

Form 5. Petition for review.

DISTRICT OF COLUMBIA COURT OF APPEALS
PETITION FOR REVIEW

DEC 14 PAID

RECEIVED
DEC 14 2012
DISTRICT OF COLUMBIA
COURT OF APPEALS

Appeal No. 12-AA-1972

David Lindeman/1923 9th St. NW, LP,
Petitioner

v.

Agency No. _____

DC Board of Zoning Adjustment,
Respondent (Agency)

I, David Lindeman/1923 9th St. NW, LP, seek review by the District of Columbia Court of Appeals of the decision or order of the DC Board of Zoning Adjustment (agency) entered on the 15th day of November, 2012.

Names, addresses, and telephone numbers of all other parties and their counsel who appeared in the agency (use additional pages if necessary)

Edward L. Donohue, Counsel for Petitioner

801 North Fairfax Street, Suite 209 Alexandria, VA 22314

703 549-1123

Carolyn Brown, Counsel for Florida Avenue Residential, LLC

800 17th Street NW, Suite 1100

202 955-3000



Signature of Petitioner or Attorney
(all but natural persons representing themselves must be represented by counsel)

Edward L. Donohue

Printed Name of Petitioner or Attorney

801 North Fairfax Street, Suite 209

Alexandria, VA 22314

Address

703 549-1123

Telephone Number

NOTE: ATTACH A COPY OF THE DECISION/ORDER ISSUED BY THE DISTRICT OF COLUMBIA AGENCY FROM WHICH THE PETITION IS TAKEN.

2013 JAN 18 AM 8:28

RECEIVED
D.C. OFFICE OF ZONING

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18397

EXHIBIT NO. 45

Board of Zoning Adjustment
District of Columbia
CASE NO. 18397
EXHIBIT NO. 45

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18397-A of Florida Avenue Residential, LLC, pursuant to 11 DCMR §§ 3103.2 and 3104.1, for area variances from the required standards for lot occupancy (§ 772), off-street parking (§ 2101.1), and loading (§ 2201), and special exceptions from the roof structure requirements under §§ 411 and 770.6, and street wall requirements under § 1903.3 to allow the development of a six-story mixed-use residential building with ground floor retail/service uses in the ARTS/C-2-B District at premises along Florida Avenue, N.W., 8th Street, N.W., and 9th Street, N.W.¹ (Square 393, Lots 41, 44, 45, 46 and 826).

HEARING DATE: September 18, 2012
DECISION DATE: September 18, 2012

CORRECTED DECISION AND ORDER²

Florida Avenue Residential, LLC (“Applicant”), submitted this self-certified application on April 24, 2012, as the owner and developer of the property at 1924 8th Street, N.W., (Square 393, Lots 41, 44, 45, 46 and 826) (the “Property”). The Applicant sought area variances from the required standards for lot occupancy (§ 772), off-street parking (§ 2101.1) and loading (§ 2201), and special exception relief pursuant to § 1906 from the street wall requirements under § 1903.3 and from the roof structure requirements under §§ 411 and 770.6 to allow the development of a six-story mixed-use residential building with ground floor retail/service uses in the ARTS/C-2-B District.

The Board of Zoning Adjustment (“BZA” or “Board”) convened a hearing on the application on September 18, 2012. The Board deliberated on the application at the conclusion of the hearing and voted 5-0-0 to **GRANT** the application subject to conditions proposed by the Applicant to mitigate any potential adverse impacts of the project.

¹ Since the filing of the application, the address of the project has been officially changed to 1924 8th Street, N.W., Washington, D.C.

² This corrected order was issued to eliminate references to rear yard relief because such relief was never requested, and to more accurately describe the contents of the Office of Planning’s Report.

BZA APPLICATION NO. 18397-A
PAGE NO. 2

Preliminary Matters

Notice of Application and Notice of Hearing. By memoranda dated April 27, 2012, the Office of Zoning sent notice of the filing of the application to the D.C. Office of Planning ("OP"), the D.C. Department of Transportation ("DDOT"), Advisory Neighborhood Commission ("ANC") 1B - the ANC within which the subject property is located, Single Member District 1B-01, and the Councilmember for Ward 1. A public hearing was scheduled for September 18, 2012. Pursuant to 11 DCMR § 3113.13, the Office of Zoning published notice of the hearing on the application in the *D.C. Register* on June 1, 2012 (59 DCR 6284), and also on June 1, 2012 sent such notice to the Applicant, ANC 1B, and owners of all property within 200 feet of the subject property.

Request for Party Status. In addition to the Applicant, ANC 1B was automatically a party to this proceeding. No other requests for party status were received.

Applicant's Case. Carolyn Brown and Norman M. Glasgow, Jr., of Holland & Knight, LLP, represented the Applicant. The Applicant presented four witnesses in support of the application: Lauren Jezienicki of the JBG Companies on behalf of Florida Avenue Residential, LLC; John Maisto, BKV Architects; Erwin Andres, Gorove/Slade & Associates, transportation consultants; and Steven E. Sher, Director of Zoning and Land Use Services at Holland & Knight, LLP. The Board qualified Mr. Maisto as an expert in architecture, Mr. Andres as an expert in traffic and transportation planning, and Mr. Sher as an expert in planning and zoning.

