GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

DECISION AND ORDER

Application No. 18905 of Jemal's 9th Street Gang of 3, LLC
April 21, 2015

Pursuant to 11 DCMR §§ 3103.2 and 3104.1, the Applicant is seeking a variance from the floor area ratio ("FAR") requirements of Section 771.2 of the Zoning Regulations, which permits a maximum density of 1.5 FAR for nonresidential uses in the C-2-A District; and a special exception under Section 2120.6, which permits the Board of Zoning Adjustment ("BZA" or "Board") to grant relief from all or part of the parking requirements for development in the C-2-A District, within the boundaries of Advisory Neighborhood Commission ("ANC") 2F-06 of Lot 174 in Square 368, which has a street address of 1216-1226 9th Street (the "Property").

HEARING DATE: March 10, 2015

DECISION DATE: April 28, 2015

PRELIMINARY MATTERS

Application.
The application was filed by Jemal's 9th Street Gang of 3, LLC ("Applicant") for a development at 1216-1226 9th Street, NW.

Notice of Application and Notice of Public Hearing.
The Office of Zoning sent notice of the applications to the Office of Planning ("OP"); Advisory Neighborhood Commission ("ANC") 2F, the ANC for the area within which the subject properties are located; the single-member district representative for ANC 2F06; the Councilmember for Ward 2; and the District Department of Transportation ("DDOT").

A public hearing was originally scheduled for January 27, 2015. Pursuant to 11 DCMR § 3113.12, the Office of Zoning mailed notice of the public hearing to the Applicant, the owners of property within 200 feet of the subject property, and ANC 2F. Notice of the public hearing was also published in the D.C. Register.

On January 12, 2015 the Applicant filed for a Postponement of Hearing in order to have sufficient time to address the comments raised by the Office of Planning relating to the required FAR and parking relief (Ex. 31.) The hearing was re-scheduled for March 10 to allow the time needed for the Applicant to interact with the Office of Planning.

Public Hearing.
The Board held a public hearing on March 10, 2015. At the end of the hearing, the Board closed the record except for submissions by the Applicant and the Opposition Party. The Board scheduled a decision hearing for April 28, 2015.

Request for Party Status.
In addition to the Applicant, ANC 2F was automatically a party in this proceeding. Ahmed Ait-Ghezala filed a party status request on January 11, 2015 on behalf of himself and 10 property owners within the 200-foot boundary of the project (Ex. 51.) The Board granted the request at the Public Hearing on March 10, 2015.

Government Reports.
The Office of Planning issued its findings in a report of March 3, 2015 (Ex. 36.) The OP did not recommend the variance and their report stated "While the Office of Planning (OP) is generally supportive of this application, it is not able to provide a recommendation because sufficient information has not been provided related to the request for FAR relief. The applicant should provide additional information that demonstrates a practical difficulty related to the increased FAR."

In the hearing of March 10, the OP representative Ms. Brandice Elliott re-stated general support for the overall project, including the positive aspect of the rehabilitation of the historic buildings. However, it is important to note the OP did not recommend the project. They instead expressed reservations and concerns regarding the increased FAR, and stopped short of a recommendation (Transcript, page 123, lines 11-19.)

The OP's position on the variance request, therefore, cannot be viewed as a recommendation.

ANC Report.
ANC 2F submitted a letter of support dated December 15, 2014 (Exhibit 27) following its December 10, 2014 regular public meeting. At that time, the project included parking relief for 14 vehicles. However, at the Hearing on March 10, the Applicant stated that the number of parking spaces for which it is seeking relief is now 21 and not 14. No ANC 2F member was present at the hearing and at the request of the Opposition Party, the Applicant sent a letter to the ANC announcing this 50% increase in requested parking relief.

A letter dated March 18, 2015 (Exhibit 48) was sent to ANC 2F by the Applicant but there was no official response. The Opposition Party then sent emails to the ANC on April 13 and 14 requesting re-review the project and presentation of the change to the community in a open ANC meeting (Ex. 50 and 51.) It is the position of the Opposing Party that this change is significant and should be discussed in front of the community and voted on. If not, the support letter of December 10, 2014 should be considered by the Board as incomplete.

Meetings with ANC and Neighbors

The Applicant arranged a meeting with neighbors and the ANC representative to discuss the project on February 11th, 2015. The meeting was attended by the members of the Opposing Party, representatives of the ANC, and the Applicant. In that meeting the Applicant explained the project and answered questions.

