and enlivened streetscape experience would be implicated in this application.

Analysis

The Duke Plan

On June 21, 2005, the District of Columbia Council adopted the Shaw/U Street Cultural Destination District Plan, commonly referred to as the DUKE Plan, in honor of Duke Ellington, one of the prominent residents of the neighborhood. It was approved by resolution as a "small area plan" pursuant to the Council's authority under the Comprehensive Plan Act of 1984 Land Use Element Amendment Act of 1984 ("Land Act"). See Council Resolution R16-0209, June 21, 2005. However, it is *not* part of the Comprehensive Plan because it was not adopted through the legislative process required for Comprehensive Plan amendments.

Nevertheless, the DUKE Plan is designed to provide supplemental guidance to the Zoning Commission and other District agencies in carrying out the policies of the Comprehensive Plan. The Applicant's proposed development site in Square 416 is located within the Howard Theatre Sub-district of the DUKE Plan. Together with the CVS/Pharmacy site also located within Square 416, the DUKE Plan calls for a minimum of 33,000 square feet of cultural destination/retail space with approximately 125 housing units on upper stories (150,000 square feet of space) on the combined site. It recommends the development of retail/arts space to include specialty restaurants, a small-format anchor and/or a cluster of retail shops, small clubs and/or museum uses themed to the African American culture and experience of the district. With respect to height, the plan proposes a minimum of 65 feet in height to the cornice line, rising to 90 feet in height with a one-to-one setback from the cornice. It specifically recommends optimizing density within constraints of the parking potential given the Metrorail tunnels under the site. Finally, the DUKE Plan suggests that residential entrances be located along 7th and 8th Streets. See DUKE Plan, adopted June 21, 2005, at 20.

The Applicant designed its project with these key goals in mind. The new development will provide approximately 95 residential units above a retail base consisting of approximately 11,000 square feet of space devoted to preferred retail and arts uses. The building will be 70 feet in height, which falls within the suggested height range, and optimizes density through preferred arts/retail uses and Inclusionary Zoning bonus density. The residential entrance to the building

will be situated along 8th Street. Because of the building's location in the U Street Historic District, the Historic Preservation Review Board is reviewing the project to ensure a quality design that is compatible with the character of the area.

Applicability of DUKE Plan and Comprehensive Plan to BZA Proceedings

Significantly, however, these provisions of the DUKE Plan, as well as those in the Comprehensive Plan, are not "self-executing" and do not "directly regulate the development of private property in the District of Columbia." *TACPEC v. District of Columbia Bd. of Zoning Adjustment*, 550 A.2d 331, 334 (D.C. 1988). Instead, they are intended "as a guide to establish broad policies and goals" and "construct a guiding framework within which public and private land use and zoning decisions are to be made." See Land Act, §§ 102 and 1101(k); *see also TACPEC* at 336.

In the *TACPEC* case, the D.C. Court of Appeals provided an exhaustive analysis of the applicability of the Comprehensive Plan provisions to zoning proceedings. The court held that "the Zoning Commission is the exclusive agency vested with responsibility for assuring that the zoning regulations are not inconsistent with the Comprehensive Plan...." *Id.* at 341. It would thus be improper for those charged with interpreting the regulations "to read the Comprehensive Plan to require an action not provided for in the Zoning Regulations." *Watergate West v. District of Columbia Bd. of Zoning Adjustment*, 815 A.2d 762, 765 (D.C. 2003).

In order for the BZA to consider the guiding principles of the DUKE Plan, the Zoning Commission would first need to amend the zoning regulations and incorporate them into specific provisions. Even the DUKE Plan itself acknowledges that the land use adjustments called for must "be implemented through amendments to the zoning map, planned unit developments (PUD), and amendments to the zoning text. This Plan provides additional guidance to the Zoning Commission as they consider zoning actions for the area." DUKE Plan at 37. As noted in the *TACPEC* decision, the District's Administrative Procedures Act allows any interested person to petition an independent agency to request the promulgation, amendment, or repeal of any rule. *TACPEC* at 340. In order to ensure that the guiding principles of the DUKE Plan are incorporated into the zoning regulations, and thus applicable to evaluation of special exception and variances cases, it is first necessary for the Zoning Commission to consider amendments to effectuate their inclusion. The BZA itself has "no power to implement the Comprehensive Plan." *Id.* at 341 n. 22.

The Board's Limited Consideration of the Comprehensive

Notwithstanding that the Zoning Commission is vested with the sole authority to rule on questions of consistency with the Comprehensive Plan, the Commission nevertheless has delegated limited authority to the Board to consider the Comprehensive Plan under the ARTS Overlay provisions for special exceptions. Section 1906.1 provides that the Board may grant exceptions from the requirements or limits of the ARTS District when, among other things,

- (b) Exceptional circumstances affecting the property make compliance with the requirements of this chapter difficult or impossible, *or* the development provides alternative public benefits in lieu of the excepted uses or features that are of comparable value to the public in achieving the purposes of this chapter and of the Comprehensive Plan;...

11 DCMR § 1906.1(b)(emphasis added).

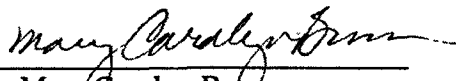
As noted above, the Applicant here seeks a special exception from the streetwall requirements in order to expand the clear sidewalk width along Florida Avenue and allow a more interactive retail experience. The Applicant has argued that it is difficult, if not impossible, to comply with the streetwall requirements and the countervailing DDOT standards for a ten-foot clear sidewalk width. See Applicant's Prehearing Statement, BZA Exhibit No. 25, at 8. The Applicant has not claimed that the relief is needed to provide alternative public benefits. Nevertheless, had it done so, only those provisions of the Comprehensive Plan relating to safe pedestrian access and enlivened streetscape experience would be implicated in this application. And the proposed project would comply with the goals of providing pedestrians safe access along Florida Avenue and creating a lively retail streetscape through undulating entrances. None of the guiding principles of the DUKE Plan would be applicable because they not part of the Comprehensive Plan.

Conclusion

Based on the long-standing interpretations of the Comprehensive Plan and the Zoning Regulations, the Board of Zoning Adjustment cannot apply the guiding principles and goals of the DUKE Plan in evaluating the merits of the variance and special exception requests in instant application. Rather, the Board may only apply the specific standards of the Zoning Regulations applicable to this case. In light of the evidence of record and testimony presented at the hearing, the application should be approved.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: 
Mary Carolyn Brown

cc: Sherry Glazer, Office of Attorney General (via email)
Paul Goldstein, OP (via email)
Advisory Neighborhood Commission 1B (via overnight mail)
Ms. Dana Jackson, Ninth Street Property Owners in Square 393 (via overnight mail)