Government Reports. The Office of Planning ("OP") filed a report with the Board on September 11, 2012, recommending approval of the special exceptions and variances from the lot occupancy, parking, and loading requirements of §§ 772, 2121, and 2201, and the special exceptions from the roof structure requirements of §§ 411 and 770.6, and the street wall requirements of § 1903.3. (See Exhibit 29.) The OP report set forth each of the provisions of 11 DCMR §§ 411.5, 1903.3, 3103.2 and 3104.1 and opined that each was met. The District's Department of Transportation filed a report with the Board at the hearing, indicating that it had no objection to the requested relief. The Board waived its rules to accept the report out of time. (Exhibit 36.)

ANC Report. ANC 1B submitted a report to the Board dated August 17, 2012, recommending approval of the application. (Exhibit 26.)

Persons in Opposition. Two persons testified in opposition to the application, citing concerns about parking and alley access especially with regard to nearby business owners.

FINDINGS OF FACT

The Property and Surrounding Area

1. The subject Property is located at Lots 41, 44, 45, 46 and 826 in Square 393 and has street frontage along Florida Avenue, 8th Street, and 9th Street, N.W., Washington, D.C. The

BZA APPLICATION NO. 18397-A
PAGE NO. 3

property measures approximately 210.4 feet along Florida Avenue, taking up the entire street frontage of the block, and extends approximately 139 feet south along 9th Street, and 194.5 feet along 8th Street, with a total land area of 32,478 square feet. A ten-foot wide alley, which runs north-south through the middle of square, bisects the development site. The north portion of the alley will be closed and re-routed on 9th Street. The site has been vacant or used for surface parking since the construction of the Metrorail Green Line in the 1970s, whose tunnels run beneath the parcel.

2. The Property falls within the U Street Historic District along its northeastern-most boundary. Small-scale commercial buildings are located adjacent to the property to the south along 9th Street. Residential buildings are located to the south along 8th Street. Other retail businesses and restaurants are located across 9th Street to the west. To the east of 8th Street is another vacant parcel controlled by the Applicant that will be developed with a companion six-story residential building with ground floor retail and service uses. The Board recently granted the Applicant zoning relief for that project in BZA Case No. 18375 (order issued September 14, 2012).
3. Mid-rise and some large-scale commercial buildings line Florida Avenue in both directions. The D.C. Housing Finance Agency is located on Florida Avenue at 9th Street. Howard University and its hospital are two blocks to the north across Florida Avenue. The thriving U Street corridor is just two blocks to the west, which includes several recently constructed condominium and apartment buildings, similar to what is proposed for this site. These include the Ellington (1301 U St NW), the Beauregard (11th and V Streets, N.W.), Union Row (2125 14th Street, N.W.), Langston Lofts (1390 V Street, N.W.), and the Murano (2117 10th Street, N.W.).
4. The property is located in the ARTS/C-2-B District. The C-2-B District is designated to serve high-density residential and mixed uses. The C-2-B Districts are generally compact and located on arterial streets, in uptown centers, and at rapid transit stops. Building use may be entirely residential or a mixture of commercial and residential uses.
5. The Uptown Arts-Mixed Use (ARTS) Overlay is designed to encourage a scale of development, mixture of uses, and "other attributes such as safe and efficient conditions for pedestrian and vehicular movement..." (11 DCMR 1900.2(a).) The ARTS Overlay requires uses that foster pedestrian activity, especially retail, entertainment, and residential uses. Among its many purposes is to expand the area's housing supply and a variety of rent and price ranges. (11 DCMR 1900.2(d)). The ARTS Overlay provides bonus density incentives for owners to attract preferred retail, arts and services uses in this area.
6. The maximum permitted height in the ARTS/C-2-B District is 70 feet, with a maximum lot occupancy of 80% for residential uses. The maximum permitted floor area ratio ("FAR") for this site is 5.0 FAR, based on a combination of bonus density incentives.

