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Exhibit E-

Discussion of Specific Test for Variance Relief

I. INTRODUCTION

D.C. Code §6-641.07 (g)(3) provides that the Board of Zoning Adjustment ("BZA") may grant a variance

> "[w]here…the strict application of any regulation adopted under this subchapter would result in ***peculiar and exceptional practical difficulties*** to or ***exceptional and undue hardship*** upon the owner of such property…a variance from such strict application so as to relieve such difficulties or hardship, provided such 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"

See also 11 DCMR § 3103.2. In accordance with the deference granted to the BZA in determining when a variance may be appropriately approved, the District of Columbia Court of Appeals has adopted a three-part test that an applicant must meet in order to obtain variance relief. See Oakland Condominium v. District of Columbia Bd. of Zoning Adjustment, 22 A.3d 748, 752 (D.C. 2011). According to the court in Oakland Condominium, an applicant must show that: (1) there is an extraordinary or exceptional condition affecting the property; (2) practical difficulties will occur if the zoning regulations are strictly enforced; and (3) 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. Id.; see also Washington Canoe Club v. District of Columbia Zoning Comm'n, 889 A.2d 995, 1000 (D.C.2005).

The Church Street Theater, now known as the Andrew Keegan Theatre, has been an important and beneficial component of the Dupont Circle community for the last 30 years. Throughout its existence, the Andrew Keegan Theatre has been openly and continually used as a performance space, despite the fact that the theater is located in a residential zone. As such, in 2009, when The Andrew Keegan Theatre Company (the "Company") began solely operating the theater under a lease with the current owner and became the resident company, the Company relied in good faith that the building would remain a performance hall for an indefinite period of time. Likewise, this was the understanding when the property was purchased in 2013 from the current owner--the owner represented that the property was properly zoned and its use was in conformance with that zoning. The existing certificate of occupancy, granted in 1996 when the building was being leased out as a performance space, supported that use showing "School/Theater Arts, (Production Classes Workshop)." The Company's reasonable reliance on the theater's long history as a performance space, as well as representations from the former owner and the certificate of occupancy showing theater arts as a use, coupled with the unwavering support from the community, the Advisory Neighborhood Commission ("ANC"), the Dupont Circle Conservancy, and the DC Historic Preservation Review Board, establishes an exceptional situation that warrants variance relief. Furthermore, due to the Andrew Keegan Theatre's long history as a performance hall, the property cannot reasonably be transformed to comply with the zoning regulations without undue hardship and great expense to the Company as owner. Since the Andrew Keegan Theatre does not adversely affect or jeopardize the residential character of the Dupont Circle neighborhood, variance relief would only enhance the public good, and allow the theater to operate in a manner that has brought joy and entertainment to Dupont Circle residents for the past thirty years.

II. <u>ARGUMENT IN SUPPORT OF GRANTING VARIANCE RELIEF</u>

A. Exceptional Condition based on Physical Characteristics

In the course of determining whether or not the use of property presents an extraordinary or exceptional situation that permits variance relief, the BZA has considered the history of use of the property and any implied zoning exceptions that have resulted from such use. <u>See</u> <u>Oakland Condominium</u>, 22 A.3d at 752. In <u>Oakland Condominium</u>, the District of Columbia Court of Appeals upheld the BZA's reasoning that "a zoning history which implicitly approved a use and thereby gave rise to good-faith, detrimental reliance by the property owner help[s] to establish [a] necessary exceptional situation." <u>Id.</u> Additionally, the BZA has found, and the District of Columbia Court of Appeals has upheld, that the extraordinary circumstances need not be limited to physical aspects of the land. <u>See</u> <u>Monaco v. District of Columbia Bd. of Zoning Adjustment</u>, 407 A.2d 1091, 1097 (D.C. 1979) (rejecting petitioner's narrow interpretation of the phrase "other extraordinary or exceptional situation or condition of a specific piece of property" to just physical aspects of the land).

Eight years ago when the Company first entered into a lease, and in 2013, when the Company acquired the Andrew Keegan Theatre, the Company did so under the good faith understanding that the theater would continue to operate as a performance hall. As was the case in <u>Oakland Condominium</u>, the Company had no immediate reason to question the use of the property. <u>See</u> 22 A.3d at 752 (upholding BZA's grant of variance relief when applicants had no immediate reason to question the use of a house which had been openly and continuously used as a 15-unit rooming house for over 30 years). The then owner, Church Street Theater, LLC had a certificate of occupancy issued in 1996, at a time when the property was being used solely as a performance hall. Therefore, Company had no indication that Theater Arts shown on the certificate of occupancy did not encompass use as a theater for performing arts, and reasonably relied on the existing certificate of occupancy and the owner's long term prior use and leases, as well as its own knowledge of the property. There have been no significant changes to, or alterations in the use of the land, and nothing to suggest that the property is no longer equipped to operate as a theater. The Company has detrimentally relied on the implied approval of the use of the property, and is therefore entitled to variance relief.