The ANC arranged a meeting with the Applicant and neighbors to discuss development in Blagden Alley on February 18th, 2015. That meeting was attended by both the Applicant and SB Urban, another developer working in the area.

Persons in Support.

The Board received two written submissions of support from Shaw Main Streets (Exhibit 38), a non-profit, and David Ansell (Exhibit 40), a neighbor and local blogger. Shaw Main Streets is a non-profit that receives "generous funding" from the Applicant according to its website. The Applicant's Project Manager is a former Board member of Shaw Main Streets, and the Board Secretary is a current employee of the Applicant. Due to the conflicts of interest, the Board cannot give any weight to this letter.

Party in Opposition.

At the March 10, 2014 public hearing, the Board heard testimony in opposition from two representative of a group of 10 people who own property within 200-foot boundary of the proposed project. The group requested party status in their letter of January 11, 2015 (Ex. 30) for and received standing from the Board at the March 10 hearing. The Opposition Party appeared before the Board in the March 10 hearing and submitted their statement of opposition (Ex. 43.)

Post-hearing Submissions.

The post-hearing submissions include a letter from the Applicant to the ANC regarding review of the the revised parking relief (Ex. 48) and emails from the Opposing Party regarding ANC review (Ex. 51 and 54).

FINDINGS OF FACT

The Subject Property and Surrounding Area

1. The Property has a land area of approximately 7,757 square feet and is located on the west side of 9th Street, NW, between M and N Streets. The Property is within the boundary of both the Shaw and the Blagden Alley/Naylor Court Historic Districts. It is improved with three rowhouses that are contributing structures within the historic districts.

2. The Property is zoned C-2-A with a maximum allowable FAR for commercial use of 1.5. The requested variance is for a FAR of 2.07.

3. Blagden Alley is an historic H-shaped interior alley complex with a series of interconnected narrow alley roads and interior courts that form an H in the center of Square 368. There are no public sidewalks in the alley complex or legal parking on the interior alley roadways. The alley complex is active with local traffic. It is improved with a mix of building types used as residences, garages, small offices, a coffee shop, a small restaurant, as well as many rear access points to residential and commercial buildings that front the surrounding streets. There are currently a total of 47 openings into Blagden Alley. These include 26 openings for residential garages, 6 openings to residences, and 15 openings used for businesses. There are nearly 75 individual lots that comprise the Blagden Alley complex in Square 368.

4. The Blagden Alley complex abuts the rear side of the Property where a court area is 30 feet wide. The three entrances to the interior alley complex are only 10 and 15 feet wide. The closest entrance to the rear side of the subject Property is from 9th Street, just south of the Property and is 10 feet wide (Ex. 36, 37.)

5. Immediately north of the Property along 9th Street are an occupied rowhouse (1228 9th Street, Bell Architects), a vacant rowhouse (1230 9th Street); WagTime dog day care (1232 9th Street); Long View Art Gallery (1234 9th Street); a row house with ground floor retail (1240 9th Street); and a 70 unit apartment building with 8,400 square feet of ground floor retail and 34 underground parking spaces (1250 9th Street).

6. Abutting the Property to the south is a vacant parcel approved for a five-story residential complex at 90 and 91 Blagden Alley with 125 units and ground floor retail. That project is seeking complete relief from 60 required parking spaces as part of BZA Cases 18852 and 18853. Further south along 9th Street is the 10-foot alley road; a converted rowhouse with a barber shop and liquor store on the lower level and residences on the upper three stories.

7. To the west on the of the Property facing the alley complex is the vacant parcel approved for a five-story residential project and south of that across the public alley are residential row houses.

8. The Walter E. Washington Convention Center is opposite the Property on the east side of 9th Street.

The Applicant's Project

1. The renovations currently underway are pursuant to Building Permit No. B1403618 and HPO approval #13-215.

2. In accordance with the approval, the three lots were combined into a single record lot and the existing structures are to be connect both internally with selective penetrations

through party walls and with a rear addition. The proposed connection and expansion of the structures are necessary to accommodate the commercial use of the Property (Exhibit 7.)

