COMMENTS FROM PARTY IN OPPOSITION TO BZA CASE #18905

GANG OF THREE DEVELOPMENT IN BLAGDEN ALLEY

MARCH 10, 2015

1.0 Overview

1.1

The Applicant is seeking a variance to increase the FAR on their current project from 1.47 to 2.07. This is a 41% increase over the approved FAR and a 38% increase above the allowable in the C-2-A zone. This variance is not supported because it does not meet the burden of proof required by the three-part test.

1.2

The Applicant's current project was reviewed and approved as matter of right development conforming to the zoning regulations for the C-2-A zone with a FAR of 1.47, where the maximum allowable commercial FAR is 1.5. Allowing a variance to take the FAR from 1.47 to 2.07 essentially allows high density C-3-A commercial development in a low density C-2-A zone. (C-2-A and C-2-B zones have a maximum allowable commercial FAR of 1.5, while the C-2-C is 2.0 and the C-3-A is 2.5.)

1.3

In a meeting with neighborhood residents on February 19, 2015, the Applicant stated that the currently approved, and nearly complete, project would lease to one restaurant, one speakeasy-type bar, and one gym. These proposed commercial tenants have indicated they do not want the high ceilings of the original plans. The Applicant stated three options were available to them:

a. Keep the current mass of the building and create a faux ceiling on the interior second level at the height desired by incoming tenants, with no variance needed.
b. Change the design of the currently in-progress project by lowering the second floor ceilings and building a second/third floor addition to add more floor space. This would be used for residential use, would be matter-of-right expansion and require no variance.
c. Change the design of the currently in-progress project by lowering the second floor ceilings and building a second/third floor addition to add more floor space to be used for for retail (office space in this case), which would require an area variance.

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At that meeting, the Applicant indicated all three options were viable. The Applicant is pursuing the third option, which requires a variance, and seeks to add more retail space that would result in increasing the allowable FAR significantly beyond the limit of C-2-A.

1.4

The DC Court of Appeals in *Palmer v. D.C. Bd. of Zoning Adj., 287 A.2d 535, 541 (D.C. 1972)* is clear: *"The nature and extent of the burden which will warrant an area variance is best left to the facts and circumstances of each particular case.* ***But it is certain*** *that a variance cannot be granted where property conforming to the regulations will produce a reasonable income, but, if put to another use, will yield a greater return."* Granting a variance in this case would be, in essence, allowing a conforming property producing a reasonable income to be put to another use in order to yield a greater return.

Granting the variance in this case would set a precedent to other developers who would be encouraged to obtain approval for compliant construction, then midway into construction, change plans and claim burden and practical difficulty created by already completed construction. This practice essentially nullifies the zone plan and should not be allowed.

2.0 VARIANCE RELIEF

2.1

The Applicant must demonstrate the variance meets the three-part test:

a. The Property is unique because of some physical aspect or "other extraordinary or exceptional situation or condition" inherent in the property.
b. The strict application of the Zoning Regulations will cause undue hardship or practical difficulty to the Applicant.
c. Granting the variance will do no harm to the public good or substantially impair the intent, purpose or integrity of the Zone Plan.

The Applicant's approach to the project creates essentially a two phased project: by completing Phase 1 they are able to create an argument for uniqueness and practical difficulty used to justify a variance for Phase 2.

The Applicant has not demonstrated the variance proposal meets the requirements of the three-part test and, therefore, it should be denied.

2.2 Part 1: Exceptional Situation or Condition

2.2.1

In their pre-hearing statement (Exhibit 34) the Applicant sites *Clerics of St. Viator v. D.C. Bd. of Zoning (1974):* "*the exceptional situation or condition standard goes to the property, not just the land*." However, the applicant should not be allowed to claim an uniqueness of a property if it is completely self-created by applicant's own **very recent** actions of designing and building the property with full knowledge of current zoning regulations. While the applicant cites *Clerics v*ery narrowly to only show that uniqueness can be attributed to the property as well as the land, they do not convey the overall facts of the case.

In Clerics the original buildings were constructed and then operated "for a number of years…" during which an event outside of the owner's control took place, namely "an extraordinary drop in enrollment of seminarians" which rendered operating these building non-viable. In this case, the Applicant started improving a property for a very viable and profitable project. Nothing outside the applicant's control has taken place, the prospective tenants merely asked to lower the ceiling. The fact that there are prospective tenants prior to project completion further shows that the project in its current form is attractive to clients and viable, yet the applicant points to these improvements to claim uniqueness.