The uniqueness of the property can arise from a variety of factors, but the extraordinary or exceptional condition must be specific to the property in question. See Gilmartin v. District of Columbia Bd. of Zoning Adjustment, 579 A.2d 1164, 1168 (D.C.1990). For instance, in Washington Canoe Club v. District of Columbia Zoning Com'n, the District of Columbia Court of Appeals upheld the Commission's decision that a variance should be granted for the purpose of building a boathouse because the applicant's new zoning category would make it impossible to build any structure without a relaxation of the zoning requirements. 889 A.2d 995, 1000 (D.C. 2005) (finding that the need for the variance was inherent in the pre-existing condition of the land).

We are not aware of any time when the property has been used for residential purposes, despite the zoning classification. Originally built as a gymnasium for Holton-Arms school, the property has over time been used as a daycare, a school, and most recently and for the last thirty years as a performance venue. The pre-existing characteristics and design of the Andrew Keegan Theatre are specific to those of a performance hall, with the large open space with a stage and audience seating, wiring and a grid for theater lighting and exposed brick walls, a sound booth, and box office. As such, complying with residential zoning requirements would be wholly impossible without substantial renovation and disruption to the community. The entire facility would have to be gutted, renovated, or likely torn down and rebuilt to accommodate any residential use. The Company would also not be in a position to use it as residential, and thereby would be forced to sell the property if it were forced to comply with residential zoning. In fact, in a decision dated January 4, 1978, with regard to the same property in question, the Board of Zoning Adjustment already found that "[t]he subject building could not be readily used for residential purposes." See BZA Application No.12521, pg. 2. Therefore, the unique nature of the property and the Company's good faith, detrimental reliance on the prior use and purpose of the property creates an exceptional circumstance that entitles the Applicant to variance relief.

B. Undue Hardship

Due to the drastic relief inherent in a use variance, a stringent showing of user hardship is required by the BZA. See Gilmartin v. District of Columbia Bd. of Zoning Adjustment, 579 A.2d 1164, 1171 (D.C.1990). An applicant is presented with an undue hardship when complying with the zoning regulations prevents the applicant from reasonably using the property. See Palmer v. District of Columbia Bd. of Zoning Adjustment, 287 A.2d 535, 542 (D.C.1972) ("A use variance cannot be granted unless a situation arises where reasonable use cannot be made of the property in a manner consistent with the Zoning Regulations"). Additionally, the applicant must be unable to reasonably adapt the property to fulfill any zoning-compliant use before a zoning variance may be issued. Id.; see also Bernstein v. District of Columbia Bd. of Zoning Adjustment, 376 A.2d 816, 819 (D.C.1977) ("[I]t must be shown that strict application of the Zoning Regulations would preclude the use of the property for any purpose to which it may reasonably be adapted."). An applicant, however, is not expected to take unduly burdensome steps in adapting the property to fulfill the zoning regulations; there are limitations.

In Oakland Condominium, the District of Columbia Court of Appeals upheld the BZA's conclusion that financial hardship precluded applicants from reasonably adapting four rooms within the property to comply with zoning regulations. 22 A.3d at 754. In fact, it has been the opinion of the District of Columbia Court of Appeals, that at some point, "economic harm becomes sufficient, at least when coupled with a significant limitation on the utility of the structure" to establish that an applicant is unable to adapt the property to comply with zoning regulations. See Gilmartin v. District of Columbia Bd. of Zoning Adjustment, 579 A.2d 1164, 1171 (D.C.1990); see also Oakland Condominium, 22 A.3d at 754.

The building known as the Andrew Keegan Theatre has operated as a performance hall for thirty years. As such, the property is structured and designed in a manner consistent with its use as a theater. It would be wholly impossible for the Company to use the property in a fashion that complies with residential zoning regulations. Furthermore, the Company is not equipped or experienced in operating or maintaining a residential space. Therefore, the likelihood of the Company having successful use of the property as residential is highly unlikely. Additionally, adapting the Andrew Keegan Theatre to comply with zoning regulations would call for significant and costly renovations, particularly in a historic district where additional building requirements would be imposed for a residential building to maintain the historic nature of the neighborhood,. The Company has already been through a demanding review and approval process with the Historic Preservation Department with regard to its planned theater renovations. The planned renovations, which serve to make the facility ADA compliant and provide additional bathrooms and space for the theater, are expected to cost almost $2 million dollars. A complete renovation to any new residential use would be expected to be significantly more costly than that. As we have seen, neither the BZA, nor the District of Columbia Court of Appeals, has required an applicant to completely reconstruct and transform the use of their property, which would be necessary in this instance.