3. The current renovations provide for 3 floors: 4,070 square feet of floor area at the cellar level, 6,656 square feet of floor area at the ground level of the building, 3,858 square feet of floor area on the second level of the building, and 1,118 square feet of floor area on the third floor of the building (Exhibit 7.)

4. The total floor area, including the cellar, for the current building renovations is 15,702 square feet. Of that 11,632 square feet is counted toward the FAR of 1.47 (Exhibit 7.)

5. The current renovation FAR of 1.47 is almost the maximum of allowed matter of right development for commercial use (FAR 1.5) in the C-2-A zone.

6. The project that is being built under permit B1403618 must be commercially viable since it was planned, permitted, financed and constructed by the Applicant.

7. The original design proposed part of the space to have very high ceilings (multi-floor) thus taking away floor space from upper stories. This was a design/strategic decision made by the applicant because they believed tenants would like the void space[1]. Since they had used the maximum floor area allowed out of the usable floor space (building at 1.47 FAR with a maximum of 1.5), they decided to to make part of the space with very high ceilings to allow for additional usage types.[2]

8. The Applicant has tenants for all of the commercial space.[3]

9. The tenant who will occupy the space with the high ceiling, expressed a preference for lower ceilings, not wanting the additional expense of cooling/heating a voluminous space with high ceilings.[4]

10. Applicant testified that the potential tenant's concern was the height of the ceiling. The Board assumes nothing else (e.g. lack of floor space.)

11. The Applicant has spoken of three options:

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[1] See Transcript of March 10, 2015 hearing, page 109, Lines 13,14,22,23
[2] See Transcript of March 10, 2015 hearing, pages 108-109.
[3] See Transcript of March 10, 2015 hearing, page 93.
[4] Transcript, pages 109-110. "As it turns out, as the tenants came through, they're more interested, justifiably so, with maintaining a level of efficiency per their heating and cooling of the space. So what they actually preferred instead is to cover up their space, whether it be with a floor or a ceiling. They don't want to essentially have to heat a large volume of space when they're not going to be using that large volume of space."

a. According to testimony: create a (faux) ceiling at the height desired by incoming tenants[5]. This would keep the current mass of the building, with no change in FAR and 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 expanding 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 due to the increase FAR by 41% to 2.07.

12. The Applicant is pursuing option c) to add floor space to accommodate additional commercial/retail use. The Applicant seeks to expand the floor area of the building from 15,702 square to 20,095 square feet and increase the FAR 41% from 1.47 to 2.07. This is 38% above the allowable 1.5 in the C-2-A zone.

13. The Applicant testified that they made a mistake with the design. The Applicant stated they did not know how the Property would lease and the change is needed to accommodate their new tenants[6].

Zoning Relief Requested by the Applicant

Variance for FAR Relief: The Applicant seeks a variance from the floor area ratio ("FAR") requirements. In the currently approved plans the Property has a FAR of 1.46. The Applicant proposes to expand the floor area to accommodate additional commercial uses. The new proposed overall FAR is 2.07, and the additional area will be entirely for nonresidential uses. Section 771.2 of the Zoning Regulations permits a maximum density of 1.5 FAR for nonresidential uses in the C-2-A Zone.

Special Exception Relief for Parking: Pursuant to Sections 2101.1, 2120.3, 2100.4 and 2118.7 of the Zoning Regulations Applicant is required to provide 21 off-street parking spaces to accommodate the proposed development. The Applicant does not propose to provide any vehicular parking, and has requested special exception relief from the parking requirement under Section 2120.6 of the Zoning Regulations.

Review of Variance FAR Relief Pursuant to Section 3103.2 of the Zoning Regulations

Under D.C. Code §6-641.07(g)(3) and 11 DCMR §3103.2, the Board is authorized to grant an area variance only where it finds that all of the following three conditions exist:

[5] See Transcript of March 10, 2015 hearing, page 110, line 3
[6] See Transcript of March 10, 2015 hearing, page 164

1. The property is affected by exceptional size, shape or topography or other extraordinary or exceptional situation or condition;
2. The owner would encounter practical difficulties if the zoning regulations were strictly applied or exceptional and undue hardship; and
3. The variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zone plan as embodied in the Zoning Regulations and Map.

As required by Section 3103.2 and based on evidence and testimony provided by the Applicant, the Board finds that the Project does not satisfy the conditions for area variance relief for the reasons set forth below.