The Applicant's Project

7. The Applicant proposes to construct a new six-story residential building with ground floor retail on the property. The main lobby entrance to the residential building will front on 8th Street, with retail spaces lining the ground floor along Florida Avenue, 8th Street and 9th Street. In order to increase the width of the substandard sidewalk on Florida Avenue, the ground floor will be set back approximately five to ten feet along that street frontage. Presently, the width of the unobstructed portion of the Florida Avenue sidewalk is eight feet with a four-foot treebox zone. The 9th Street sidewalk is also narrow, with a clear width of only 6.5 feet in some segments where the tree boxes are seven feet in width. In contrast, the 8th Street sidewalk is much wider, with a clear width of 30 feet in most locations. The additional six-foot set back along Florida Avenue will increase that width to 10 feet clear with a six-foot treebox zone, in conformance with section 31.2.5 of the *Design and Engineering Manual* published by the D.C. Department of Transportation and the *Public Realm Design Manual* jointly issued by DDOT and the Office of Planning (at page 3-4).
8. The project includes an upgraded alley configuration to serve the new building and enhance overall access to the interior of the square. The current north-south alley is substandard with a width of only ten feet. Because of utility poles that line the alley, the effective width is only eight feet. Due to its narrowness, trash collection vehicles do not use the alley but instead idle on Florida Avenue and the trash receptacles are brought to the truck.
9. The new alley configuration will improve service access to the north half of the square. The portion of the alley to be closed will be re-routed to 9th Street and widened to 20 feet with the dedication of an access easement. A portion of the north-south alley will be widened to an effective width of 20 feet, as well. The Applicant will dedicate five feet of its Property as an access easement, and another five feet will be provided through a building setback along the alley.
10. In order to accommodate the new alley configuration and simultaneously maintain a cohesive setting along the streetscape, the Applicant will relocate the historic buildings on Lot 826 (1933-35 9th Street) approximately 48 feet to the south. The Historic Preservation Review Board ("HPRB") reviewed the reconfigured alley, the relocation of the historic buildings and design of the proposed new building on March 22, May 31, and July 26, 2012, and recommended approval in concept of all elements of the project.
11. The equipment on the roof of the Applicant's project will comprise two stair towers, an elevator penthouse, and communal recreation space. The elevator penthouse will be located in the center of the roof and will open onto the communal recreation space on the west portion of the roof. "Stair C" will be located at the south part of the roof, while "Stair A" will be situated at the west end of the Florida Avenue bar of the building. Small mechanical units for each of the individual residential units will also be located on the roof and screened by a metal wall. These individual units will be less than four feet in height and are not subject to the roof structure requirements. (See 11 DCMR § 411.17.)

The Variance Relief

Nature of Relief Requested

12. The Applicant seeks relief from the parking requirements for the new development. Based on the proposed 157 residential units, the Applicant must provide 53 spaces (one for every three units). The retail space, at 20,238 square feet of gross floor area, generates a requirement of 23 spaces (in excess of 3,000 square feet, one space for every 750 square feet), or a total of 76 required parking spaces for the entire development. The Applicant proposes to provide a total of 70 parking spaces, all of which will be devoted to residential uses and none of which will be allocated for retail uses.³
13. The Applicant also seeks relief from the loading requirements for the project. The residential uses require one 55-foot loading berth, one 200 square-foot platform, and one 20-foot loading space. The retail uses require two 30-foot loading berths, two 100 square-foot platform, and one 20-foot loading space. The Applicant proposes to not provide the 55-foot residential berth and one 30-foot berth, and proposes to share the remaining 30-foot berth between the residential and retail uses. Additionally, the Applicant also proposes to not provide the 100 square-foot retail platform and share the 200 square-foot platform between the two uses.
14. Relief is also requested from the lot occupancy requirements for the residential portion of the building. Whereas 80% is the maximum permitted lot coverage for residential uses, the Applicant proposes 87% coverage on the second floor and 83.7% coverage on floors three and four. No relief is required on the fifth or sixth floor, which will have lot occupancies of 79% and 76.6%, respectively.

Exceptional Conditions

15. The subject Property is affected by several exceptional and extraordinary conditions. First, the Property is irregularly shaped due to the confluence of a diagonal avenue (Florida) with north-south streets (8th and 9th Streets), which affects the layout and configuration of the retail and residential units. Second, the sidewalk width along Florida Avenue is only eight feet "clear" and does not comport with the 16-foot standard under *DDOT's DEM* or the *Public Realm Design Manual* jointly published by DDOT and OP. Third, the two contributing historic structures (now a single building for zoning purposes) on the site must be incorporated into the design, which also limits and constrains the floor plate of the building. Finally, the site is encumbered by Metrorail tunnels, related air vents and the

³ In its initial application materials, the Applicant requested relief from 13 parking spaces. In its prehearing submission dated September 4, 2012, the Applicant requested relief from four parking spaces. At the hearing, the Applicant clarified that, as a result of the design review process before the Historic Preservation Review Board, the number of dwelling units planned by the Applicant decreased, thereby reducing the number of required parking spaces. Further review of the egress requirements in the proposed garage changed the total amount of parking relief necessary to six (6) spaces.

BZA APPLICATION NO. 18397-A
PAGE NO. 6

Metrorail "zone of influence" that impose severe design and construction constraints on the property.

16. The Metrorail Green Line tunnels run diagonally underneath the site, approximately 27 feet below the surface. The Washington Metropolitan Transit Authority ("WMATA"), which controls the Metrorail system, has an absolute "no-build" 10-foot easement surrounding the tunnels. This limits the maximum depth of excavation for the project to approximately 17 feet below grade.

