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January 28, 2014

Chairman Lloyd Jordan  
Board of Zoning Adjustment  
441 4<sup>th</sup> Street, NW  
Suite 210S  
Washington, DC 20001

**Re: Application No. 18688 – 1348-1356 Florida Avenue, NE  
Square 4068, Lots 116, 147, 146, 145, 144  
Supplemental Statement of the Applicant**

Chairman Jordan and Honorable Members of the Board:

On behalf of Applicant Lock 7 Development, LLC, enclosed please find the Supplemental Statement for the above-referenced application. At the conclusion of the hearing on January 14, 2014, the Board of Zoning Adjustment (the "Board") continued the hearing and requested that the Applicant supplement the record with additional information. The hearing has been continued to February 4, 2014.

The Applicant includes with this Supplemental Statement documentation to address three matters. First, the Applicant has revised the rendering of the top level and roof to address aesthetic concerns expressed by the Board. *See Revised Renderings at Exhibit A.* Second, the Applicant has provided a supplemental architectural plan showing the size and location of the Inclusionary Zoning units that will be included as part of the project. *See Architectural Plan Showing IZ Units Identified at Exhibit B.* Third, the Applicant has provided additional documentation in demonstrating the financial infeasibility of a matter of right project or various alternatives. Additional documents include architectural plans for alternative configurations and corresponding ProFormas, rental and sales comparables, and support from expert witnesses as to residential and commercial real estate rentals and sales and real estate financing.

In response to the Board's request, the Applicant has included with this Supplemental Submission the following additional documents:

**Exhibit A:** Revised Renderings  
**Exhibit B:** Architectural Plans with IZ Units Identified  
**Exhibit C:** Report from Hush Acoustics, LLC  
**Exhibit D:** Residential Real Estate Agent Expert Letter  
**Exhibit E:** Impact of BRL on Parking Garage Feasibility  
**Exhibit F:** Environmental Cost Breakdown

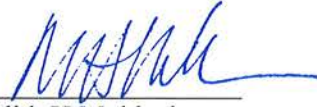
Board of Zoning Adjustment  
District of Columbia  
CASE NO. 18688  
EXHIBIT NO.36

**Exhibit G:** Letter from Real Estate Finance Expert  
**Exhibit H:** Architectural Plans for Alternatives  
**Exhibit I:** ProFormas for Proposed Project and Alternatives  
**Exhibit J:** Rental and Sales Comps  
**Exhibit K:** Commercial Real Estate Agent Expert Letter  
**Exhibit L:** Applicant's Proposed TDM Conditions  
**Exhibit M:** ANC 5D Letter of Support

Thank you for your attention to this matter.

Sincerely,

GRIFFIN, MURPHY,  
MOLDENHAUER & WIGGINS, LLP



By: Meredith H Moldenhauer

Enclosures:

Cc: Advisory Neighborhood Commission 5D  
c/o Kathy Henderson, Chair (via email)  
Single Member District 5D06 Representative, Tina Laskaris (via email)  
Elisa Vitale, Office of Planning (via email)  
Cliff Moy, Board of Zoning Adjustment (via email)

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

**APPLICATION OF  
LOCK 7 DEVELOPMENT, LLC**

**BZA APPLICATION NO. 18688  
HEARING DATE: JANUARY 14, 2014  
DECISION DATE: FEBRUARY 4, 2014**

**SUPPLEMENTAL STATEMENT OF THE APPLICANT**

Lock 7 Development, LLC (the “Applicant”) seeks area variances from the height requirement (§770), FAR requirement (§771) and parking requirement (§2101.1) to allow the Applicant to develop a mixed use residential structure with ground floor retail in the C-2-A District. The Board is authorized to grant an area variance where it finds that the Applicant fulfills the three-prong area variance standard. As described in the Initial Application and Prehearing Statement, and further explained at the public hearing, all three prongs of the area variance test are satisfied. As requested by the Board at the hearing, the Applicant is supplementing the record with additional information.

**I. Exceptional Circumstance**

The Property is unusual and affected by an exceptional situation and condition as a result of a confluence of the following factors: (1) the location of the Property relative to the “Starburst” Intersection at H Street, Bladensburg Road and Benning Road, NE; (2) the proximity of the Property to the nearby fire station; (3) the Property is subject to a 10-foot building restriction line along Orren Street; (4) the prior use of the Property requires environmental remediation; (5) preservation of the existing façade as encouraged by the HS-Arts Overlay; and (6) the proximity of the Property to the HS-Arts Overlay and inclusion in extension of the Overlay.