Part 1: The Board finds that the Property is not affected by an exceptional situation or condition:

1. The confluence of factors described by the Applicant do not create an exceptional situation because these factors either affect other properties in the vicinity of the Property and/or are positive characteristics of the property. These cannot be counted towards a confluence of factors that create any exceptional situation and/or are self-imposed.

2. The area zoning allows mixed commercial and residential use, the Board finds that it is not important what is immediately north or south of the Applicant's property and uniqueness cannot be created by the distribution of conforming use in the middle part of a single side of a block.

3. The **first factor** cited by the Applicant is that the Property is improved with three row structures that are contributing structures within the Shaw and Blagden Alley/Naylor Court Historic Districts. This is not unique within the area of the project because just about every lot in the area contains a contributing structure. Accommodating the presence of historic buildings on building lots is common in Washington.

4. The **second factor** cited by the Applicant is that the individual lots have been subdivided into a single record lot. Merging lots into a single record lot is common. Recently 90 and 91 Blagden Alley were created by combining nearly a dozen separate lots. Furthermore, merging three lots into one allows the applicant to have a wider lot which makes compliant development much easier, as evidenced by the current project that was approved without variances. This is actually a positive characteristics of the property. This factor is self-imposed and was a decision made by the Applicant in the original approved design.

5. The **third factor** cited by Applicant is that a rear addition and other renovations to connect the buildings internally have been approved for the Property and are currently under construction. The rear addition is not unique. In addition it is a positive factor for

the requested variance because it allows the Applicant to add more floor space on top. Connecting buildings internally is also not unique and is also not a negative factor. It is be a positive factor because internal walls can be broken down to use the space more efficiently. This factor is self-imposed and is part of the approved design by the Applicant.

6. The **fourth factor** cited by Applicant is that 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. In fact, residential development is plentiful in the area. 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 complex in the center of the Square. The Applicant's property is immediately abutted on two sides by existing and planned residential development. The following residential developments are also located within a 200-foot boundary of the project, and include 214 apartments and 16 row houses, many converted to multiple units:

    - The Colonel, a 70-unit apartment building at 1250 9th Street.
    - Ten existing historic row houses from 901 to 927 M Street.
    - A new 15 unit apartment building at 926 N Street.
    - Six existing historic row houses from 914 to 926 N Street.
    - A planned 4 unit condo building at 925 M Street.
    - A planned apartment complex with 125 units for the abutting properties at 90 and 91 Blagden Alley, formerly 1212 9th Street and 917 M Street.

Part 2: The Board finds that strict application of the Zoning Regulations will not cause undue hardship or practical difficulty to the Applicant.

1. As it relates to increasing the FAR by adding retail space, the Applicant lists practical difficulties on two floors of the building created by the arrangement of the building core.

2. The Applicant explained in testimony on March 10, that the existing location of the building core and the building stairs make for an inefficient expanded second floor plan that be be unusable by most office or commercial tenants. However, the Board finds that (i) it is not unique for a building designed for retail to have a building core or stairs (ii) it is not unique that the stairs and the core are located centrally in the building (iii) the location of the building stair and the location of the building core that create the inefficiency are both self-created by the original approved and permitted design by the Applicant. In testimony, the Applicant explained that flexibility was one of the most important aspects of the original design. If for example the stairs are moved to the south side of the building, the inefficiency would be removed, and (iv) inefficiency, by itself, is not a factor that can be considered when evaluating a request for an area variance since the relevant statute does not refer to inefficiency.

3. The Applicant stated that the existing layout for the third floor is problematic because the third floor is consumed almost completely by elements of the building core, making the space nearly unusable. The Board acknowledges this, however, the Board finds that even if the elements of the building core were removed completely, the space would still be of little use because it is by original design, when the property was purchased, small, which is not unique. In testimony the Applicant stated that one of the reasons for the location of the elevator was to create flexibility[7]. Practical difficulty, if any, is self-created by their existing design. Applicant has testified that it made a mistake[8]. This, however, is not grounds for granting relief through variance.

4. As it relates to increasing the FAR by adding matter-of-right residential the Applicant explains that it would be inefficient because a second elevator would need to be added for residential use and a handicapped access elevator would need to be added at the front of the building. The Board finds that (i) having two elevators for residents is not necessary and one elevator can be shared by all residents with appropriate access cards as the Applicant testified sometimes happens (ii) Applicant did not satisfactorily explain why adding a handicapped access would be inefficient (iv) inefficiency, by itself, is not a factor that can be considered when evaluating a request for an area variance since the relevant statute does not refer to inefficiency.