Additionally, comparable affordable theater performance space is unavailable in DC, so the Company would be unable to continue its activities and would likely lose its DC-based audience if forced to move. As a nonprofit organization, the Company does not have resources to purchase space elsewhere. We point out that in previous cases, the BZA has been permitted to apply a more flexible standard for hardship when a nonprofit entity was the applicant, so such a flexible standard would be applicable here. See National Black Child Development Institute, Inc. v District of Columbia Bd. of Zoning Adjustment, 483 A2d 687, 690 (D.C. 1984). Due to the unduly burdensome hardship and economic harm that would be imposed on the Company in order to reconstruct and adapt the property to conform to the current zoning regulations, the BZA is within its power to grant the Company a use variance.

C. Detrimental to Public Good and Impairment of Zoning Plan

In order to grant a use variance, the BZA must find that the variance will not impair the integrity of the zone plan, or substantially harm the public good. See Oakland Condominium, 22 A.3d at 752 and 757. The Andrew Keegan Theatre is located in the R-5-B District, a residential district in Dupont Circle. As is the primary focus in all residential areas, the purpose of the zoning regulations in the DC/R-5-B District are to minimize the development of commercial real estate, restrict traffic, contain noise, and prohibit businesses that may impact the preservation of the neighborhood.

As previously noted, the building has been used a performance space by numerous theaters for thirty years, and by the Company for the last 8, with performances running most weeks. Furthermore, today, the Andrew Keegan Theatre holds the same number of seats and maximum audience as the space did thirty years ago when the theater last came before the BZA (Application No. 12521). As such, and given its continual use as a theater, granting this variance would not increase traffic or noise or provide any additional parking concerns. Many of the people going to the Andrew Keegan Theatre walk or use public transportation, since the Dupont Circle metro station is only about 3 blocks away from the property, and many patrons and performers who drive use the 2 parking garages in the area. The Company has a good working relationship with its neighbors, having addressed any concerns raised directly by the neighbors over the years, and are not aware of any complaints of noise or traffic being filed with the City with regard to its current use.

In a recent matter before the BZA, regarding the application for a use variance from the provisions for theater performances in the DC/R-5-B District for Spooky Theater, the BZA contemplated whether the introduction of the particular commercial use would jeopardize the residential character of the neighborhood. See BZA Application NO. 18471, pg. 7. Of note, this use is located close to the Andrew Keegan Theatre, in the same District, and even cites the continued use of Church Street Theatre. The BZA concluded that not all commercial uses are categorically prohibited in the R-5 zone, and that certain commercial uses are compatible with a residential area. Id. at pg. 8. Specifically, the BZA found that the use of the property in question as a performance space did not impair the integrity of the DC/R-5-B zoning plan. Id. Likewise, the BZA, in the previous application for this property, found the use as a school for the theater arts and a performance space was permissible. See Application No. 12521.

Similarly, the Andrew Keegan Theatre's continued use of the property as a performance space is not contrary to the purpose of the DC/R-5-B zoning plan. When looking specifically at whether or not the use of the property as a theater would jeopardize the residential character of the neighborhood, it is clear that after thirty years of existence, the Andrew Keegan Theatre is an integral part of the residential area. Furthermore, the continued use of the property as a performance space is continually supported by local neighborhood residents, with almost 20 percent of subscribers coming from the immediate neighborhood. There is also support of the use from the ANC for the use and the renovations, per discussions between Board Chair Virginia Riehl and ANC members. Section 13(d) of the Advisory Neighborhood Commissions Act of 1975 (D.C. Law 1-21; D.C. Official Code § 1-309.10 (d)(3)(B)) requires that the Board's written orders give "great weight" to the issues and concerns raised in the recommendations of the affected ANC. As such, the BZA is obligated to heavily consider ANC's finding that a use variance from the provisions for theater performances in the DC/R-5-B District will not impair or be inconsistent with the general intent and purpose or the integrity of the zoning plan, or substantially harm the public good.

In addition, many restaurants and local business also benefit from traffic to the theater from the neighborhood patrons and performers alike, who often grab dinner or run errands in the neighborhood before or after performances. Furthermore, permitting this use would allow the Company to complete its renovations to better serve patrons and residents with disabilities that otherwise might not be able to attend quality, affordable theater. The existence of this use as a theatre performance space indeed benefits the character of this neighborhood.

III. CONCLUSION

For the reasons stated above, the Andrew Keegan Theatre should be granted a use variance to allow zoning relief from the use provisions for theater performances in the DC/R-5-B

District because the property inherently presents an exceptional or extraordinary condition based on its physical characteristics, the applicant would encounter undue hardship if the zoning regulations were strictly applied, and the variance will not result in substantial detriment to the public good or intent of the zone plan, regulations and map.