In Clerics, it should also be noted that the Board rejected the request because they said the Clerics had created their problem. The Court of Appeals didn't rule that a variance couldn't be rejected if the problem was self-imposed as a general rule. They only ruled that the variance could not be rejected because in the case at hand, the Clerics' problem was not self-imposed.

2.3 Applicant's Argument

2.3.1

Exceptional Situation or Condition: The Applicant cites *Gilmartin v. D.C. Bd. of Zoning (1990).* In *Gilmartin* the Court ruled it is not necessary that an exceptional situation or condition arise from a single situation or condition on the property. Rather, it may arise from a "confluence of factors." However, *Gilmartin v. D.C. Bd. of Zoning* also states *"the critical point is that the extraordinary or exceptional condition must affect a* ***single property****"* i.e. as Palmer v. Bd. of Zoning Adjustment states *"To support a variance it is fundamental that the difficulties or hardships [be] due to unique*

circumstances peculiar to the applicant's property and not to the general conditions in the neighborhood."

The Applicant makes the following statements in support of the existence of an exceptional situation or condition (pre-hearing statement, Ex. 34, page 6):

2.3.2 ***"The Property is improved with three row structures that are contributing structures within the Shaw and Blagden Alley/Naylor Court Historic Districts."***

Many of the buildings in the Shaw and Blagden Alley/Naylor Court Historic Districts are contributing structures so there is nothing unique in the context of their location in an historic district.

2.3.3 ***"The individual lots have been subdivided into a single record lot."***

Merging lots into a single record lot is very common. For example, nearby SB Urban aggregated a number of small lots to form a more developable lot. Furthermore, merging three lots into one allows the applicant to have a wider lot, which makes compliant development even easier. It would be illogical if positive characteristics of a property were allowed to be counted towards the confluence of factors that create uniqueness.

2.3.4 ***"A rear addition and other renovations to connect the buildings internally have been approved for the Property and are currently under construction."***

a. The rear addition is not unique. Even if hypothetically it were, it is a positive factor for the requested variance because it's precisely because of the addition that the Applicant can add more floor space on top.
b. Although connecting buildings internally may be unique, this is not a negative factor. If anything it would be a positive factor because internal walls between could be broken down to use the space more efficiently.
c. Finally, both points are self-imposed. Rear addition and connecting buildings work for the current approved, viable, project.

2.3.5 ***"While additional density can be achieved through the residential use of the Property, the Property is on a section of 9th Street – mid-block between M and N Streets – where there are no other residential uses in the existing structures. All of the existing structures along this section of 9th Street are occupied with office or commercial uses, or are vacant but planned for non-residential uses. The building immediately to the north is a commercial office; the next building to the north is vacant; the next building is the WagTime dog day care center; and the building on the other side of the Long View Art Gallery is vacant, but expected to have ground floor retail."***

The Applicant does not state what is unique here and appears to argue that the lack of other existing residential development on one nearby section of 9th Street between M and N Streets creates an exceptional situation or condition.

The fact is that residential development is plentiful in the area. In fact, Square 368, the location of the property, is primarily zoned residential R-4, except for the side facing 9th Street and the interior part of historic Blagden Alley, in the center of the Square.

The Applicant's property is immediately surrounded on two sides by existing and planned residential development. The following residential development is located within a 200-foot boundary of the project, and includes 214 apartments and 16 row houses.

- The Colonel, a new 70-unit apartment building at 1250 9th Street, only a few doors away from the Property at 1226 9th Street. It has parking for 38 cars.
- Ten existing historic row houses are located from 901 to 927 M Street. Many have been converted to multi-family use.
- A new 15 unit apartment building at 926 N Street.
- Six existing historic row house from 914 to 926 N Street. Many have been converted to multi-family use.
- A planned 4 unit condo building at 925 M Street.
- A planned apartment complex with 125 units for the abutting property at 90 and 91 Blagden Alley, formerly 1212 9th Street and 917 M Street. This project is also seeking a variance for 0 parking.

Furthermore, zoning of the area allow mixed commercial and residential, it's not relevant what is north or south of the Applicant's plot and uniqueness cannot be created by the distribution of conforming use in the middle of a single block.

