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Real Estate | Zoning | Business Law

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June 10, 2014

By E-Mail Submission

Lloyd Jordan, Chairman
Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, DC 20001
bzasubmissions@dc.gov

Re: Opponent's Draft Findings of Fact and Conclusions of Law; BZA Application No. 18638, NW; 1456-1460 Church Road, NW

Dear Chairman Jordan and Members of the Board

Please find the attached draft Findings of Fact and Conclusions of Law filed on behalf of party opponent Metropole Condominium

Sincerely,



Martin P. Sullivan

Enclosure

cc: Office of Planning, Stephen Gyor
Carolyn Brown, Esq.
ANC 2F

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18638

EXHIBIT NO. 76

[PARTY OPPONENT'S DRAFT]

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment**



Application No. 18638 of Rosebusch LLC and Gregg M. Busch, Pursuant to 11 DCMR §§ 3104.1 and 3103.2, for special exceptions from the rear yard requirements under section 774, and the roof structure requirements of sections 411 and 1902.1(a), and variances from the off-street parking requirements under section 2101.1, to allow the construction of a new residential building in the ARTS/C-3-A District at premises 1456-1460 Church Street, N W. (Square 209, Lot 65, 66 and 67).

HEARING DATE: January 7, 2014 and May 20, 2014
DECISION DATE: February 25, 2014 and June 17, 2014

Decision and Order

This self-certified application was submitted July 24, 2013 by Rosebusch LLC and Gregg M. Busch (collectively, the "Applicant"), the owners of the property that is the subject of the application. The application was originally filed Pursuant to 11 DCMR §§ 3104.1 and 3103.2, for special exceptions from the rear yard requirements under section 774, and the roof structure requirements of sections 411 and 1902.1(a), and variances from the lot occupancy requirements of section 2604 2, and the off-street parking requirements under section 2101 1, to allow the construction of a new residential building in the ARTS/C-3-A District at premises 1456-1460 Church Street, N W. (Square 209, Lot 65,66 and 67).

The Application was revised and the requests for lot occupancy variance relief, and rear yard special exception relief, were withdrawn

Following a public hearing on January 7, 2014, the Board of Zoning Adjustment (the "Board") voted, on February 25, 2014, on a motion to grant the Application; the vote was 2-2-0 The Board then held a second hearing on May 20, 2014, and recused Boardmember Hinkle was replaced by NCPC representative Shane Dettman. At the May 20 hearing, the Applicant amended the Application to include a request for Special Exception relief pursuant to 11 DCMR §

At the second hearing on May 20, 2014, the Applicant submitted a Projected Project Cashflow (the "Pro Forma") purporting to compare the expected financial results from the operation of a 37-unit apartment house vs. that of an 18-unit apartment house

PRELIMINARY MATTERS

Notice of Application and Notice of Public Hearing. By memoranda dated _____, 2013, the Office of Zoning sent notice of the application to the Office of Planning ("OP"), the District Department of Transportation; the Councilmember for Ward 2; Advisory Neighborhood Commission ("ANC") 2F, the ANC for the area within which the subject property is located, and the single-member district ANC 2F-02. Pursuant to 11 DCMR § 3112.14, on _____, 2013 the Office of Zoning mailed notice of the hearing to the Applicant, the owners of property within 200 feet of the subject property, and ANC 2F. Notice was published in the *D C Register* on _____ (____ DCR ____).

Party Status. The Applicant and ANC 2F were automatically parties in this proceeding. The Board granted a request for party status in opposition to the Metropole Condominium Association, representing the unit owners in the Metropole Condominium located at 1515 15th Street, NW, immediately to the west of the subject property. In response to the Applicant's attempt to prove a practical difficulty warranting the requested variance or special exception relief, the Party Opponent submitted a report from a real estate tax and valuation expert, and a report from an appraiser discrediting the Applicant's financial calculations.

Government Reports. By report dated October 15, 2013, and through testimony at the public hearing, OP recommended approval of the requested relief.

ANC Report. By letter dated _____, at a regular, duly noticed monthly public meeting held on June 5, 2013, with a quorum present, the ANC voted 7-0-1 to recommend approval of the Application. The ANC resolution was voted on and approved six (6) weeks before the actual Application was filed, so it is not clear exactly what information the ANC considered and approved at its June 5, 2013 meeting.

Persons in opposition. The Board heard testimony from Celia Davis, a member of the real estate committee of the Metropole Condominium Association, on behalf of the Metropole Condominium Association. The Board also received a detailed letter of opposition from Metropole resident Paul Mesterhazy on October 17, 2013, which it considered in its deliberation. At the second hearing on May 20, 2014, the Board heard testimony from Metropole residents Michael McKenzie and Paul Mesterhazy.

