

June 4 2016

VIA EMAIL

Board of Zoning Adjustment
441 4th St N.W., Suite 200S
Washington DC 20001

RE: DENIAL OF EXTENSION REQUEST Order No. 18723
2105 10th NW (Square 358)

Dear Members of the Board:

I am writing to you today to request that you deny the extension of the Board of Zoning Adjustments (“BZA”) Order Number 18723. As I will lay out, the 2101 Morning Bright LLC (“The Applicant”) has failed to meet requirements to show good cause for an extension under 11 DMCR 3130.6.

I moved into the area in 2013, but did not participate as a party in the original hearing. I am writing to you in the context of neighbor of the property who walks by the space every day, but does not live within the 200 foot limit. As the BZA is probably aware, this area has seen substantial infill development. The area is a mish-mash of zoning and historic districts, and while we hope to knit together a cohesive neighborhood, there have been many speed bumps along the way. For example, the infamous V st “Finger” pop-up is next to the this site. Many of us who live here are concerned about the zoning impact of this project, as substantial changes are being made.

The Applicant wants to build a 5.0 FAR building with the variances that were granted, but we believe that a new use is being created and that under a new matter of right a building of 3.5 FAR should be built. If the new owners want to build a larger building, they are free to once again go through the zoning process, but the variances that were granted in 2014 have expired and should not be renewed.

1. Background

I am sure the Board is now adequately briefed on the background of the case. In short, the Applicant purchased this property in 2003. It has laid vacant since. BZA Order Number 18723, which became effective on June 2, 2014, granted three variances and one special exception to allow the construction of a mixed-use residential building with ground floor retail at 2105 10th Street, N.W. (Square 358, Lots 5, 6 and 802). The area is

zoned C-2-B with an Arts overlay.

The three variances were:

- A. lot occupancy (§ 772)
- B. rear yard (§ 774)
- C. and off-street parking location (§ 2116.12)

and the special exception was for

- D. rooftop structure requirements under § 770.6(b)

In January of this year the Applicant began to negotiate with the Mayor to lease the land to build a replacement shelter for the Spring Road Family Emergency Shelter. They signed a Letter of Intent (“LOI”) that was based on a groundlease of \$770,000 a year, and the city would construct a building based on the Applicant’s plan. The DC Council, after hearing significant public pushback on the terms of the groundlease, passed legislation a few weeks ago that made it clear the city was only authorized to buy at market or acquire the land through eminent domain. The DC Council, however, at the last minute did add an amendment that would allow the city to negotiate to buy both the land and the building, which is why this extension hearing is so important.

While the politics of the issue are not germane to the issues before the BZA, they are important to understanding the opposition to this extension. In short, both the Applicant and the City have not been acting in a spirit of transparency. This has created a great deal of anger on the part of neighbors and other local residents. I can sum up these issues as:

- 1) The Mayor announcing the sites with almost no public notice and then scheduling public hearings on the locations a few days later.
- 2) The Mayor refusing to negotiate with the community on other potential siting locations.
- 3) The secrecy behind the letter of intent and the price of the groundleases (over \$35 million in rent over the term of the contract).
- 4) Scheduling the terms of the contract so the Applicant would not have to pay real estate taxes over the term of the contract.
- 5) Putting in over Memorial Day weekend an amendment to allow both the purchase of the land and the building

Again, these are not zoning issues and I understand the BZA will not consider them. I do want to emphasize that this anger over being misled is why we are all asking the BZA to enforce the rules properly and deny the extension.

2. Analysis

You have set out a three part test on extensions under DCMR § 3130.6

(a) "The extension request is served on all parties to the application by the applicant and all parties are allowed 30 days to respond;"

(b) "There is no substantial change in any of the material facts upon which the Board based its original approval of the application that would undermine the Board's justification for approving the original application;"

(c) "The applicant demonstrates that there is good cause for such extension with substantial evidence of one or more of the following criteria:

(1) An inability to obtain sufficient project financing due to economic and market conditions beyond the applicant's reasonable control;

(2) An inability to secure all required governmental agency approvals by the expiration date of the Board's order because of delays that are beyond the applicant's reasonable control;

(3) The existence of pending litigation or such other condition, circumstance, or factor beyond the applicant's reasonable control."