2.3.6

The Applicant states there is a **confluence of factors,** yet does not clearly state exactly what those factors are. The Applicant also does not explain why any "unique" factor creates any difficulty.

In this case, there is no confluence of factors that uniquely affects the land or the property. The Property is rectangular, accessible on two sides and contains an historic structure. This is a common configuration in the area, and is desirable as well, hence the Applicant chose it for matter-of-right development. The property is, in fact, not exceptional at all in the C-2-A zoned historic area where it is located.

2.4 Part 2: The Strict Application of the Zoning Regulations Will Cause Undue Hardship or Practical Difficulty to the Applicant.

2.4.1

The applicant is asking for an area variance and thus must prove undue hardship or practical difficulty. From *Gilmartin vs. Board of Zoning Adjustment* we are told that case law has been further refined since *Palmer* (cited by the Applicant) and *"**In order to prove that an applicant suffers from 'practical difficulties' two elements must be proven:** The applicant must demonstrate that (1) 'compliance with the area restriction would be unnecessarily burdensome...', A.L.W. Inc. v. District of Columbia Board of Zoning Adjustment, D.C. App., 338 A.2d 428, 431 (1975); and (2) the practical difficulties are unique to the particular property. Barbour v. District of Columbia Bd. of Zoning Adjustment, 358 A.2d 326, 327 (D.C.1976)."*

By the first requirement alone, it's clear that the Applicant has not proved practical difficulty because they have an approved, viable, conforming development. They cannot argue they have been "unnecessarily burdened" by compliance with the area restriction for retail.

In addition from *Taylor v. DC BD. of Zoning Adjustment*, the Court ruled that *"It is clear that..a self-imposed hardship..is entitled to only slight weight if any"*.

2.4.2

In section B. of the pre-hearing statement (Ex. 34), the Applicant lists practical difficulties on two floors of the building created by the "building core". This relates to increasing the FAR by adding retail space. The Applicant states:

2.4.3 "The bulk of the second floor would be divided by the building stair, and the remaining portion is a narrow corridor occupied primarily by elements of the building core. These features make for a very inefficient floor plate that would be unusable and unmarketable to most office or commercial tenants."

a. If it is a practical difficulty, it is not unique for a building designed for retail to have a building core or stairs. Nor is it unique that the stairs and the core are located centrally in the building.
b. The location of the building stair and the location of the building core that create the inefficiency are both self-created. If the stairs are moved to the south side of the building, the inefficiency would be removed. This would have been done in the original plans if the Applicant had foreseen office space on the 2nd floor.
c. Inefficiency, by itself, is not a factor that can be considered when evaluating a request for a variance since there is nothing in the relevant statute that mentions inefficiency. If the applicant is suggesting that inefficiency ultimately creates a practical difficulty, this claim has not been quantified or proven in any way and thus must be ignored.

2.4.4 ***"The existing layout for the third floor is most problematic because the third floor is utilized almost completely by elements of the building core, making the space nearly unusable altogether."***

a. Most of the increase in FAR requested by the Applicant comes from increasing floor area of the third floor (page 5 & 6 of approved floor plans). Even if the elements of the building core were removed completely, the space would still be unusable because it is small, which is not unique. Because one part of a building is small or not useable, an argument cannot be made to increase the size if the rest of the building can be viably used (as is the case here) in a conforming way.
b. Even if it could be argued that the "elements of the building core" are making the space unusable, this is because it was originally designed that way. The situation is self-created by the original design. If the Applicant had originally planned to have additional floor space for retail on the third floor, they are experienced enough to have avoided this problem. Practical difficulty, if any, is self-created.

2.4.5

The Applicant lists the "challenges" of providing residential versus office space if the FAR is increased. It's important to note here that the choice for the Applicant is not

residential vs. office. It is residential vs. office vs. status quo. And so, the Applicant can still be compliant with the zone plans area restrictions without providing residential at all.