FINDINGS OF FACT

The Subject Property and Surrounding Area

1. The subject property is located at 1456 – 1460 Church Street, Square 209, Lots 65, 66, and 67.
2. The subject property is a rectangular property containing approximately 3,420 square feet of land area.

3. The subject property is located in the Arts/C-3-A Zone District.
- 4 The subject property is currently improved with three nineteenth century buildings
- 5 Of the three existing buildings, 1456 and 1458 Church Street are three-story flat-front brick row houses with bracketed wood cornices.
- 6 The building at 1460 Church Street is a three-story, flat-front brick row house with a corbelled brick cornice.
- 7 The subject property fronts on Church Street, NW, and borders a ten-foot wide alley at the rear of the property.

The Applicant's Project

- 8 The Applicant is proposing an addition to the existing structures resulting in a building with a height of seventy (70) feet, consisting of thirty-seven (37) apartment units
- 9 The Applicant has a parking requirement of eighteen (18) spaces, but is only providing four (4) parking spaces and asking for variance relief for fourteen (14) parking spaces. None of the four (4) parking spaces will be devoted to tenant use
- 10 The Applicant is proposing to build two separate roof structures of unequal heights and is requesting special exception relief from the requirements under 11 DCMR §§ 411.3 and 411.5
- 11 The Applicant is also requesting relief from 11 DCMR § 1902.1(a), for the maximum height of the top of roof structure of 83.5 feet above the building's measuring point.
12. The Applicant claimed that the subject property was exceptionally narrow at thirty-eight feet, but did not submit any evidence to show that a thirty-eight foot width was exceptionally narrow in relation to the width of other lots in the surrounding neighborhood.
- 13 The structures on the subject property were contributing buildings in the 14th Street Historic District. The Applicant claimed that the existence of these buildings made providing parking a practical difficulty for the Applicant.
14. The Metropole Condominium, at the hearing, contended that the Applicant had not met its burden of proof to show that the property was exceptionally narrow or that such a great degree of parking relief was necessary to relieve the practical difficulty of the Applicant in constructing the addition

15. The Metropole Condominium asserted at the first hearing that the Applicant provided no economic information to support its argument that it could not build a building that could comply with the parking requirement, either by providing fewer units or more parking spaces.

No Unique Condition of the Subject Property

16. The Board finds that the Applicant did not provide sufficient evidence to prove that a lot of 38 feet in width was extraordinarily narrow. The large majority of lots in this neighborhood are much smaller than 38 feet in width.
17. The subject property was unique in that it contained three contributing buildings in the historic district, but the Applicant did not show how this particular condition caused a practical difficulty to the owner Applicant such that it required a 79% variance from the parking requirement to relieve the practical difficulty.

No Practical Difficulty Proven

18. While the existence of the historic structures may have added costs to the Applicant's proposed project, the board finds that the Applicant's financial information did not support a showing of practical difficulty sufficient to support the requested variance relief.

Public Good and Integrity of the Zone Plan

19. The granting of relief would present a burden on the available parking in the neighborhood of the subject property.
20. Granting a 79% variance for a lot that is 38 feet in width has a substantial detrimental effect on the integrity of the parking requirements of the Zoning Regulations. Granting approval would set the precedent that any lot that is less than forty (40) feet in an historic district does not need to provide parking, or can meet just 20% of its parking space requirement and receive variance relief for the remainder.
21. The Applicant's attempt at mitigating the impact of the parking relief, such as taking parking spaces from the Metropole condominium, do not mitigate the parking situation in the neighborhood, but simply exacerbate the issue by taking existing spaces for new residents.

Special Exception Request for Parking Relief

22. The Applicant requested at the May 20th hearing that the requested parking relief be granted under 11 DCMR §2120.6, rather than the variance request requested and argued up until the May 20 hearing.

23. The Applicant did not directly address the requirement under Section 2120.6 that the Board grant only the amount of relief needed to alleviate the difficulty proved
24. To the extent the Applicant did address this requirement, its financial information was found to be inaccurate and not supportive of the requested relief.

CONCLUSIONS OF LAW

The Board is authorized to grant variances from the strict application of the Zoning Regulations where “by reason of exceptional narrowness, shallowness, or shape of a specific property. . . or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition” of the property, the strict application of any zoning regulation “would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property ” D.C. Code 0 6-641.07(g)(3) (2001 Ed), 11 DCMR § 3103.2.