Practical Difficulties

17. The bottom of the garage slab of the proposed development will, at final completion, sit approximately 14 feet below grade. This depth poses significant difficulties in constructing the support of excavation ("SOE") system. Traditional SOE systems typically require piles to be driven 10 feet below the lowest point of the foundations, which in this case would be a depth of 24 feet. The WMATA "no build" zone makes this traditional SOE system impossible. The SOE system proposed for this project, due to its uniquely proximate location within WMATA zones, is significantly more expensive than any traditional system and carries a premium of 150% over the generally accepted SOE systems.
18. In addition to the "no build" zone, the manner in which the WMATA tunnels were constructed exacerbates the construction difficulties of the site and compounds the high cost of the SOE system. Unlike the majority of existing Metrorail tunnels, these particular tunnels are extremely susceptible to changes in soil pressure that occur during the construction process. Constructed with pre-cast sections that were bolted together, the tunnels beneath the site are among the weakest WMATA allowed to be built. The joints between each pre-cast section allow the tunnels to become very flexible when excavating and constructing above them. If the tunnels are allowed to move too much, they could eventually crack and fail.
19. These construction constraints dramatically increase up-front costs to the project and demand reserve capital to re-engineer and adjust construction if issues arise. In order for the project to remain viable in light of these extraordinary costs, the Applicant needs to maximize the allowable FAR on site. The Applicant cannot achieve the necessary density, however, unless zoning relief is granted from the loading and lot occupancy requirements.
20. With respect to parking, the Applicant has configured the garage as efficiently as possible to maximize the number of parking spaces, accommodate garage ramps and aisles, and provide access stairs, utility rooms and bike storage. In doing so, only 70 parking spaces are achievable. The only way to achieve the requisite number of spaces would be to excavate another below grade level or convert ground floor space to parking. The first option is impossible, given the WMATA constraints described above, and the second is impractical. The second option would reduce the amount of retail square footage, which would undermine the purposes of the ARTS Overlay to encourage preferred retail and arts uses and

BZA APPLICATION NO. 18397-A
PAGE NO. 7

active streetscapes within the ARTS Overlay District. The retail area is also the most valuable space, which is critical to support the costs of the sophisticated engineering and construction techniques required for the site.

21. Similarly, if the Applicant were required to provide both the 55-foot loading berth required for the residential uses and the 30-foot berth required for retail uses, as well as the additional 100-square-foot loading platform, the ground floor would become extremely inefficient and further reduce the amount of active retail uses that are envisioned along 8th Street. Under *DDOT's DEM*, curb cuts are not permitted along major arteries such as Florida Avenue and consequently the garage ramp and loading facilities will be located off of 9th Street, at the interior of the site. If the Applicant were required to provide a 55-foot loading berth and second platform, the size of Florida Avenue retail space would be reduced significantly, which severely compromises the type of retailers that could use the space.
22. Further, a 55-foot truck could not make the turn into the loading space without eliminating the remainder of the retail space along this southern portion of the building. While there is sufficient room for a 30-foot truck to maneuver into this area, as shown on the truck turning diagram included with the drawings, it would be extremely difficult to accommodate a 55-foot truck and maintain useable retail space along this southern portion of 8th Street. Thus, inclusion of a 55-foot loading berth and second platform would create practical difficulties in achieving the purposes of the ARTS Overlay and the necessary income derived from the most valuable retail space to help address the WMATA costs.
23. The shallow depth of the WMATA tunnels not only limits the Applicant's ability to excavate another level of below-grade parking, it also limits the ability to put service elements, including loading facilities, in below grade space. That results in significantly more ground floor space being devoted to building-function areas and less room for the most valuable retail/service uses required and promoted by the ARTS Overlay. The widening of the sidewalk at Florida Avenue also reduces the amount of ground floor retail space. The amount of retail square footage lost is approximately 1,384 square feet. The historic buildings on the site and the HPRB design constraints have additionally limited the placement of square footage on the site.
24. In order to recoup the loss of valuable retail space, the Applicant plans to increase the square footage on the second level to 87.3%, and on floors three and four to 83.7%. (The upper two floors will comply with the lot occupancy limitations.) This results in an increase of approximately 4,772 square feet of residential space, which is less valuable and helps make up for a portion of the lost revenue. Retail space in this neighborhood is expected to command rental rates of approximately \$4.00/s.f. per month, while residential rates generate approximately \$2.24/s.f. per month. That represents a net loss of approximately \$2,700/month, even with the increase in lot occupancy. The rate of return for residential units would be even lower if the Applicant were required to comply with the 80% lot occupancy limit, because the unit mix and layout would likely command lower rents.

BZA APPLICATION NO. 18397-A
PAGE NO. 8

25. If the Applicant were required to meet the 80% lot occupancy requirement, it would result in inefficient layouts and a reduced unit count, in contravention of the District's housing goals and inclusionary zoning (IZ) regulations. In order to maintain a continuous building wall along the street frontages, the only place to accommodate open areas on the lot is at the rear of the building. However, by narrowing the portion of the building along Florida Avenue, numerous one-bedroom units would need to be converted to studios. Additionally, the elevator core would need to be shifted to the north, which would negatively affect the garage layout and result in inefficient and wasted retail space on the ground floor.

No Harm to Public Good or Zone Plan

26. The requested relief can be granted without harm to the public good and without threat to the integrity of the zone plan. With respect to the public good, the replacement of a vacant lot with a new residential building in the Florida Avenue corridor will provide a significant contribution to the community.

