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October 9, 2015

Marnique Heath, Chairperson
Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, DC 20001

Re: Application No. 19055 – 4409 Minnesota Ave NE
Supplemental Submission – BZA Hearing: October 20, 2015

Chairperson Heath and Honorable Members of the Board:

On behalf of the Applicant, Valor Minnesota, LLC, (the "Applicant"), the owner of the property located at 4409 Minnesota Avenue NE (the "Property") enclosed please find the Supplemental Submission for the above-referenced application (the "Supplemental Submission").[1]

I. Introduction

The Applicant is excited to propose a community of 30 new, for-sale, high-quality, **affordably-priced** semi-detached homes on an essentially vacant lot abutting the CSX tracks in

[1] The initial hearing on this case occurred on July 28, 2015. At the end of that hearing, the Board continued the case to allow the Applicant to prepare additional materials and to continue working with the community. The subsequent hearing was scheduled for September 29, and on that date, the case was continued to October 20th at the Applicant's request.

Deanwood (the "Project"). Importantly, three of the homes will be Inclusionary Zoning ("IZ") units that will be sold at **50% AMI (<u>$236,900.00</u>)**[2].

The Project also provides other significant benefits to the surrounding community including:

- Construction of a 16-foot sound wall to buffer the sound from the CSX tracks and I-295;
- Greatly improved landscaping at the intersection of Minnesota Avenue NE and Sheriff Road NE and around the development;
- Dedication of 10,500 s.f. (almost 19% of the lot) to DDOT for the Minnesota Avenue right of way along the property frontage; and
- Construction of new Minnesota Avenue roadbed and sidewalks.

It is well settled that "[i]mportant public interest concerns as well as potential hardship to the public are properly considered as factors in BZA determinations of variance relief.'" See *Williams v. Board of Zoning Adjustment*, 535 A.2d 910, 911 fn. 2 (D.C. 1988), citing *National Black Child Development Inst. Inc. v. Board of Zoning Adjustment*, 483 A.2d 687, 690 (D.C. 1984). Accordingly, the Project's significant community benefits are to be considered by the Board in this Application.

Further, the Property is identified in the Comprehensive Plan's Generalized Land Use Map as a "Neighborhood Enhancement" area that "present[s] opportunities" for compatible infill development. Moreover, the Comprehensive Plan "strongly encourage[es] infill development on vacant lots in the Deanwood Community" as well as recommends developments that proposes homes suitable for families and additional noise buffering from the CSX tracks. *See* 10 DCMR §§ 1700 *et seq.* Therefore, the Project as proposed satisfies the recommendations of the Comprehensive Plan and helps to complete the vision for the future of the neighborhood as adopted by the Council of the District of Columbia.

For the reasons set out in the Initial Submission, supplemented in the Prehearing Statement, and the July 28 hearing and as further supplemented in this Supplemental Submission and at the October 20 hearing, the Project satisfies the requirements for special exception and variance relief from the requirements of the Zoning Regulations pursuant to 11 DCMR §§ 3104.1 and 3103.2: (i) a special exception from the minimum lot with requirement of Section 2604.3; (ii) a variance from the rear yard setback requirements of Section 405; (iii) a variance from the minimum lot area requirements of Section 401; (iv) a variance from the maximum lot occupancy requirement of Section 403.2; and (v) a variance from the minimum side yard setback requirements of Section 405.

[2] The IZ Regulations only requires two of the IZ units to be sold at 50% AMI. The Applicant, after discussions with the Community, has agreed to sell all the IZ units at 50% AMI.

The relief requested will permit development of the Property, which is affected by exceptional conditions due to its odd shape, location abutting the CSX tracks and the requirement to dedicate almost 19% of the Property for the Minnesota Avenue right of way along the Property's frontage, with a new 30, home community that will provide affordably-priced homes for families. As stated above, three of those homes will be IZ units that will be sold at **50% AMI (<u>$236,900.00</u>)**.