**II. Practical Difficulty**

The Applicant seeks to expand on how the exceptional condition, including but not limited to the acoustical impacts as a result of the Property’s location, the limitation on design options caused by the building restriction line (“BRL”), and the environmental costs associated with development of the Property cause strict application of the zoning regulations to result in a practical difficulty.

### *A. Acoustical Impacts*

Based on the proximity of the Property to Florida Avenue, the Starburst Intersection, and the busy fire station across the street, the residential units and commercial space at the Property, particularly those facing Florida Avenue, will be negatively impacted by the resulting noise level. Typical traffic along Florida Avenue, particularly near the Starburst Intersection, generates substantial noise levels. Sound levels at the Property are exacerbated by having one of the busiest fire stations in the country located across the street. A typical fire engine emits a siren sound at over 100 decibels (dBs) from the street. The HUD Noise Guidebook, illustrating acceptable noise levels for purposes of obtaining HUD financing, indicate that a project with a day-night average sound level (DNL) less than 65 decibels (dBs) is acceptable, while between 65 and 75 dBs is normally unacceptable and above 75 dBs is unacceptable. *See US HUD Noise Assessment Guidelines, Office of Policy Development and Research.*

The residential units along Florida Avenue will be most impacted by the detrimental effect from the elevated sound levels at the Property. At the rear of the structure, furthest from Florida Avenue, the noise level is 32 to 45 dBs lower than on Florida Avenue. This difference between the rear and Florida Avenue would be quite significant, with Florida Avenue being roughly 16 times as loud. On Orren Street, the noise level increases every 20 feet as you move toward Florida Avenue. Relative to the side of the structure at 90 feet from Florida Avenue, the units fronting on Florida Avenue will be roughly twice as loud. These differences in sound levels would all be clearly noticeable to potential renters or buyers. *See Report from Hush Acoustics, LLC at Exhibit C.*<sup>1</sup> While the noise levels will be highest on the first floor, the slight decrease in noise levels at each floor will be minimal with the true distinction occurring based on the unit orientation. That being said, the Applicant reduced the impact of sound to the extent possible by setting the fifth floor façade back 5 feet.

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<sup>1</sup> While the Applicant did not have sufficient time between the January 14 hearing and the January 28 deadline for the Supplemental Submission to conduct onsite measurement, the standard indicates the impact sound levels have on financing real estate developments. The Applicant retained an acoustical engineer to provide insight on the acoustical impacts of noise levels at the Property.

The exceptional circumstance created by the noise levels at the Property is directly related to the financial feasibility analysis of the project. *See* Residential Real Estate Agent Expert Letter at Exhibit D. The acoustical impacts decrease the sale and rental values of those units most affected by the loud traffic and fire truck sirens. Residential units facing Florida Avenue will be most impacted. Thus, the project's proforma reflects a decrease in rental and sales values for all units facing Florida Avenue. The units along the side of the structure and in the alley are less impacted than those closer to Florida Avenue. Based on these and other factors, additional height and FAR relief is necessary to offset the adverse conditions at the Property.

*B. Building Restriction Line*

Design options are limited substantially as a result of the 10-foot building restriction line along the 124.22 feet of frontage along Orren Street NW. In combination with the 15 foot rear yard requirement along the 90 feet of frontage at the rear of the Property, the Applicant proposes to only occupy 70% of the lot where 75% lot occupancy is permitted as a matter of right.

Because the BRL also impacts subsurface development, an underground parking garage, if required, would be exceptionally inefficient and particularly costly on a cost-per-space basis. *See* Impact of BRL on Parking Garage Feasibility at Exhibit E. Without the BRL, there would be sufficient space to provide 22 spaces at a cost of \$39,817 per space. However, because the Property is subject to the BRL, the decrease in space allows only 14 spaces below grade at a cost of \$62,570 per space.<sup>2</sup> *See* NCD Management Excavation and Construction Proposal, Prehearing Statement at Exhibit D. In sum, the BRL contributes to the practical difficulty associated with putting underground parking below the proposed structure.

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<sup>2</sup> Based on the record in BZA Case No. 18632, Prehearing Statement at Exhibit H, underground parking typically costs between roughly \$12,000 to \$39,000 per parking space.