27. With respect to parking and loading, the zone plan will not be compromised because the project will include sufficient parking and loading facilities that are adequate to serve the needs of the prospective residents and tenants of the new building. The loading dock will be managed by the residential property management company so that deliveries are scheduled appropriately. The site is within two blocks of two Metrorail Stations, U Street-Cardozo and the Shaw-Howard University stations, which provides alternative means of transportation. Fourteen car-share vehicles are also within walking distance of the site.

28. To ensure safe vehicular and pedestrian circulation, the Applicant has agreed to implement several transportation demand mitigation ("TDM") measures, as set forth in Exhibit 28 to the record.

29. With respect to the lot occupancy, the open court at 9th Street above the access easement and the interior alley at the rear of the property will provide adequate light and air to surrounding properties. The relief is consistent with other zone districts that allow 5.0 FAR as a matter of right for residential uses and which also provide a means of spreading the density across the site through 100% lot occupancy and the provision of a court in lieu of a rear yard.

The Special Exception Relief

30. Housing for mechanical equipment or a stairway or elevator penthouse on the roof of a building or structure must be placed in one enclosure and the enclosing walls from the roof level must be of equal height. (11 DCMR § 411.4 and 411.5 (made applicable to commercial zoned properties by § 770.6 (a))). Additionally, the roof structures must be set back from all exterior walls a distance at least equal to its height above the roof upon which it is located. (11 DCMR § 770.6 (b).) Here, in order to minimize the size and visibility of the roof structures, the Applicant proposes to house the stairway enclosures separately from

BZA APPLICATION NO. 18397-A

PAGE NO. 9

the elevator penthouse and communal recreation space on the roof. The Applicant also seeks relief from the setback requirements for the elevator penthouse, which is located approximately 12 feet, 8 inches, from the closest exterior wall along the alley where a distance of 15 feet, 8 inches is required.

31. In order to comply with the requirement for one enclosure, the Applicant could build a continuous wall around all the equipment. However, such a wall would increase the massing and visibility of the penthouse, which would undermine the purpose of the regulations, which is to exercise a degree of architectural control over roof structures. (11 DCMR § 411.) Instead, the separate enclosures for the stair towers and elevators will help minimize the appearance of the roof structures and protect the visual quality of the U Street Historic District. The surrounding walls will be of quality material to integrate them into the overall design of the building.
32. If the Applicant were required to set back the elevator penthouse an additional three feet, it would result in awkward corridors and interior unit layouts on the upper two floors, which will have a smaller floor plate than floors two, three and four, as a result of the HPRB design review process. These upper floors will be stepped back from the smaller historic structures along 8th Street to allow a better transition between the new construction and existing historic buildings. The elevator penthouse will be set back significantly from the street elevations and adjacent properties, and will afford greater protections to the surrounding historic community. The Applicant's proposal meets the spirit and intent of the regulations to exercise a reasonable degree of architectural control over roof structures and thus relief from §§ 411.4, 411.5 and 770.6 is appropriate.
33. Pursuant to § 1903.3 of the Arts Overlay District, each new building on Florida Avenue between 7th and 9th Streets must be designed so that not less than 75% of the street wall is built to the property line. Here, the Applicant proposes to set back the street wall at the ground floor level approximately six feet, in an undulating fashion to mimic the rhythm of the historic row fronts of the neighborhood, to ensure that the public sidewalk's width complies with applicable streetscape standards of *DDOT's Design and Engineering Manual ("DEM")*. The *DEM* and the *Public Realm Design Manual* issued in 2011 require a minimum pedestrian clearance of 10 feet with a six-foot treebox zone.
34. The expansion of the sidewalk will not adversely affect neighboring properties or be detrimental to the health, safety, convenience, or general welfare of the public. Rather, it will enhance the health, safety, convenience and welfare of the public by increasing the sidewalk width along Florida Avenue, which presently is extremely narrow at only eight feet wide "clear," with a four-foot treebox zone. This existing exceptional circumstance of the narrow sidewalk width warrants a deviation from the street wall requirements. The resulting architectural treatment of the ground floor retail area will be enhanced with the setback. The Applicant received conceptual approval for the retail entrance design, but requests flexibility from BZA to make adjustments to the exterior design, including the

BZA APPLICATION NO. 18397-A
PAGE NO. 10

ground floor retail setbacks, as the project is refined through the building permit application process.

CONCLUSIONS OF LAW

Variance Relief

Standard of Review

The Applicant seeks area variances from the required standards for lot occupancy (§772), off-street parking (§2101.1), and loading (§2201) in order to allow construction of new residential development with ground floor retail at 1924 8th Street, N.W. (Square 393, Lots 41, 44, 45, 46 and 826). Under § 8 of the Zoning Act (D.C. Official Code § 6-641.07(g)(3) (2001 ed.)), the Board is authorized to grant an area variance where it finds that three conditions exist: "(1) the property is unique because, *inter alia*, of its size, shape or topography; (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." *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995), quoting *Roumel v. District of Columbia Bd. of Zoning Adjustment*, 417 A.2d 405, 408 (D.C. 1980). See, also, *Capitol Hill Restoration Society, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987). Applicants for an area variance need to demonstrate that they will encounter "practical difficulties" in the development of the property if the variance is not granted. See *Palmer v. D.C. Bd. of Zoning Adjustment*, 287 A.2d 535, 540-41 (D.C. 1972) (noting that "area variances have been allowed on proof of practical difficulties only while use variances require proof of hardship, a somewhat greater burden"). An applicant experiences practical difficulties when compliance with the Zoning Regulations would be "unnecessarily burdensome." See *Gilmartin v. D.C. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1170 (D.C. 1990).