The proposed development is appropriate for the Property, compatible with the surrounding neighborhood, and not inconsistent with either the Comprehensive Plan or the Zoning Regulations.

II. Exhibits

Exhibit A:	Revised Architectural Plans
Exhibit B:	Summary charts showing dimensions of surrounding lots.
Exhibit C:	Photos of nearby, R-2 zoned properties with similar lot sizes, lot width and side yard widths to the lots proposed in the Project
Exhibit D:	Generalized Land Use map recommendations for the Property.
Exhibit E:	Revised Pro-Forma
Exhibit F:	MRIS Listings

III. Revised Architectural Plans

At the hearing on July 28th, the Board requested revised architectural plans, including a rendering and a plan that identifies the anticipated building materials. A copy of the revised plans is attached as **<u>Exhibit A</u>**. The requested rendering is at Sheet A-04, and the proposed materials are shown on Sheet A-12, respectively of **<u>Exhibit A</u>**. The homes proposed as part of this Project are designed to accommodate families, as they will have four bedrooms and two, off-street parking spaces in attached garages as shown on Sheet A-10, included in **<u>Exhibit A</u>**.

Importantly, the revised Project proposes 30 units (a reduction from the previously proposed, 31-unit development). At the request of the neighbors, the lot that was previously identified as "Lot 31" will be converted from a single-family dwelling into a secure playground. An image of the revised lot layout and an enlargement of the playground area is included in **<u>Exhibit A</u>** at Sheet A-13.

The Revised Plans allow for a minor reduction in the degree of special exception and variance relief requested. A chart of the current relief requests is included in **Exhibit A** at Sheet A-03, and can be summarized as follows:

- Special Exception for approximately 25-foot lot width (§2604.3): Lots 4-27 & 30.
- Rear yard setback (§404): All lots
- Lot area (§401): Lots 2 – 30
- Lot occupancy (§403): Lots 4 – 27 & 30
- Side yard setback (§405): Lots 4 – 27

IV. Description of the Property

As explained in the prior filings and at the July 28, 2015 hearing, the Property is known as Lot 846 in Square 5097 and is approximately 55,517 s.f. in size. The Property is zoned R-2, and is one of only a handful of properties in this Zone District that is large enough to accommodate IZ units.

The Property is a long, shallow, trapezoidal lot with angular ends. The rear boundary of the Property is the CSX tracks; and the front boundary is delineated by a section of Minnesota Avenue right of way, but the location of the public right of way mistakenly extends onto the Property due to a paving error. That paved roadbed ends halfway along the front Property line, and the remainder of the lot does not have paved road access.

As a result of the Property's trapezoidal shape, the rear boundary line that abuts the CSX tracks is 906.04 s.f. long, and the front line abutting existing and proposed Minnesota Avenue is 776.79 feet long. Five of the lots confronting the Property's front boundary line are improved. The remainder of the land surrounding the Project is vacant.

As stated above, as part of the Project, the Applicant has agreed to dedicate 10,500 s.f. to the District and to construct the Minnesota Avenue along the Property's frontage. As required by DDOT, the right of way will be one lane in each direction and will not provide a shoulder for on-street parking. This construction narrows the developable depth of the Property to a very narrow, 64 feet and reduces the total developable area of the Property by almost 19%.

The Property is essentially vacant, as the only "improvement" is a small, abandoned, one-bay auto repair garage located near the middle of the Property. The rest of the Property has never been improved.

The Property is conveniently located near I-295 for commuters' access to Downtown or Maryland. The Deanwood and Minnesota Avenue metro stations, are both approximately .5

miles away, and the Benning Road Metro Station is approximately a mile from the Property. Seven Metrobus routes are within .2 miles of the Property.

V. Description of the Surrounding Area

Like many similar, well-established residential neighborhoods in the District, the R-2 Zoned area surrounding the Property includes a variety of lot sizes and uses that have evolved organically over time. A summary of the lot dimensions of nearby properties was included in the presentation provided to the Board on July 28, and is attached here as **Exhibit B.** Also, like the subject Property, many of the lots in the surrounding area are vacant. This is especially true east of the Property, where much of the land along 44th Street and 45th Place remains unimproved.