Where an applicant seeks an area variance, as here, the above standard of “practical difficulties” applies, with the “undue hardship” standard applying only to use variances. *Palmer v Board of Zoning Adjustment*, 287 A.2d 535 (D.C. App 1972). Additionally, variance 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” *Id.*

Under the three-prong test for area variances set out in 11 DCMR § 3103.2, an applicant must demonstrate that (1) the property is unique because of its size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property; (2) the applicant will encounter practical difficulty if the Zoning Regulations are strictly applied; and (3) the requested variances will not result in substantial detriment to the public good or the zone plan. *See Gilmartin v District of Columbia Bd of Zoning Adjustment*, 579 A 2d 1 164, 1 167 (D.C. 1990). In order to prove "practical difficulties," an applicant must demonstrate first that compliance with the area restriction would be unnecessarily burdensome; and, second, that the practical difficulties are unique to the particular property *Id* At 1 170.

The “exceptional situation or condition” of a property can arise out of “events extraneous to the land,” including the zoning history of the property. *See, e.g De Azcarate v Board of Zoning Adjustment*, 388 A 2d 1233, 1237 (D C 1978), and *see Monaco v Board of Zoning Adjustment*, 407 A.2d 1091, 1097, and 1098 (D C 1979) *See also BZA Order No. 17264* (2005).

The Board concludes that the Application has not satisfied the requirements necessary for variance relief, as follows:

The Board concludes that the property is not extraordinary or unique. It is a 38 foot wide property in an historic district. This is a description that could apply to thousands of property in the District, many of them in the Logan Circle neighborhood surrounding the subject property.

The Board further concludes that the Applicant has not satisfied its burden to prove the existence of a practical difficulty justifying a 79% variance relief from the parking requirement for this project. The Applicant submitted financial information which in part represented that an 18-unit scenario and a 37-unit scenario were of equal value (based on the expected property tax burden). If this is true, then there is no practical difficulty to the Applicant in providing the larger units and thereby reducing the requested parking relief. This is particularly true as it pertains to the special exception request under Section 2120.6. The need for such a great amount of parking relief is merely a function of the Applicant's desire to provide very small units, as opposed to a standard rental unit size. The Applicant failed to prove that the proposed project would be just as successful with larger units and less parking relief. Pursuant to Section 2120.6, the Board may only grant the amount of relief needed to alleviate the difficulty proved. It is the Applicant's burden to prove that it needed additional parking relief to alleviate the practical difficulty. The Applicant did not do so. If the Applicant could develop this property successfully with less parking relief (say, as an 18-unit building with the same overall density as the 37-unit proposal), then there is no difficulty to overcome in providing the 18-unit building and greatly lowering the amount of required parking.

The Applicant's argument seems to be that since it cannot provide more than four (4) parking spaces, it is then permitted to configure its building with as many required parking spaces as it wants. This ignores the requirement that the Board grant only the amount of relief needed to alleviate the difficulty. If the difficulty is alleviated by providing an 18-unit building using 100% of the permitted density with standard apartment sizes, then the Applicant does not need additional relief to alleviate the difficulty and it does not meet the special exception requirements of Section 2120.6. In any event, the Applicant clung to its argument that it did not need to address such an argument, and then when it did attempt to address the argument with pro formas, it presented unsupportable data that failed to prove the point.

The Party Opponent submitted persuasive information from two sources, a real estate tax and valuation expert, and an appraiser, that both found the Applicant's pro forma to be unsupportable. The report from the appraiser concluded that "both the 37 and 18 unit development scenarios offer expense estimates which are not supported by the statistical data. In fact, the Applicant's numbers in some instances varied drastically from the appraiser-compiled statistical data. The tax and valuation specialist concluded that the property tax amount provided in the pro forma was clearly incorrect and the other expenses were highly questionable.

The Office of Planning recommended approval of the Application, but the Office of Planning did not present any testimony regarding why a 38-foot property would be considered unique and was not persuasive in its discussion of the asserted practical difficulty requiring a parking variance.

ANC 2F recommended approval of the Application, but there was evidence that the ANC did not have input from the Metropole or other neighbors of the project. Also, it is interesting that the ANC recommended its approval of the application before the application was even filed and well before any notice went out to surrounding property owners. This exhibits a lack of diligence on the part of the ANC in informing its constituents about a matter before it.

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For the reasons stated above, the Board concludes that the applicant has not met its burden of proof. It is hereby **ORDERED** that the application is **DENIED**

VOTE: 5-0 (Lloyd Jordan, S Kathryn Allen, Peter May, Marnique Heath, and Shane Dettman to DENY)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

The majority of the Board members approved the issuance of this order

ATTESTED BY: _____

FINAL DATE OF ORDER: _____