As discussed below, the Board concludes that the Applicant has met its burden of proof for the requested variances.

Exceptional and Extraordinary Conditions

The Board concludes that the subject property is affected by several exceptional and extraordinary conditions. See *Clerics of St. Viator v. District of Columbia Bd. of Zoning Adjustment*, 320 A.2d 291 (D.C. 1974); *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990) (an exceptional or extraordinary situation or condition may arise from a "confluence of factors"). First, the property is irregularly shaped due to the confluence of a diagonal avenue (Florida) with north-south streets (8th and 9th Streets), which affects the layout and configuration of the retail and residential units. The east portion of the site is also twice as deep as the west portion, further limiting the building floor plate. Second, the sidewalk width along Florida Avenue is only eight feet "clear" and does not comport

BZA APPLICATION NO. 18397-A
PAGE NO. 11

with the 16-foot standard under *DDOT's DEM* or the *Public Realm Design Manual* jointly published by DDOT and OP. Third, the two contributing historic structures (now a single building for zoning purposes) on the site must be incorporated into the design, which also limits and constrains the floor plate of the building. Finally, the site is encumbered by Metrorail tunnels, related air vents and the Metrorail "zone of influence" that impose severe design and construction constraints on the property.

Practical Difficulties

The confluence of these exceptional and extraordinary conditions creates practical difficulties for the Applicant in complying with the parking, loading, and lot occupancy provisions of the Zoning Regulations. The WMATA tunnels and the "no build" zone prevent the Applicant from excavating more than one level below grade, thereby limiting the amount of parking, loading and other building service space that can be provided in an underground garage. The maximum number of parking spaces that can fit on one level is 70 spaces. Because the ARTS Overlay requires that a minimum of 50% of the ground floor level be devoted to retail uses, parking is effectively precluded on that level. Further, the reduction in the amount of retail space to accommodate parking and loading facilities would create significantly inefficient tenant layouts and reduce the most valuable income stream for the property, which is critical to off-setting the increased structural costs to build around and over the Metrorail tunnels.

Without the increase in lot occupancy, the Applicant would not be able to achieve the bonus density permitted under the Inclusionary Zoning regulations, which is designed to offset the developer's cost of constructing affordable housing. Increasing the residential square footage is also critical to help offset some of the extraordinary costs and additional construction premiums associated with the WMATA constraints.

Similar difficulties exist in meeting the lot occupancy requirements. If the Applicant were forced to comply with the lot occupancy requirements, the number of one-bedroom units would drop significantly, limiting the number of residents and families that could be served by this development. Additionally, the elevator core would need to be shifted to the north, which would negatively affect the garage layout and result in inefficient and wasted retail space on the ground floor.

No Harm to Public Good or Zone Plan

The requested 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. The transportation needs of the building's tenants and residents will be well served. The number of loading spaces is anticipated to sufficiently support the demand of the building. The loading dock will be managed by the residential property management company so that deliveries are scheduled appropriately. Further, the parking demand can be adequately served through the 70 spaces proposed for project and further offset by the transportation demand management measures to be implemented by the Applicant. Given

BZA APPLICATION NO. 18397-A
PAGE NO. 12

the high transit accessibility at the site, including two Metrorail Stations within two blocks of the project, the demand for parking will be greatly reduced.⁴

The C-2-B District and the Inclusionary Zoning provisions "incentivize" residential uses and the increase in lot occupancy is consistent with that objective. The relief will ensure an appropriate mix of studio, one-bedroom and two-bedroom units that will support a variety of household sizes rather than an overconcentration of one-person studio units.

Special Exception

Pursuant to § 3104 of the Zoning Regulations, the Board is authorized to grant special exceptions where, in its judgment, the relief 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. Additionally, certain special exceptions must meet the conditions enumerated in the particular sections pertaining to them. In this case, along with the general requirements of § 3104, the Applicant also had to meet the requirements of §§ 411 and 1906.

Relief granted through a special exception is presumed appropriate, reasonable, and compatible with other uses in the same zoning classification, provided the specific regulatory requirements for the relief requested are met. In reviewing an application for special exception relief, the Board's discretion is limited to determining whether the proposed exception satisfies the requirements of the regulations and "if the applicant meets its burden, the Board ordinarily must grant the application." *First Washington Baptist Church v. D.C. Bd. of Zoning Adjustment*, 423 A.2d 695, 701 (D.C. 1981) (quoting *Stewart v. D.C. Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973)).