As shown in the recent photos of R-2 zoned neighborhood homes included as **Exhibit C,** many nearby lots, despite being zoned R-2 are nonconforming rowhomes or narrow lots. Indeed, these exhibits illustrate that many of the nearby properties have lot widths, sizes and side yards that are less than what is required under R-2 zoning. These smaller lots contribute to the neighborhood's authenticity and its special qualities.

As to the uses, the R-2 zoned portions of the surrounding areas mostly consist of one-family detached dwellings and semi-detached units, but it also includes apartment houses, row dwellings and flats. For example, as shown in **Exhibit C,** an apartment houses, which is non-conforming under the R-2 zone, is located at 4400 Hunt Place NE.

The variation in lot sizes and uses that exist in the surrounding, R-2 zoned areas substantially contribute to the neighborhood's character; and the juxtaposition of small and big lots, single-family dwellings, semi-detached dwellings and apartment houses makes this area unique.

Further, it is important to note that along Sheriff Road to the south and Minnesota Avenue towards the metro station, the area becomes significantly more industrial and commercial in nature. These areas are zoned C-1/ C-M-1, and are improved with commercial and industrial areas of all sizes and shapes. Indeed, to the south of the Property across Sheriff Road is the Republic National Distribution Company, a beer distributor with an approximately 93,062 s.f. warehouse on an approximately 142,466 s.f. lot.

Therefore, in sum the surrounding neighborhood is eclectic with the R-2 zoned section divided into lots of various sizes and shapes that are improved with different residential uses, and the commercially zoned sections with larger lots improved with expansive warehouses and other commercial uses. As such, the proposed Project is fully compatible with the surrounding area and will complement its character and unique qualities.

VI. The Applicant meets the test for Special Exception Relief.

As stated above, the Applicant seeks a special exception from the R-2 zone's minimum lot width requirement of Section 2604.3 of the Zoning Regulations, as described below.

a. Standard for Approving Special Exception Relief

Relief granted through a special exception is presumed appropriate, reasonable and compatible with other uses in the same zoning classification, provided the specific regulatory requirements for the relief requested are met. In reviewing an application for special exception relief, "[t]he Board's discretion ... is limited to a determination of whether the exception sought meets the requirements of the regulations." *First Baptist Church of Washington v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 695, 701 (D.C. 1981) (quoting *Stewart v. District of Columbia Board of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973)). If the applicant meets its burden, the Board must ordinarily grant the application. *Id.*

b. Description of Minimum Lot Width Relief Requested

The Applicant seeks special exception approval pursuant to Section 3104.1 from the 30-foot minimum lot width requirement in accordance with the IZ provisions set forth in Chapter 26 of the Zoning Regulations. Section 2604.3 permits IZ developments located within the R-2 District to reduce the required minimum lot width for semi-detached dwellings to 25 feet if approved by the Board as a special exception.

Initially, the Applicant requested the special exception to permit Lots 4 to 27 and 30 to have minimum lot widths of 25 feet. By removing one house, we have been able to incorporate that area into lots 8, 14, 20, 26, and 30 to make them more conforming, but still less than 30 feet.[3] No special exception is requested for Lots 1-3 and 28 and 29. Lot 31, with the widest width will be improved with a new playground.

c. Standard of Review for Special Exceptions from IZ Minimum Lot Area

The provisions of Chapter 26 do not contain a specific standard of review that is to be applied to requests for special exceptions from the minimum lot width requirement of Section 2604.3.

Rather, in reviewing such requests the Board is guided by the general special exception standard set forth in Section 3104.1, which authorizes the Board to grant the relief if the special exception will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map and will not tend to adversely affect the use of neighboring property.

[3] The Revised Plans show lots 8, 14, 20 and 26 as being 26-feet in width, and Lot 30 as being 28-feet in width.