### *C. Environmental Contamination*

As a result of the prior use, the Applicant will incur additional costs and must pay special attention to environmental remediation concerns at the Property. As indicated by the Phase I and Phase II Limited Subsurface Investigation Report, conducted by ICOR Ltd., the petroleum impacted soil and presence of hazardous materials will require special handling and proper disposal and treatment at a permitted facility at a cost of \$128,170. Primary costs include excavation, transportation, and disposal of petroleum impacted soil; abatement of asbestos, light tubes, ASTs, and ballasts; and installation of a vapor venting system and barrier installation. *See* Environmental Cost Breakdown at Exhibit F. Also from an environmental perspective, adaptive reuse of the existing façade is not only incentivized by the HS-Arts Overlay, it is also in keeping with green building principles through more efficient use of the existing building materials. These exceptional circumstances contribute to the financial infeasibility associated with alternative designs at the Property.

### *D. Financial Infeasibility*

As a result of the exceptional circumstances, the Property will not generate a fair and reasonable return on investment without the requested variances. It is not simply that compliance with the height and FAR requirement would produce less of a profit for the Applicant. Rather, *any* matter of right development at the site, and other alternative configurations reducing the zoning relief, would result in a financially infeasible project. This Supplemental Submission, and other information in the record, provides specific financial documentation demonstrating the financial feasibility of the proposed project as well as several alternative configurations at the Property rather than relying on generalities.

The Board, and the Court of Appeals, has recognized financial infeasibility as grounds for finding a practical difficulty in the context of area variance relief on several occasions. *See Downtown Cluster of Congregations v. District of Columbia Bd. of Zoning Adjustment*, 675 A.2d 484 (D.C. 1996)(finding that an undue hardship existed because a tenant could not be located that offered a “reasonable rate of return to the owner”). In *Downtown Cluster*, the Court heard testimony and upheld variance relief based on

financial infeasibility. The Court concluded that the 6% return the applicant could achieve as a matter of right was insufficient and the higher return that would be achieved upon approval of the variance was a reasonable return. *Id.* at 487-89. Furthermore, the Board granted relief in *1444 Fairmont Partners, LLC* based on financial figures showing a 15% return, which the Board determined was a reasonable return. *See* BZA Case No. 18163-A, Transcript p.146.

In addition to the reasonable return standard established by the Board and Court of Appeals, lending institutions look closely at a borrower's proforma to ensure the borrower's project meets basic lending requirements prior to issuing a loan. As described by Paul Merritt of Capital Bank, in the context of a rental, these lending requirements typically include a debt coverage ratio of 1.20<sup>3</sup> and in the context of sales a lender typically requires net profit of above 10%. *See* Letter from Real Estate Finance Expert at Exhibit G.

As demonstrated by the various Profit & Loss Analyses, Construction Budgets, Rental and Sales Comps, and letters from residential and commercial real estate agents as well as a real estate finance expert, the proposed project results in a reasonable return to the Applicant.<sup>4</sup> The documentation provided shows the proposed project results in a return of just 4.8% on a rental project or 13.3% on condominium sales. The proposed project has a DCR of 1.23 and thus meets typical lending requirements, though only by a thin margin. Thus the return constitutes a reasonable return in the context of this project and a lending institution is likely willing to lend on such a project.

In contrast, alternative configurations including developing the Property as a matter-of-right, or with reduced zoning relief, are not financially feasible. Due in large part to the adverse impacts created by the acoustical noise level on Florida Avenue NE, the design restrictions created by the BRL, and the environmental contamination costs, the minor relief requested is necessary for the Applicant to obtain a reasonable return. The three alternate configurations described below were included to evaluate whether

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<sup>3</sup> A debt coverage ratio of 1.20 means that the operating income of the property must be 120% of the debt service.

<sup>4</sup> Because the Applicant has not determined whether the Project will be rented or sold as condominiums, both scenarios are presented.

a matter of right project, or a project with reduced zoning relief, would allow for a viable project. In Alternatives 1 through 3, the gain, if any, does not justify the investment based on the degree of risk involved with real estate development of this size and the returns are insufficient to meet the basic lending requirements. *See* Architectural Plans for Alternatives at Exhibit H; ProFormas for Proposed Project and Alternatives at Exhibit I; and Rental Sales Comps at Exhibit J. Each alternative is addressed in turn.