Here, the Applicant's proposal to provide two separate stair enclosures advances the goals of minimizing the visibility of roof structures and reducing the impacts on the light and air of other buildings. Additionally, the elevator penthouse will be set back 12 feet, 8 inches from the closest exterior wall along the alley where a distance of 15 feet, 8 inches, is required. Nevertheless, the elevator penthouse will be set back significantly from the street elevations and adjacent properties, and will afford greater protections to the surrounding historic community. Based on the foregoing, the Board concludes that the Applicant has met its burden of proof in demonstrating that the proposed roof structures will be in harmony with the purposes and intent of the Zoning Regulations.

The Board further concludes that relief from the street-wall provisions of the ARTS Overlay District will substantially advance the purposes of the overlay and will not adversely affect neighboring property or be detrimental to the health, safety, convenience or general welfare of

⁴ For these reasons the Board finds the testimony of Ms. Dana Jackson to be unpersuasive. Ms. Jackson, testifying on behalf of herself and other business owners on 9th Street in Square 393, expressed concerns that the proposed development would be detrimental to the public good due to the lack of sufficient parking and loading facilities, creating negative impacts on the traffic patterns in the surrounding neighborhood.

BZA APPLICATION NO. 18397-A
PAGE NO. 13

persons living, working or visiting the area. The exceptionally narrow sidewalk width along Florida Avenue, coupled with the WMATA constraints and the *DEM* standards, make it difficult to comply with the requirement to bring the building façade out to the property line. Here, a ground floor setback of approximately five to 10 feet effectively widens the public sidewalk to the range of 14 feet, consistent with DDOT standards. In conformance with the provisions of the ARTS Overlay, the design is also subject to review by HPRB to ensure its compatibility with the historic district and the surrounding area.

Great Weight to ANC and OP

Section 13(b)(d) of the Advisory Neighborhood Commission Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Code § 1-309.10(d)(A)), requires that the Board's written orders give "great weight" to the issues and concerns raised in the recommendations of the affected ANC. In this case, ANC 1B supported the development of the Applicant's project, stating that "the BZA relief requested presents no harm to the public good," and did not express any issues or concerns. The Board concurs in its recommendation.

The Board is required under section 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163, D.C. Code § 6-623.04) to give great weight to OP recommendations. The Board also concurs with OP's recommendation that the zoning relief should be granted.

Based upon the record before the Board, and having given great weight to the ANC and OP reports filed in this case, the Board concludes that the Applicant has met the burden of proof pursuant to 11 DCMR § 3103.2 for an area variance under §§ 772, 2101 and 2201, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the requested 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. The Board also concludes that the Applicant has met the burden of proof for special exception relief, pursuant to 11 DCMR §§ 3104.1, 411.5, 1906 and 1903.3, that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

It is therefore **ORDERED** that the application is hereby **GRANTED**, subject to the revised plans, Exhibit 28 in the record, and **SUBJECT** to the following **CONDITIONS**:

1. The Applicant shall comply with zoning requirements to provide bicycle parking/storage facilities;
2. The Applicant shall commit that all parking costs be unbundled from the cost of lease or purchase. Parking costs must be set at no less than the charges of the

BZA APPLICATION NO. 18397-A
PAGE NO. 14

lowest fee garage located within ¼ mile.

3. The Applicant shall identify a project's TDM Leader (for planning, construction, and operations), and provide DDOT/Zoning Enforcement with annual TDM Leader contact updates.
4. The Applicant shall post all TDM commitments on-line, publicize availability, and allow the public to see what commitments have been promised.
5. The Applicant shall provide website links to CommuterConnections.com and goDCgo.com on developer and property management websites.
6. The Applicant shall provide an on-site business center to residents with access to copier, fax, and internet services.
7. The Applicant shall install a Transportation Information Center Display (kiosk) within the residential lobbies containing printed materials related to local transportation alternatives, and maintain a stock of materials at all times.
8. The Applicant shall provide secured bicycle parking/storage facilities.
9. The Applicant shall host a transportation mobility fair six months after both the residential buildings have opened. The transportation fair will be advertised to all residents and retail workers. The on-site TDM coordinator will work with DDOT's goDCgo team to organize representatives that are experts in the non-auto transportation options that serve the site. Each person that attends the event will be educated on the various options and representatives will work with attendees to help them tailor the use of non-auto options to their specific transportation needs. Based on the turnout of the transportation fair and feedback gleaned by the on-site TDM coordinator, a determination shall be made if the event will be repeated the following year.
10. The Applicant will fund the installation of a new traffic signal at 8th Street and Florida Avenue, N.W.
11. The Applicant shall have the flexibility to modify the mix and location of units, and to modify the design of the building to address any comments from the D.C. Historic Preservation Review Board during final review of the project so long as the modifications do not require any additional areas of relief.