I would argue that under this test the Applicant fails to meet the standard and the extension should be denied.

A. The Applicant failed to serve the parties, and the circumstances suggest a better approach would be open a new case and allow new parties.

In the case of the ANC, the did not receive the original notice from Holland and Knight. The ANC needed to discover this on its own. This goes back to the bad faith that the Applicant has demonstrated since the beginning of trying to hide and conceal what is happening. I know the ANC appreciate the BZA efforts to reschedule this matter, but as a matter of law the extension should be throw out. Under 3111.4, the proof of service rests on the party served or on the written statement of the person making the service. In both cases Applicant failed to show evidence of service to the ANC.

On the matter of Dave Stripe, who was a party to the original hearing, but implicitly

disqualified by not taking part in that hearing. We are not sure the BZA was correct is not taking his testimony. In particular, the BZA relied on another party in that hearing — Ms. Nikki Sorg, former BZA member — to make sure Mr. Stripe was not in the building. From the May 20, 2014 hearing transcript:

“COMMISSIONER MAY: Mr.Chairman,I just had a question for you, and you may know more about this than I do. But we had two requests for party status, and one was clearly withdrawn. The other one is simply not present?

CHAIRMAN JORDAN: That’s we actually started this hearing, so that would be gone. They have a duty and--

COMMISSIONER MAY: No. I understand. I just didn’t—

CHAIRMAN JORDAN: Yes.

COMMISSIONER MAY: I was confused by that.

CHAIRMAN JORDAN: And I called it like two or three times. And it might have been from your discussions with them earlier. We don’t know. Because they were here; is that correct? And they left; right? is that right?

MS.NIKKI SORG: Mr. Chairman, I did not see them here today.

CHAIRMAN JORDAN: Okay.”

This is improperly relying on a party’s word that another party was not in the building. This is a clear conflict of interest, even more so given the status of Ms. Sorg as a former BZA member.

In the alternative, we know that Mr. Strige should have been present. That said, there is a difference between disregarding his testimony and service of process for the purposes of an extension. The Applicant should have served Mr. Strige as part of the extension process, and their failure to do so should mean the extension is not granted.

Finally, on service issues, there was another party to the hearing who withdrew before the 2014 hearing. Urbaniak LLC agreed to withdraw based on an agreement that the western wall be deeded to Urbaniak, and that the condo declarations be amended with disclosures on the at-risk nature of eastern windows if 923 V st is redeveloped in the future. We have no evidence that the quit claim was made, and given the failure to develop a condo there will be no declarations. Urbaniak LLC should have also been notified of the extension if the conditions for their withdrawal have not been made.

The service issue is a technical one, although the Applicant's lawyer is surely aware of the technical issues. But again, the change in the use of the structure, and the proposed changes, suggest that a more equitable outcome would be allow new parties to comment on the new proposal. Blocking out new parties does serve the interest in making sure the community is represented and their voices heard.

B. The reasons the variances were granted in the first place no longer apply to the new proposed use of the building.

The one thing we can say for certain on this project is that it is flux. At this point, none of us know what is going to be built.

The Applicant has put several facts in letters and affidavits in support of this extension which may have changed or can be argued in a different light. The crux of this issue is cited by her attorney as "The Applicant is not proposing to change the exterior of the building approved by the Board pursuant to Order No. 18723." It is not clear if the Applicant is in charge of this process.

In the LOI that was signed on February 4, the Applicant is listed as the Architect of Record. The LOI, of course is not a legally binding document. In response to the DC Council's questions, on April 11 the Mayor admitted that they estimated the architectural fees on the site would be \$907,000 and that "It is the policy of the Department of General Services to procure Architectural and Design Services through a formal, competitive process by DGS Contract and Procurement publicly announcing on the DGS website of all requirements for architect-engineer services and to negotiate contracts for architect-engineer services on the basis of demonstrated competence and qualification for the type of services required, and at fair and reasonable prices. The architectural and design services have not yet been selected for this site. A design build RFP will be released in the near future."

In fact the City had already retained Cunningham Quill to do a test-fit of the building. In initial public sketches, changes to the building were already being made. The mixed use space was being turned into program offices. The residential units were being turned into two to three bedroom units. This may or may entail moving balconies and other exterior elements. The walls of the historic church were being removed to create larger bedrooms. The roof area was completely reconfigured. The rooftop patio was being turned into a play area, and being moved from the 10th street side to the back of the property. The green roof was also moved and reconfigured.