- **Alternative 1:** To allow for a structure that is matter-of-right as to height and FAR, this alternative removes the top story from the proposed structure and removes the retail space. Removal of the top story results in a loss of 10 units. Due to the loss of units, the Applicant could not afford to provide the retail amenity at the project. The community strongly encouraged retail use at the corner but, as confirmed by John Gogos of Papodopolus Properties, the retail space would require significant landlord concessions that could not be financed in this alternative scenario. *See* Commercial Real Estate Agent Expert Letter at Exhibit K. This alternative, while permitted as a matter-of-right, results in a loss of 3.6% for rentals and a loss of 7.7% for condominium sales. Furthermore, the DCR, at 0.83, is less than the 1.20 DCR typically required by a lending institution. Thus, Alternative 1 does not provide a reasonable return and a lending institution is unlikely to make a loan for this alternative.
- **Alternative 2:** To allow for a structure that is matter-of-right as to height while maintaining a fifth floor, this alternative reduces the floor to ceiling height on each floor. Relief for an additional 0.5 FAR would still be required. The retail space would need to be removed as the shorter floor-to-ceiling height would not be sufficient to allow for a marketable retail space. *See* Exhibit K. As stated above, the loss of retail would be less desirable from the perspective of the community. Alternative 2, while compliant with the zoning regulations as to height, results in a loss of 1.3% for rentals and a small gain of just 3.8% for condominium sales. In addition, the DCR is just 0.94. With a roughly \$14 million total project cost, this nominal profit on condominium sales would not be sufficient to make the project viable. The primary reason for



the limited return is the reduced marketability of residential units with lower floor-to-ceiling heights. See Exhibit D. Thus, Alternative 2 does not provide a reasonable return and a lending institution is unlikely to make a loan for this alternative.

- **Alternative 3:** To allow for a structure that is matter-of-right as to FAR, this alternative removes a portion of the 5<sup>th</sup> floor. Relief for the additional 5 feet of height would still be required. The primary reason for the limited return is the inefficiency associated with constructing a partial floor, which is necessary to reduce the FAR. Thus Alternative 3, while compliant with the zoning regulations as to FAR, results in a loss of 0.8% for rentals or a small gain of just 3.6% for condominium sales. The DCR is just 0.96. Again, with a roughly \$14 million total project cost, this nominal profit would not be sufficient relative to the risk involved and the investment required. Thus, Alternative 3 does not provide a reasonable return and a lending institution is unlikely to make a loan for this alternative.

We submit that the Applicant has fully demonstrated the financial infeasibility of a matter-of-right structure at the Property, or alternative configurations, whether the units are rented or sold as condominiums. The Applicant or any owner of this exceptional Property would encounter practical difficulty in complying with the Zoning Regulations. The Applicant has provided the Board with detailed proformas, construction budgets, and MRIS comparables as well as testimony regarding its intention to beautify and improve the Property.

For the reasons outlined above, strict application of the zoning regulations would result in a practical difficulty.

#### **E. No Detriment to the Public Good or Zone Plan**

Granting the variance relief requested would not impair the intent, purpose, and integrity of the zone plan. There will be no substantial detriment to the public good and no substantial impairment to the intent, purpose, and integrity of the zone plan by approving the zoning relief. The proposed project replaces an underutilized space with a much needed residential use and corner retail. The new mixed-use

development will significantly contribute to the vibrancy of the neighborhood while supporting the District's vision for this area. The project also remediates the environmental condition at the Property, at great expense to the Applicant, to allow for residential use onsite. Moreover, the additional residential units help address the well documented shortage of housing in the Washington D.C. area.<sup>5</sup> Furthermore, as the result of two upcoming changes to the zoning at the Property, namely the extension of the HS-Arts Overlay and completion of the ZRR, the proposed structure will likely be permitted as a matter of right in the very near future.

### *1. Height*

The minimal height relief of 5 feet will have little, if any, impact on the surrounding neighborhood. The five foot setback on the fifth floor and revised roof design reduce any potential visual impact granting this relief would create. Furthermore, the height relief requested will effectuate the goals of the HS-Arts Overlay. With respect to height, structures in the HS-Arts Overlay with frontage on Florida Avenue, NE are subject to a uniform minimum clear floor-to-ceiling height of 14 feet and are entitled to an additional 5 feet of building height under §1324.13. Thus, if the project were located in the HS-Arts Overlay the permitted height would be 55 feet and no relief would be required.