The requested special exception can be granted as the proposed lot widths are in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map. The purpose and intent of the minimum lot width requirement is to establish an appropriate development scale and character for an area. The proposed approximately 25-foot widths for these lots allow for well-designed, high-quality semi-detached homes; a use that is specifically permitted in the R-2 Zone and is consistent with much of residential development on the blocks surrounding the Property as shown in the photos included with **Exhibit C** and the summary charts at **Exhibit B**. Therefore, development of this particular Property with semi-detached townhouses, which is the only development that can appropriately be located on approximately 25-foot width lots, results in a building type that is permitted in the Zone and is compatible in scale and character with the existing density in the surrounding area.

The proposed lot width would also be consistent with the guiding philosophy for the area set forth in the Comprehensive Plan for the National Capital (the "Comprehensive Plan"). The Generalized Policy Map (January 2013) identifies the Property as a "Neighborhood Enhancement Area," with such areas being generally described as having a patchwork of existing homes and individual vacant lots that "present opportunities for compatible small-scale infill development including new single family homes, town homes, and other density types of housing."

Also, the Property and the greater Deanwood Neighborhood are addressed in the Comprehensive Plan's Far Northeast and Southeast Planning Area, which "strongly encourages" infill development of vacant properties, a variety of new housing options, as well as buffering of the residential neighborhood from noise for the Planning Area. *See* 10 DCMR §§ 1700 *et seq.*

Further, the approximately 25-foot lots widths requested through this special exception advance additional Comprehensive Plan recommendations for the area, by allowing for:

- The construction of new one and two-family homes that complement existing architectural traditions and community character. (10 DCMR § 1712.5)

- The development of new housing on vacant lots and around Metro stations and on underutilized commercial sites (10 DCMR § 1708.3- Policy FNS-1.1.2);

- The provision of new housing choices including three- and four bedroom homes suitable for families with children (10 DCMR § 1707.2.a); and well as

- Improved noise buffering from the CSX railroad line to the greater Deanwood neighborhood (10 DCMR § 1712.4)

In addition, granting the requested special exception will also not adversely affect the use of neighboring properties. None of the lots requesting the special exception relief abut an existing dwelling, and the slightly narrower lot width is consistent with lot widths of existing dwellings in the surrounding area. In addition, the narrower lot widths will not create adverse impacts on light or air or to the privacy of the existing neighbors. Instead, light, air and privacy will be vastly improved with the installation of the sound wall against the CSX tracks.

VII. The Applicant Meets the Burden of Proof for Variance Relief

The Board is authorized to grant an area variance where it finds exceptional condition of the Property, practical difficulties to the applicant and no substantial detriment to the public good or substantial impairment to the Zone Plan. *See French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995) (*quoting Roumel v. District of Columbia Bd. of Zoning Adjustment*, 417 A.2d 405, 408 (D.C. 1980)); *see also*, *Capitol Hill Restoration Society, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987).

Applicants for area variances need to demonstrate that they will encounter "practical difficulties" in the development of the property if the variance is not granted. *See Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 540-41 (D.C. 1972)(noting that "area variances have been allowed on proof of practical difficulties only, while use variances require proof of hardship, a somewhat greater burden"). An applicant experiences practical difficulties when compliance with the Zoning Regulations would be "unnecessarily burdensome." *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1170 (D.C. 1990).

Importantly, the Courts have conclusively determined that the doctrine of "self-created hardship" does <u>not exist</u> in area variance cases, like this one. Specifically, in the *Assoc. for Preservation of 17000 Block of N Street NW et. Al. v. DC* BZA, 384 A.2d 674 (1978), the District of Columbia Court of Appeals held that, "Petitioners state that whatever hardship faced the YMCA 'was self-created to the extent of Metro YMCA having full knowledge of all problems with the alleged shape of the land, the type of zoning, and costs of putting in the parking, prior to the purchase of the property in March 1974.' **The YMCA's self-created hardship is not a factor to be considered in an application for an area variance, however, as that factor applies only to a use variance**." (emphasis added) *See also*, *Salsbery v. District of Columbia Board of Zoning Adjustment*, D.C. App., 357 A.2d 402, 404 (1976).[4]