Now, with the council's most recent action we under the LOI is a dead document. That said, we cannot take the Applicant at her word that the building will remain the same because she may not in charge of the process.

And this gets the core issue on this prong of the test, which is the Applicants and the city want a building that is not zoned correctly.

Under the Comprehensive Plan Future Land Use Map, this block is marked as Medium Density Commercial, Medium Density Residential. Reaffirming the mixed use nature this section of the block is zoned C-2-B with an Arts overlay.

The building as approved would have included both ground floor retail to enliven the area, and residential. The new proposed use would include office and program space, which does not aid the the larger community, and emergency family housing. That use is outside what both the zoning and the future land use map are proposing. Again what the city envisions for this site is emergency family shelter. The units would be occupied, as according the HOMEWARDS DC plan, for less than 60 days by residents as they wait for more permanent housing. This is not apartment housing as defined under regulation. As families in the emergency shelter system, as occupants they do not have “exclusive use and control” of the units — anymore than residents of a motel have exclusive control of the units. No lease or other legally binding contract awarding tenancy will be given.

In addition, they changing what would have been mixed use retail into program space. That does not enliven the area. They are also using the bonus FAR awarded for IZ units for short-term housing. Under the current zoning rules, the building should be a 3.5 FAR rather than a 5.0 FAR based on lack of mixed use and IZ bonus.

If the Applicant had starting building when the approvals were made in 2014, it is likely she would have an almost completed building to sell the city. She did not, and the particular variances she was granted are also no longer applicable to the new use of the building.

(1) lot occupancy (§ 772)

The matter of right on lot coverage is zoned for 80 percent, and the Applicant received a variance for 90% lot coverage. The historic church occupies 18% of the lot and we recognize that is, in the applicant’s words, a “detriment” to future building. Presumably that is why the applicant also tore down the neighboring Koons building.

The Applicant noted that the hardship for her was keeping the LOT occupancy under 80% while including the historic church and the DESIRED number of units. Since the proposal is to convert the unit into a homeless shelter, the new owner does not need to worry about the number of units. They are being reduced to 29 units from 45. The size of the units are increasing to two and three bedrooms units but that gives the flexibility to still place 29 units and keep the lot coverage under 80%.

(2) rear yard (§ 774)

The zoning also requires a 15 foot setback under 774.1. The historic church would occupy the entire section of the rear yard. The Applicant admits that the new portion of project will be set back 17 feet from the alley at the ground floor and 12 feet on the second floor and above, thus the project will encroach only 3 feet into the required rear yard on this portion of the property.

Now again the “test-fit” by the new architects has changed that. They have moved the ground floor setback as the same (12.8 feet). See attachment 1 “Ground Floor”. This is a large material change.

Again the reason for the setback that she gave was the need to have twelve one bedrooms on the 2nd, 3rd and 4th floors. Again under the new proposed use those will not be one bedrooms, but rather two and three bedrooms units. So not only is this variance no longer needed, and the reasons given no longer applicable, it appears as if the plan by the city is to ignore this requirement.

The rear yard would allow both access for trash removal and for access into the alley. The trash requirements for a building with up to 100 children (in two to three bedroom units) is going to be substantially larger than one with single adults or couples. This is even more the case as it being used as an emergency shelter, with families moving in and out constantly. At least in my building, when people move out they create a great deal of extra rubbish. This will be a significant burden on the neighbors, and the extra room for trash removal and/or storage is more than needed.

I’d also note the condo building to the north has windows that would look out on both the historic church (no setback), but contra to the original application windows that look out on the new building as well. They would be impacted by a change in the rear yard for both light and space.

(3) and off-street parking location (§ 2116.12)

The applicant also received a variance for the parking spaces. Based on her design, the parking level raises above the grade by an average of 3’ 2”. The zoning code required that the parking be at least 20 feet from all the lot lines.

Again, the need for that many spaces was determined to be based on residential use and parking minimums. Under the new proposed use, there is no need for that much parking, and the variance is not needed. The City picked the location expressly because it was one block from a metro station, and both workers and the new homeless residents can use public transportation rather than parking. Those areas may be better used in a homeless

shelter as storage or office space rather than parking.