5. As it relates to increasing the FAR by adding matter-of-right residential the Applicant explains that the existing stairwell would be unsuitable for use by residential and commercial tenants. The Board finds that (i) it is not unique that stairwells are used for both commercial and residential tenants (ii) suitability does not equate to practical difficulty.

6. As it relates to increasing the FAR by adding matter-of-right residential the Applicant explains that 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. The Board finds that (i) the small and elongated foot print is not unique for the neighborhood (ii) two elevators are not necessarily required and one can be shared between and residential and commercial tenants (iii) any inefficiency is self-created by the original design of the Applicant (iv) inefficiency, by itself, is not a factor that can be considered when evaluating a request for an area variance since the relevant statute does not refer to inefficiency.

7. As it relates to increasing the FAR by adding matter-of-right residential the Applicant explains that doing so would result in an inefficient 67% core factor when an efficient design would achieve 85-90% core factor. The Board finds that (i) the efficiency Applicant will achieve with commercial is only 1% more at 68% (ii) the efficiency of a

[7] See Transcript of March 10, 2015 hearing, page 107 lines 19-23 "It was designed .. with flexibility being one of the most important aspects to keep in mind... This was why we put the elevator in the middle of the building where we did"
[8] See Transcript of March 10, 2015 hearing, page 164, line 2

matter-of-right residential expansion would still be more efficient than Applicant's current design which has 62% efficiency (iv) inefficiency, by itself, is not a factor that can be considered when evaluating a request for an area variance since the relevant statute does not refer to inefficiency.

8. As it relates to increasing the FAR by adding matter-of-right residential the Applicant explains that they would have to forgo amenities commonly available in today's residential market making it hard to market. Applicant does not explain which amenities they would have to forgo and how much marketability would be reduced.

9. As it relates to increasing the FAR by adding matter-of-right residential the Applicant explains that 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. The Board believes that (i) not having a trash chute is not unique (ii) the practical difficulty associated with no trash chute is not demonstrated.

10. Applicant in testimony acknowledged that they can build residential[9].

Part 3: The Board finds increased FAR beyond zone limits will result in substantial detriment to the public good and will impair the integrity of the zone plan.

1. The zone plan of Blagden Alley is outlined in Zoning Commission Order No. 782 of 1994, where the interior of the Blagden Alley complex was re-zoned to create opportunities for small scale commercial development. Part of the interior of the alley complex was rezoned to C-2-A from R-4 to encourage development while protecting the residential and historic nature of the alley and the remainder of Square 368. The C-2-A zone is closely surrounded by R-4 residences and to sustain the integrity of the plan and protect the surrounding, long established residential neighborhood.

2. The Zoning Commission's intended to restrict development to low and medium density C-2-A as explained in Order 782. The Applicant's proposal to increase the FAR from 1.47 to 2.07 would allow C-3-A high density commercial development in a low/medium density C-2-A zone.This is in direct opposition to the clearly stated intent of the zone plan in Order 782. The proposed FAR of 2.07 is 38% higher than the maximum FAR of 1.5 allowed in the C-2-A zone.

[9] See Transcript of March 10, 2015 hearing, page 112, line 7

CONCLUSIONS OF LAW

Variance Relief

The Applicant seeks floor area variance pursuant to 11 DCMR §§ 3103.2 and 3104.1 for a variance from the floor area ratio ("FAR") requirements of Section 771.2 of the Zoning Regulations.

The Board is authorized under Section 8 of the Zoning Act (D.C. Code § 6-641.07(g)(3)) to grant variances, as provided in the Zoning Regulations, "[w]here, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations, or by reason of exceptional topographic conditions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation adopted under D.C. Official Code §§ 6-641.01 to 6-651.02 would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, to authorize, upon an appeal relating to the property, a variance from the strict application so as to relieve the difficulties or hardship; provided, that the 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 11 DCMR § 3103.2.

For the reasons set forth above, the Board concludes that the Applicant has not met the burden of proof under Section 3103.2. For the reasons stated below, the Applicant is not entitled to the requested variance relief as a matter of law.