VOTE: 5-0-0 (Lloyd L. Jordan, Nicole C. Sorg, Rashida Y.V. MacMurray, Jeffrey L. Hinkle, and Marcie I. Cohen to Approve.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

ATTESTED BY:



SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: November 15, 2012

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 AT LEAST 30 DAYS PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THAT SUCH REQUEST IS GRANTED. NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR § 3205, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY

**BZA APPLICATION NO. 18397-A
PAGE NO. 16**

BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ. (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

District of Columbia Court of Appeals
Appeal of District of Columbia Board of Zoning Adjustment Order No. 18397-A
Appellant's Statement of the Case

Appellant, 1923 9th Street NW LP, appeals the November 15, 2012 decision of the District of Columbia Board of Zoning Adjustment ("BZA"). The BZA's Order in the referenced case (the "Order") granted Applicant, Florida Avenue Residential, LLC, special exceptions from the roof structure requirements of §§ 411 and 770.6, the street wall requirements of § 1903.3 and area variances from the required standards for lot occupancy of § 772, the off-street parking requirements of § 2101.1 and the loading requirements of § 2201. Florida Avenue Residential, LLC sought the above-described zoning relief to allow for the company's development of a six-story, mixed-use, residential building with ground floor retail/service uses in the ARTS/C-2-B District on Florida Avenue, 8th and 9th Streets, Northwest (Square 393 - Lots 41, 44, 45, 46 & 826). The BZA erred in granting the requested relief, as set forth below.

Appellant asserts that the Applicant failed to satisfy the three (3) prongs of the test for the grant of an area variance established in Section 8 of the Zoning Act, D.C. Code Section 5-424(G)(3):

"[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. 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."

We turn first to the third prong of the above-described test for an area variance, namely, the requirement 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." The most egregious error in this case involves the BZA's failure to adequately weigh the adverse impact that a complete waiver of § 2201's loading berth requirements (one 55-foot and two 30-foot berths) would have on the Appellant, similarly-situated proprietors on this block, and the spirit and intent of the overall zoning plan.

As articulated by Appellant before the BZA and as will be demonstrated to this honorable Court, the relief will negatively impact Appellant and other property owners similarly situated along 9th Street by exacerbating an already existing congested traffic pattern. Instead of the required 55-foot berth and two 30-foot berths, the Applicant proposed only

District of Columbia Court of Appeals
Appeal of District of Columbia Board of Zoning Adjustment Order No. 18397-A
Appellant's Statement of the Case

one 30-foot berth to be shared by the residential and retail uses. The commonly-used large trucks will no longer have an appropriate place to park and unload and, as a result, will be forced to stand on 9th Street, impede traffic and frustrate access to the existing businesses that front 9th Street. This public harm is common to many business owners in the block of the proposed development and was improperly ignored by the BZA. The BZA ignored testimony given by Appellant and others as to the adverse impact to abutting properties from traffic and loading.

In Paragraph 5 of Findings of Fact in the BZA's Order, it reads:

“The Uptown Arts-Mixed Use (ARTS) Overlay is designed to encourage a scale of development, mixture of uses, and “other attributes such as safe and efficient conditions for pedestrian and vehicular movement.”(11 DCMR 1900.2(a)) The ARTS Overlay requires uses that foster pedestrian activity, especially retail, entertainment, and residential uses.”

The impediment to pedestrian traffic and therefore patronization of the businesses fronting on 9th Street as well as the addition of vehicular traffic along the Street that would result from the waiver of § 2201 are in direct contradiction of the above-quoted intent of the ARTS Overlay as explained in the Municipal Regulations. The zoning plan would not and does not support the granting of relief for one business at the detriment to another. This Section evinces the fact that a complete waiver of the loading requirements of §2201 would “substantially impair[] the intent, purpose, and integrity of the zone plan” to foster and encourage the retail uses in the district and thus could not satisfy the third prong. The BZA erred in finding that it did.

As described in Section 5-424(G)(3), the first prong requires that the subject property be unique because of some physical aspect or other extraordinary or exceptional situation or condition inherent in the property. As support for this requisite, Applicant cited only the irregularly shaped parcel that the trajectory of Florida Avenue renders – a characteristic shared by several of the lots in the vicinity. This characteristic is not unique to the subject parcel and as such cannot satisfy this first prong. Throughout the District of Columbia, wherever a [] street intersects with the street grid, the result will be an irregular shape; clearly not a unique condition.

The Applicant also noted that the sidewalk's dimensions are not in compliance with the District of Columbia's Department of Transportation's (“DDOT”) Design and Engineering Manual and the Public Realm Design Manual. The BZA incorrectly attributed this “unique characteristic” to the subject property in its consideration of the zoning relief requests, as the sidewalk is not part of the property. Similar to the trajectory of Florida Avenue, any characteristic of the sidewalk equally applies to all parcels that abut it and thus render its effect on Lots 41, 44, 45, 46 and 826 common and not unique.

District of Columbia Court of Appeals
Appeal of District of Columbia Board of Zoning Adjustment Order No. 18397-A
Appellant's Statement of the Case

The Applicant failed to satisfy the second prong as well. An applicant must show that the strict application of the Zoning Regulations will cause practical difficulty. The Applicant offered the devaluation of the parcel due to the Metro facilities below the property as evidence of the practical difficulties mandated by this second prong. The case law precedent clearly illustrates that proximity to public mass transit is an asset to parcels. Florida Avenue Residential, LLC admitted as much by noting its interest in the property was strengthened by the presence of Metro. This fact is neither burdensome to the Applicant nor unique to the subject lots, particularly given the presence of Metro throughout the District.

For the above-stated reasons, Appellant asks that the November 15, 2012 decision and order of the Board of Zoning Appeals be reversed.