(4) Rooftop Structure (770.6).

The applicant also received a special exception for a rooftop structure. Under the code, the stairway penthouse shall be set back from all exterior walls a distance at least equal to its height. Here, they are proposing a roof structure that is 14 feet high with a setback of 9.6 feet.

Because of change in the rear lot, the edge of the roof is already closer to the condo to the north by 3 feet. In the “test fit”, the city’s new architect also moved a roof terrace (and presumably the entrance of the roof) from the south of the building to the north —again facing the condo building next door. The location of the green roof as also shifted. The size of the rooftop structure is also different. If I read those plans correctly they have moved the roof to a 8’ 5” setback rather than a 9’ 6” one. See attachment 2 “Roof structure.”

Presumably, a play area for children on a roof is going to need sort of shading and more importantly a fence for safety, which will also effect the look of the rooftop structure from the surrounding buildings and the street.

Again, we understand that it unclear who will be designing this building, but that again suggests the need for a clean slate and that the extension should not be granted.

In sum, under the second part of the test in granting extensions, the Applicant has failed to meet the burden of proof. The fundamental nature of the building is being changed from mixed use to institutional housing. It is unclear who will be making the changes, and the reasons needed for the variances no longer apply to the new use.

C. Proposing to sell a the land to the city is within the control of the Applicant and not grounds for granting an extension.

The final part of the test is whether there are reasons outside the Applicant’s control for granting an extension. The regulations lay out three parts:

- (c) "The applicant demonstrates that there is good cause for such extension with substantial evidence of one or more of the following criteria:
 - (1) An inability to obtain sufficient project financing due to economic and market conditions beyond the applicant's reasonable control;
 - (2) An inability to secure all required governmental agency approvals by the expiration date of the Board's order because of delays that are beyond the applicant's reasonable control;
 - (3) The existence of pending litigation or such other condition, circumstance, or factor

beyond the applicant's reasonable control."

I want to be short here on addressing this test. It is our belief that the Applicant has failed to meet any part of this test. The larger point here is the Applicant does not get to toll the extensions by attempting (and failing) to sign a contract with the city. Since October of last year, they have had all the permits required to begin the move forward. Their failure to do so — and the contract with the city the DC Council rejected — is a result of their own actions and within their control.

On the first prong of the test, they have not put forth any evidence that they had the financing or arrangements to build since October. No contractors have been hired, no banks have been asked for money, and their only actions is to sell the property.

On the second part of the test, there is no evidence that they had an inability to secure government approvals for construction. What stopped them was their desire to sell the land to the city. Yes, this has been thwarted by the actions of the city council, but again that was their choice. The LOI was not a legally binding document and they could have gone ahead, but rather they hoped for a larger payoff (\$35M lease over 30 years) rather than taking the risks of construction.

On the third part of the test, they do not cite any pending litigation. In fact in their letter from Holland and Knight, they really only address the first part (project financing). I might remind the board that Applicant has a history, dating back to 2003, to be able to secure financing for this project. And you have to read all three tests with an emphasis on the "Applicant's reasonable control". The purpose here is to allow owners who through no fault of their own are unable to build within a two year period. That is not the case here, as the Applicant's own actions demonstrate they are more interested in selling this property than in the building.

3) Conclusion

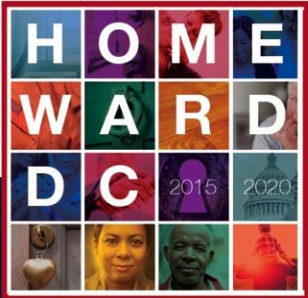
In conclusion, the Applicant bought this property in 2003. My oldest nephew was born that year. He is almost ready for high school. In 2011, when the Applicant was already mired in developmental hell, some software developer invented a game called "Minecraft" which became an obsession for young boys my nephew's age. I don't know if the board is familiar with the game, which actually a great deal like zoning and urban development. Children spend hours placing blocks together and create fantastic buildings, cities and worlds. In 2014, when the Applicant received these variances, Microsoft bought Minecraft for \$2.5 Billion.