In their pre-hearing report, Exhibit 34, the Applicant makes the following statements:

In Section B. Access:

2.4.6 ***"If residential units were constructed on the Property, a second elevator would need to be provided off of 9th Street as well as a handicap lift to provide accessibility up from the sidewalk to the first floor residential lobby. Installing two elevators in the project would be grossly inefficient because of the relatively small and elongated building footprint."***

a. The relatively small and elongated building footprint of the subdivided lots is not unique and certainly not for the area. Immediately south, abutting the Applicant's lot, SB Urban has a lot that has the almost identical width and length as the Applicant's. These are subdivided lots that SB Urban is using for residential on the upper floors and retail on the ground floor. SBUrban also has an elevator.
b. The need for a handicapped lift "to provide accessibility up from the sidewalk to the first floor residential lobby" is not unique. Even if it were, the Applicant has not explained the practical difficulty of providing it.
c. Having two elevators is itself not inefficient, it may be required by code (Applicant must furnish proof of this) but it's clear you can place two elevators next to each other efficiently. What may be inefficient is locating them in two different areas of the building. However, this is a problem self-created by the Applicant because their original approved, matter-of-right plan did not envision residential, and so they located the building core in the center of the plot for easy access by all parts of the building.
d. "Gross inefficiency" must be quantified. In addition, inefficiency should not be a factor considered in proving or disproving practical difficulty.

2.4.7 ***"The existing stairwell on 9th Street will be utilized by the office and commercial tenants of the project, but is not suitable for including residents of the project and their guests."***

a. A stairwell used by both retail and residential tenants is not unique.
b. How "suitable" it is to use this staircase for two different types of tenants does not equate to practical difficulty.
c. Lastly, it seems plainly false that the staircase cannot be used by potential residents of the project. The applicant fails to explain what they mean by this.

In Section B. Building Code, Core Factor and Pluming Chases:

2.4.8 ***"A residential layout on the third floor of the building would be grossly inefficient because it requires two elevators in a relatively small elongated footprint."***

a. Inefficiency should not be a factor considered in proving or disproving practical difficulty.
b. If the Applicant had planned for residential from the beginning, they could have created one core with two elevators next to each other. Again, the practical difficulty is self-created. The Applicant furnishes no proof that "relatively small elongated footprint" could not have two elevators in an efficient configuration.
c. The "relatively small elongated footprint" is not unique for the neighborhood and so there can be no unique hardship created by it.

2.4.9 "Typically, a core factor of 85-90 percent can be achieved with an efficient design; however retrofitting residential units into this retail-oriented footprint results in an inefficient 67 percent core factor."

a. The need to retrofit is completely self-created. It's not reasonable to believe that an experienced developer cannot efficiently put two elevators in this building had it been planned to do so from the beginning.
b. The Applicant should explain what the current core factor is and how it would become 67%.
c. Again, inefficiency should not be a factor considered in proving or disproving practical difficulty.

In Section B. Leasing, Amenities and Parking:

2.4.10 "Given the limited space available for residential use, a building design that incorporates residential units would forego amenities commonly available in today's residential market, thus reducing the marketability of the units."

a. "Limited space" is not quantified and is not unique.
b. "Amenities commonly available" are not explained. Is it gym? Many buildings don't have a gym. Lack of any amenity is practical difficulty for potential tenants/owners not the Applicant.
c. Applicant does not quantify how much "marketability is reduced".

2.4.11 "Additionally, trash would have to be walked down to the ground floor of the building because the current trash room is not designed to accommodate a residential trash chute."

a. This is a practical difficulty for tenants not the Applicant.
b. Inability to include a trash chute is not unique.

2.4.12 "Three residential parking spaces would be required in addition to the commercial parking, but cannot be provided, as discussed below."

a. The number of parking spaces required for commercial vs. residential+commercial is higher so needing to provide only 3 is a good thing.
b. Since Applicant is seeking exception from parking, this is irrelevant.

2.5 Part 3: Detriment to the Public Good, Impairment to the Intent, Purpose and Integrity of the Zone Plan

2.5.1 Zone Plan

The Applicant states the requested variance relief can be granted without impairing the intent, purpose and integrity of the Zone Plan. We disagree. The zone plan of Blagden Alley is outlined in Zoning Commission Order No. 782 of 1994. The area was rezoned to C-2-A from R-4 to encourage development while protecting the residential and historic nature of the ally and the rest of the square. The Zoning Commission's intent was very clear in restricting development to low and medium density C-2-A to protect a very unique area from over-development. In fact, even the proponents of rezoning were in favor of recording covenants to restrict the allowable matter of right uses, essentially making this square a scaled down version of C-2-A, "... property owners….would sign a covenant proposing the restriction of matter of right uses to those compatible with residential surroundings."