Rationale for immediate rejection of the requested FAR variance based on existence of viable uses for a compliant structure:

The Board finds that the FAR variance cannot be granted as a logical conclusion of facts **5** through **10** in "Findings of Fact - The Applicant's Project" section and existing case law. Essentially, a viable use option exists for a conforming structure as described in under 11(a).

The applicant designed the project at near maximum allowable FAR for commercial use. The project that is being built under permit B1403618 must be commercially viable since it was planned, permitted, financed and constructed by the Applicant. Applicant found tenants for all the spaces and one tenant's only concern was the height of the ceiling. The height of the ceiling can be easily adjusted by constructing a faux ceiling - a solution acceptable to the tenant based on applicant testimony. Considering the above, our denial of the variance request is based on Palmer v. District of Columbia Board of Zoning Adjustment, where it was established that in the commercial context, "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."

The Board does not understand, and the Applicant failed to show, why when the only documented objection/preference expressed by the prospective tenant is for a different ceiling height, the solution proposed by the applicant is to dramatically increase the floor space, thus violating the maximum FAR of 1.5.

Even if some tenants prefer additional floor area, this does not mean that a tenant could not be found who would find existing floor area sufficient. The applicant presented no evidence, or offered any testimony, to show that in its current form the project cannot be leased and be, thus, economically viable. The request for additional commercial use FAR appears to be a preference, rather than a request based on unique practical difficulty, and therefore must be denied.

Building "inefficiency" is not a standard for granting variance relief. No evidence was presented to establish "practical difficulty" based on building "inefficiency:

The Board wants to directly address the concept of "inefficiency" raised by the applicant. 11 DCMR §3103.2 does not mention the concept of building efficiency or inefficiency, and thus by itself it is not a standard on which the board may grant variance relief. The board understands why increasing building efficiency is prefered from an economic standpoint, but unless building inefficiency causes "peculiar and exceptional practical difficulties" it has no bearing on a decision with respect to granting the requested variance relief. Low building efficiency does not necessarily imply practical difficulty. To state it in terms of economics: while lots in the city will never be as generous in terms of width/depth or car accessibility as lots in suburban subdivisions, and construction in the suburbs almost never has the additional Historic Preservation restriction that are imposed in Washington, D.C., real estate income from rent in D.C. is higher. This higher income from higher rent more than makes up for any inefficiencies that developers may experience building in the city, which is why they choose to develop in the city.

Thus, the Applicant's argument of improving efficiency cannot be given much weight because 1) It is primarily self imposed, as it is a function of applicants own original design; 2) The Applicant's original permitted design, for which construction is currently in progress, is also inefficient, yet it did not deter the Applicant from starting construction; and 3) Most importantly and relevant to the issue of variance, the Applicant failed to establish a link between building inefficiency and practical difficulty, as is discussed below.

With Regard to the FAR Variance Request and the Three Part Test

The Applicant has not demonstrated that the Property (land or structure) is affected by an exceptional condition arising from a confluence of factors.

1. In *Gilmartin v. D.C. Bd. of Zoning* 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 law is also clear that self-imposed difficulties should be granted little if any weight *Taylor vs. DC BD. of Zoning Adjustment*.

In this case, as explained in the Findings of Fact the confluence of factors cited by Applicant do not satisfy this legal standard because they either (i) are not unique to the property in the context of the neighborhood (ii) do not represent hardships but are positives for the Property (ii) are factors self-imposed by the original approved design of the Applicant. Additionally by Applicant’s own testimony, it is possible to increase FAR with matter-of-right conforming residential expansion.

2. 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 cannot be allowed to claim an exceptional situation of a property if it is completely self-created by applicant's own design. 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 viable project of their own design. Nothing outside the applicant’s control has taken place, the prospective tenants merely asked to make the open space more efficient for cooling and heating. The fact that there are prospective tenants prior to project completion shows that the project in its current form is attractive to clients and viable. 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 however 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.

The applicant is asking for an area variance but has not proved exceptional practical difficulty.

1. From *Gilmartin vs. Board of Zoning Adjustment* we are told that case law has been further refined since *Palmer* 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)*.” As explained in the Findings of Fact the difficulties the Applicant cites are not unique. They are also mostly self-created by the current approved design of the Applicant. The case for efficiency in design is not a standard for ruling on burden if not least because it’s

possible to have an inefficient design that is functional, desirable and commercially viable.