But what even children love and appreciate about Minecraft is there is a set of rules. Some boxes they put down only work with other boxes; to create a city you need zoning and rules. And that is what the Applicant is trying to do. They want to put down a set of boxes under one set of rules, while what they really want to sell the city is another use. We all have seen this behavior before as landowners refuse to build as they hope the land

will become more valuable in the future. Yes, it is hard to find financing for mixed use projects. But others in the area have done so, and they have had 13 years. Working with the city, they are changing both the use and exterior of the blocks they were given, and after all this time, the BZA needs to call this out and not grant this extension.

With Regards,

Krishna M. Kumar



A FRESH START TO ENDING FAMILY HOMELESSNESS

Ground Floor Plan

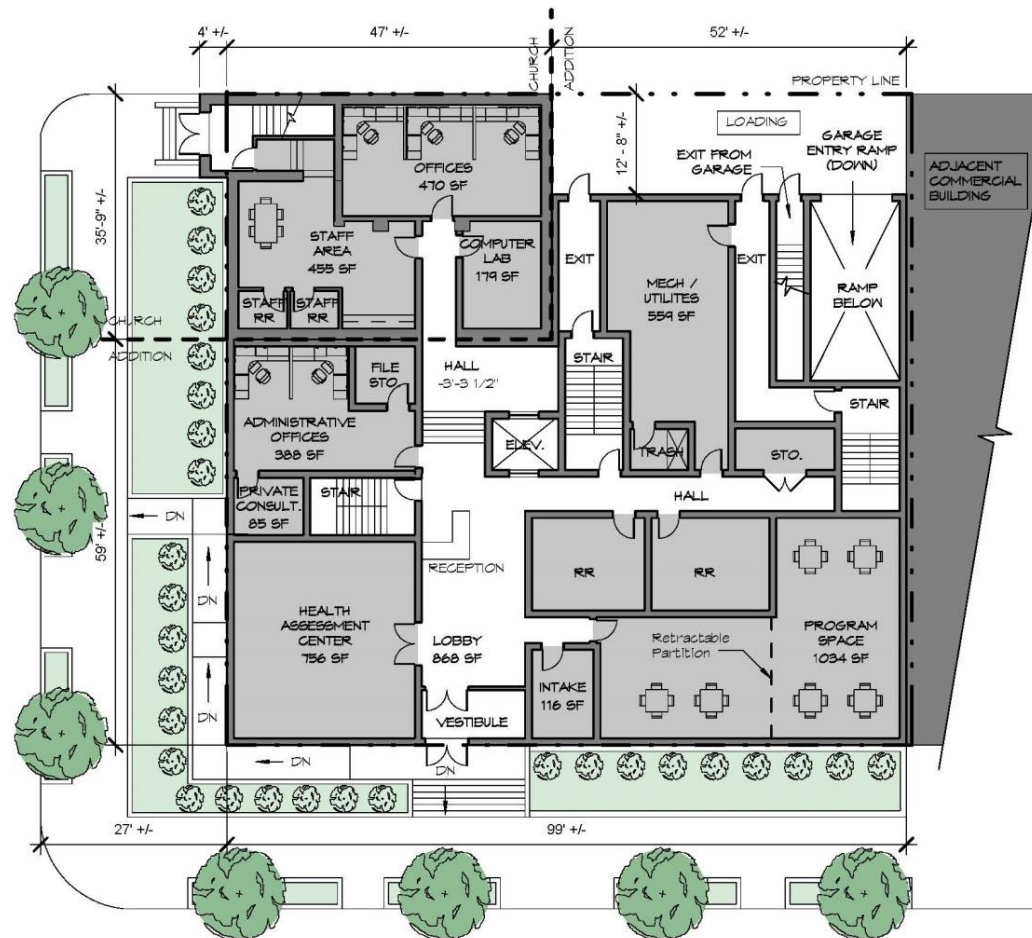
Program Requirements

Administrative

- Grand Lobby
- Office (4 to 5)
- Intake
- Private Consult

Common Areas

- Program Space
- Computer Lab
- Health Assessment Center



Key

- Administrative / Bldg. Services
- Circulation / Lobby

SCALE: 1" = 16'-0"