Allowing a variance to take the FAR from 1.47 to 2.07 essentially allows C-3-A high density commercial development in a low/medium density C-2-A zone. If the ZC wanted to allow such high density FAR, it would have rezoned the lots to allow this FAR as a matter of right. Since it did not and as evidenced in the record, a commercial use FAR of 2.07 was never envision and is thus a violation of the zone plan. It is also important to keep in mind that this rezone order is very recent - 1997 - compared to the overall zone map of the city. Considering the very recent rezoning of these lots by the ZC with

extensive community feedback, it is best to assume that this level of zoning is best for the square, and the BZA should not allow any additional variances on these lots.

2.5.2 ANC Approval

The Applicant misrepresented their application to the ANC as a variance for 14 parking spaces, when the actual number is 21, a 50% difference. While this may have been a mistake, we believe the ANC vote should not be counted, until the ANC reviews this change in a public meeting. It can be hard for people to visualize the massing represented by the FAR itself since 1.47 versus 2.07 doesn't mean much, but the relation of FAR to parking demand is easy to visualize. To the extent that parking was misrepresented, it gave an incorrect impression of the extent of the increase in the FAR, and therefore, should be revisited by the ANC.

2.5.3 Cumulative Effect of Increased Density

The public good is not served when variances are used for de facto re-zoning. In this case the low and medium density commercial development allowed in the C-2-A zone would be replaced by a high density C-3-A zone. Once such a variance is granted, all other owners may argue for the same relief. And given the vague explanation of exceptional condition and practical difficulty, this is even more likely since the bar would clearly be set very low.

2.6 Parking Exception

We are not addressing the applicant's request for a special exception against parking because the need for parking is triggered by their attempt to increase the FAR for retail. If the FAR variance is not granted, as we hope, the issue of the parking variance is moot.

However, if the applicant ultimately decides to pursue with a residential FAR increase (as opposed to current request for retail FAR increase), up to 2.07, the residential use will also trigger a parking requirement that would have to be addressed via a separate special exception, which must be addressed in a separate BZA case.

2.7 Loading Berth Exemption

According to the Applicant's parking and loading statement (Ex. 34D page 16) "loading zone regulations do not require that any loading berths be provided by this site per Section 2200.5." However this is not true. Section 2200.5 is limited to historic buildings themselves and does not refer to the additions to them, which are further discussed in

Sections 2200.6 - 2200.7. The Applicant is not in compliance with the loading berth exemption they have claimed.

Section 2200.5 clearly refers to loading berth requirements for historic buildings themselves and not additions thereto. This is clear, since other sections of the zoning code that deal with exceptions for historic buildings explicitly mention additions. For example, 11 DCMR § 2120 - Parking for Historic Buildings, Section 2120.3 reads as follows, "A historic resource and **any additions thereto** …" If Section 2200.5 was meant to also apply to additions, it would have explicitly stated this.

Furthermore, DCMR 11-2200.6 states that "When the intensity of use of a building or structure existing before May 12, 1958 is increased by an addition or additions of dwelling units, gross floor area, seating capacity, or other unit of measurement specified in § 2201, loading berths, loading platforms, and service/delivery loading spaces shall be provided for the addition or additions; provided, that the provisions of §§ 2200.7 through 2200.9 are satisfied.

While DCMR 11-2200.5 clearly refers to loading berth requirements for historic buildings themselves and not new structures built next to historic structures, DCMR 11-2200.6 refers to the additions to historic buildings. Section 11-2200.6 is very clear in requiring loading berths for additions. The current proposal is much more than a mere addition.

According to the pre-hearing statement (EX. 34, page 4), the original historic structures had 10,748 square feet of floor area, with 8,723 sf contributing to the FAR of 1.12. The approved renovations now underway "modify the original historic structures" and allow for 15,702 sf of floor area, with 11,632 counted toward the new FAR of 1.46.

The new addition to the building is a 33% increase that triggers a loading berth requirement under DCMR 11-2200.7, which states that "loading berths, loading platforms, and service/delivery loading spaces shall not be required for the addition or additions unless the addition or additions increase the intensity of use of the building or structure by more than twenty-five percent (25%) of the aggregate."