[4] Notably, the Office of Planning ("OP") is clearly trying to assert that Applicant's practical difficulties were "self-created" when it states that because "this is new development on a vacant lot recently purchased by the Applicant, OP does not accept" one of the Applicant's practical difficulty arguments. However, such assertion has no bearing on the current, area variance application, because the Courts have concluded that concept of self-created hardship should not be applied to area variance cases.

Also, it is well accepted that the financial feasibility of a project is a factor that the Court of Appeals has repeatedly stated may constitute an unnecessary burden or practical difficulty. *Tyler, et. al. v. District of Columbia Bd. of Zoning Adjustment*, 606 A.2d 1362 (D.C. 1992). Moving beyond pure financial feasibility, the Court has upheld BZA decisions that considered the **realities of the market place**, and the need for a project to have a reasonable return on investment. In *Downtown Cluster of Congregations v. District of Columbia Bd. Of Zoning Adjustment*, 675 A.2d 484 (D.C. 1996), the Court upheld BZA approval of a use variance to allow conversion of a building formerly occupied as a department store to mixed-use office space based on the Board's findings that with the requested zoning relief the applicant would receive an annual rent equivalent to a 9% return on investment and without zoning relief, the applicant would only yield a 6% return on investment.

The marketability of a project is inextricably linked to its financial feasibility. Indeed, a project is only economically feasible if the end product can be reasonably expected to sell within a predetermined timeframe.

A. The Property is Affected by an Exceptional Situation or Condition.

In the instant case, the exceptional condition of the Property has been well-documented. The Property is an odd, trapezoidal shape, is exceptionally shallow, abuts the CSX tracks and only has street frontage on a portion of the frontage. Further, the developable area of the Property is reduced by almost 19% for the required dedication and construction of Minnesota Avenue. Also, based on Office of Planning testimony during the public hearings on Zoning Commission Case No. 04-33B, which set out the text of the IZ section of the Zoning Regulations, it is understood that the Property is one of only a handful of R-2 zoned parcels that is suitable for potential IZ development. Based on the above, the exceptional condition aspect of the variance test has been satisfied, and accordingly, the Applicant will focus on the "practical difficulty" prong.

B. Strict Application of the Zoning Regulations Would result in Practical Difficulty to the Applicant

1. Relief from R-2 Zone's Minimum Rear Yard (§404)

Due to the Property's shallow depth, odd shape, adjacency to the CSX line and required dedication for Minnesota Avenue extended limiting the developable area to 64 feet, a variance from the minimum rear setback in the R-2 zone is required for all of the proposed lots. OP supports this requested rear yard setback variance finding "there are no other ways to arrange the subdivision to achieve a greater depth…" The Applicant agrees with this analysis.

2. Relief from R-2 Zone's Minimum Lot Area (§ 401)

Section 2604.3 of the Zoning Regulations permits a minimum lot area of 2,500 s.f. for semi-detached, IZ projects in the R-2 Zone District. As set out in the zoning data sheet A-03 in **Exhibit A**, relief from this requirement is necessary for all lots except for townhouse 1, but that the amount of relief required for lots 8, 14, 20 and 26 and 30 has been slightly reduced due to the conversion of Lot 31 into a playground and the reallocation of some of that land elsewhere throughout the Project.

Importantly, as noted above, the standards for a special exception to reduce the lot width of most of the lots to approximately 25 feet are satisfied because the proposed 25-foot width is in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map, and many nearby properties have lot widths at or below 25 feet, as illustrated by **Exhibits B** and **C**. Further, such width will not adversely affect the use of neighboring properties, and this width permits the type development that is recommended for the Property in the Comprehensive Plan.