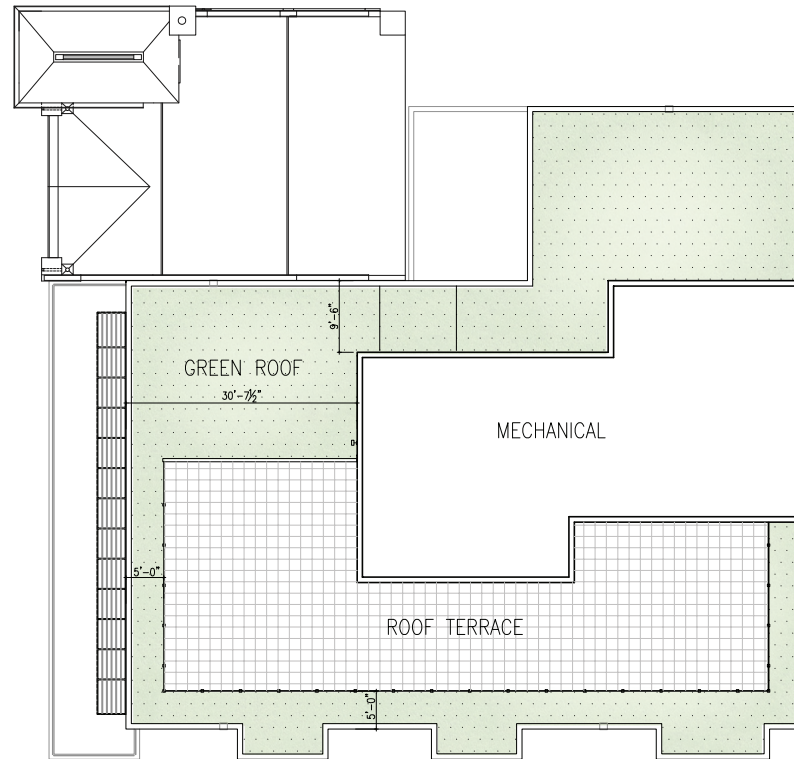


LOGIC BUILDING

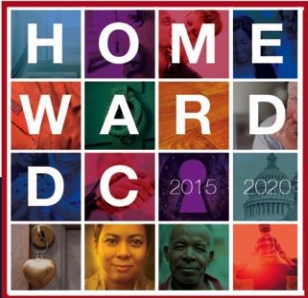
WASHINGTON, D.C.

ROOF PLAN

JUNE 2014



SCALE: 1/16" = 1'-0"

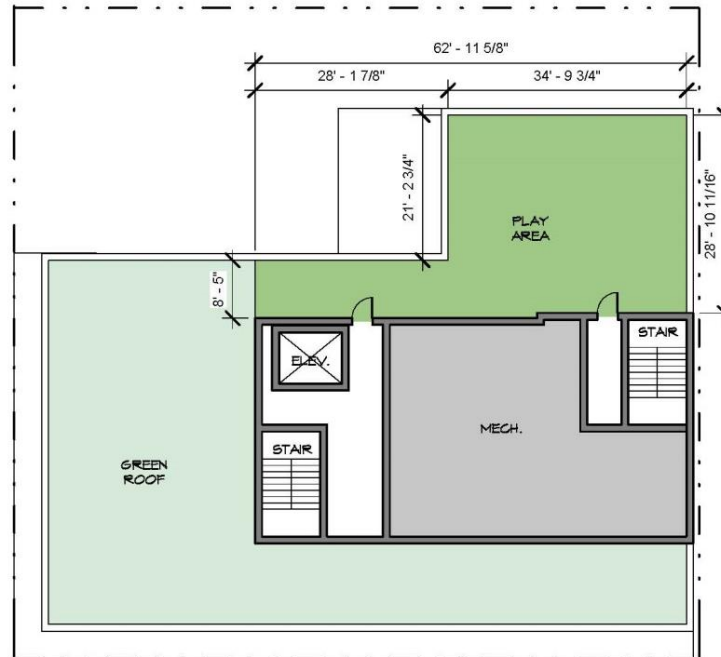


A FRESH START TO ENDING FAMILY HOMELESSNESS

Roof Plan

Per Floor Requirements

- Mechanical Enclosure
- Play Area
- Green roof



Key

- Administrative / Bldg. Services
- Circulation / Lobby
- Green Space
- Play Area

SCALE: 1" = 16'-0"