### *2. FAR*

The additional FAR of 0.5 will have little to no impact on the surrounding neighborhood. Furthermore, as a result of the preservation of the existing façade and IZ bonus, no relief would be required with respect to FAR once the HS-Arts overlay is extended. Under §1324.3, new construction that preserves an existing façade constructed before 1958 is permitted to use, for residential uses, an additional 0.5 FAR above the total density permitted in the underlying zone district for residential uses. In

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<sup>5</sup> Over the next 20 years the Washington metropolitan area will need 700,000 new housing units by 2030, or roughly 36,500 each year to keep up with predicted population growth. However, if the pace of construction over the last 20 years continues, at roughly 28,000 new housing units per year, the region would only add about ¾ that much. Artemel, Agnes and Sturtevan, Lisa. *Washington's Economic Future Depends on More Housing*. October 17, 2012. Greater Greater Washington. Found at: <http://greatergreaterwashington.org/post/16470/washingtons-economic-future-depends-on-more-housing/>.

addition, under §1326.3, developments subject to the IZ requirement are eligible for an additional FAR bonus of 0.5 FAR. Thus, if the project were located in the HS-Arts Overlay the permitted FAR would be 3.5 FAR and no relief would be required.

### *3. Parking (2101.1)*

Gorove/Slade conducted and prepared a technical memorandum assessing the effect the parking and loading for the project would have on the local neighborhood. Gorove/Slade concluded that no parking is necessary to supply the site because the site is located near ample transit services coupled with an aggressive TDM plan. *See Applicant's Proposed TDM Conditions at Exhibit L.* They also concluded that it is not likely that the development will cause any detrimental impact to on street parking conditions. *See Gorove/Slade Report, Prehearing Statement at Exhibit E.*

All residents and patrons of the retail space will be well accommodated by the combination of the proposed bicycle parking spaces, metrobus routes, and forthcoming DC Streetcar. The availability of a variety of transportation options reduces the incentive to own and store a vehicle on the premises and minimizes spillover parking in the neighborhood. Furthermore, the immediate area has ample underutilized on street parking.

In addition, under the Bicycle Commuter and Parking Expansion Act of 2007, a residential building owner must provide on secure bicycle parking space for every three residential units. In this instance, the 49 residential units would require 16 bicycle spaces. The Applicant has provided 36 secure, covered bicycle parking spaces, which is 20 more than required. Furthermore, the Applicant intends to implement mitigation measures, described in detail in prior submissions and at the hearing, to promote the use of alternative modes of transportation and limit any potential negative impacts as a result of the parking relief requested.

For these reasons, approval of the zoning relief requested will not cause a detriment to the public good or zone plan.

## **F. Community Outreach**

Following the submission of the Initial Application, the Applicant has conducted extensive neighborhood outreach. On November 18, the Applicant presented at the SMD 5D06 community meeting. The Applicant also met with the Fire Marshall on November 18 to obtain feedback and has tentatively agreed to host firestation functions at the Property. On November 26, the Applicant presented to the Trinidad Neighborhood Association meeting and subsequently received a Letter of Support. *See* TNA Letter of Support, Prehearing Statement at Exhibit F. On December 17, the Applicant received unanimous support from ANC 5D and was commended by the SMD for their exceptional communication and willingness to work with the community. *See* ANC 5D Letter of Support attached at Exhibit M.<sup>6</sup> The Applicant has obtained 12 letters in support of the Application including a letter from the one adjacent neighbor. Furthermore, the Applicant has obtained 12 letters of support from residents who live on Orren Street, Morse Street, and Staples Street NE. *See* Letters of Support, Prehearing Statement at Exhibit G.

## **G. Conclusion**

For the reasons stated above, and for the reasons enumerated in the Applicant's prior filings in this case, we hereby submit that the Application meets the requirements for the area variance relief requested.

Sincerely,

GRIFFIN, MURPHY,  
MOLDENHAUER & WIGGINS, LLP



By: Meridith H Moldenhauer

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<sup>6</sup> The ANC 5D Resolution references "irrevocable restrict covenants that would prevent purchasers from seeking to own cars and park them on the Property or along Florida Avenue." The RPP restriction offered and agreement reached at the ANC 5D meeting is more accurately represented in the Applicant's Proposed TDM Conditions at Exhibit L.