2. It is legally proper for the Board to grant area variance where not granting one would result in economic loss. See *Wolf v. D.C. Bd. of Zoning Adj., 397 A.2d 936 (1979)*. However, the Applicant has not furnished any documentation to suggest economic non-viability of the current design or a matter-of-right residential expansion and so the Board cannot say that there is practical difficulty with the application of zoning regulations in this regard. (The applicant in the BZA case that is subject of *Wolf v. D.C. Bd* presented evidence documenting financial loss with status quo usage vs. financial return if the zoning relief was granted.)

Granting the variance relief would cause substantial detriment to the public good and substantially impair the intent, purpose, and integrity of the zone plan.

1. The zone plan of the Blagden Alley complex is described in detail 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 alley, the remainder of Square 368, the surrounding R-4 zone and the abutting historic residences. The Blagden Alley complex is part of two protected historic areas, one on the National Register. It is, thus, especially critical to maintain the zone plan to protect this special area.

2. Increasing the FAR by 41% from 1.47 to 2.07 would allow the density to grow to the level allowed in the high density C-3-A zone from the current low/medium density C-2-A zone. The proposed level of density is too high for the C-2-A zone and the closely surrounding R-4 zone.

3. Zoning Order 782 of 1994 is recent compared to the overall zone plan of the city. The recent rezoning of these lots by the Zoning Commission was done with extensive community, ANC, and Office of Planning involvement. It is clear from reading the Order that this level of zoning is necessary to protect the area and a change to increased density via a FAR variance would violate the intent, purpose and integrity of this order.

With Regard to Board's Decision Being Contrary to ANC Vote

The board acknowledges the ANC vote in support of the FAR variance. However, based on the facts of the case and existing case law, the board must deny the variance request. The Board views the ANC vote as an indication that the ANC is "not opposed, yet indifferent" in regards to the addition that will exceed the allowable FAR. Thus, the denial of the variance request represents no harm to the ANC and the citizens it represents.

The issue of according "great weight" to the ANC has been clarified in *Neighbors Against Foxhall Gridlock v. BZA, 792 A.2d 246 (2002)* and *Foggy Bottom Ass'n v. BZA, 791 A.2d 64*

(2002) . In *Neighbors Against Foxhall Gridlock*, the Court of Appeals clarified that the "great weight" provision is "not a quantum requirement," and the agency is "not obliged to follow the ANC's recommendations or adopt its views." The Court of Appeals also stated that the ANC does not enjoy "expert" status, and that its views are not necessarily entitled to special deference. Instead, the agency must "pay specific attention to the source, as well as the content, of ANC recommendations, giving them whatever deference they merit in the context of the entire proceedings."

In the *Foggy Bottom Association* case, the Court of Appeals pointed out the "special position" occupied by the ANCs, and reiterated, from previous cases, the agencies' obligation to "elaborate, with precision, its response to the ANC issues and concerns." As part of making a final decision, an agency is not required to follow the ANC's recommendation, but it must articulate why the particular ANC does, or does not, offer "persuasive advice." Furthermore, agencies should make explicit reference to each ANC issue and concern, and address specific findings of fact and conclusions of law with respect to each. At the same time, the Court of Appeals cautioned that an agency does not have to accept the ANC's concerns. As the Court of Appeals put it, "All that the law demands is that the views of the ANC be specifically addressed."

Since this case did not raise any specific requests or advice from the ANC, and the ANC does not enjoy expert status, it is legally proper for the Board to rule only on the facts of the case and reject the FAR variance.

With Regard to the Parking Exception

The Board finds that the Applicant does not meet the requirements of the three part test for a variance for FAR relief as a matter of law. Since the Applicant's request for special exception for parking is triggered by the proposal to increase FAR for retail, the issue of parking exception is redundant and the Board will not address it.

DECISION AND ORDER

Based on the findings of fact and conclusions of law, the Board finds that the requested zoning relief cannot be approved. For the reasons stated above, the Board concludes that the Applicant has not satisfied the requirements for variances from area restrictions. This fact makes the parking exception moot.

Accordingly, the Board of Zoning Adjustment hereby ORDERS DENIAL of the application for variance, and by extension, the special exception.

VOTE: _____ Vote taken on April 28, 2015.

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

Each concurring member has approved the issuance of this Decision and Order.