An approved reduction in lot width necessarily reduces the lot area due to the unique characteristics of the Property. Accordingly, in subdividing the Property, the Applicant sized most of the proposed lots to what is necessary to have a minimum width of approximately 25-feet.[5] However, the Property's 64-foot, exceptionally-shallow developable depth resulting from the Property's narrowness and the substantial DDOT dedication leaves limited area in which to locate the approximately 25-foot width lots without the requested variances from the R-2 zone's lot area requirements.

Also, it is important to note that the Property is completely constrained in size by the public space/ Minnesota Avenue right of way to the front and the CSX tracks to the rear. The Board and OP have recognized the inability for a project to acquire more land as a practical difficulty. *See Application No. 17737 of District Properties.com LLC* (2008) (approving variances to allow new residential use on a vacant lot surrounded on both sides by improved lots, and concluding that the inability to expand the subject property in that case created a practical difficulty for the owner). Clearly, because the Property's narrow width is what drives the smaller-sized lots, due to the Property's constrained location located between the right of way and the CSX tracks, the impossibility of widening the Property creates a practical difficulty in the instant case.

Indeed, due to the depth constraints, OP's suggestion that the Property should instead be subdivided into 21 lots of 2,500 s.f. a piece would result in extraordinarily short and stubby lots with lot widths of almost 37 feet. Such lots would not allow for an efficient building layout for semi-detached homes, meaning that the Property, would, instead, be improved with large, single-family detached homes, which are not in keeping with the character of the surrounding neighborhood or the recommendations in the Comprehensive Plan.

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[5] Using the 25-foot lot width, the Property could have been divided into 31 lots (776.79' front lot line length/ 25' lot width). However, the Project, as revised, only proposes 30 units.

3. Relief from R-2 Zone's Maximum Lot Occupancy (§ 403)

Pursuant to Section 403.2, the maximum lot occupancy in the R-2 zone is 40%. As shown in the Revised Plans, 20 of the lots are still at approximately 44%, but with the reallocation of the area from Lot 31, the lot occupancy on lots 8, 14, 20 and 26 has been reduced to 42.2%.

If no dedication was required to DDOT for Minnesota Avenue, the buildable area of the Property would be 19% larger and would negate the need for any lot occupancy relief.

Therefore, but for the unique dedication to DDOT, the proposed homes would comply with the 40% lot occupancy requirement. Therefore, the DDOT street dedication creates the practical difficulty to comply with the Zoning Regulations, and the Applicant requires the requested relief.

4. Relief from the R-2 Zone's Side-Yard Requirement (§ 405.9)

Under Section 405.9 of the Zoning Regulations, side yards of eight feet are required. While six of the lots provide the required side yard width, 24 do not, and instead provide side yards that range from five to six feet in width.

Given the approximately 25-foot lot width, a smaller home could be developed on the proposed lots to provide compliant side yards. However, doing so would reduce the amount of parking provided in the Project because the Zoning Regulations require parking spaces to be 9-feet in width by 19-feet in depth. Accordingly, garages of at least 18 feet in width are the absolute minimum required to provide two, off-street parking spaces. However, provision of an 8-foot side yard would reduce the width of a structure on each lot to 17 feet, making the attached garages too narrow to accommodate two parking spaces.

As stated above, the Project is designed for families and is located adjacent to I-295, and, therefore, will likely be attractive to car owners. For marketability and sale purposes the ability to only provide one parking space will negatively impact the Project. This is because, unlike the vast majority of homes in the surrounding area, the Project will not have access to any, nearby on-street parking due to the unique location along the CSX tracks to the rear and the narrowness of Minnesota Avenue, which will only be one lane in each direction at this location. Further, there is no area for on-street parking in the near vicinity of the Project, because Kane Place is a dead-end street, and Sheriff Road is a commercial corridor.

Accordingly, if no variance is granted for side-yard relief, then the homes will only be wide enough to provide one, off-street parking space, which will negatively impact their marketability due to the lack of on-street parking available at or near the Property. This practical difficult results directly from the Property's unique location and lack of nearby, on-street parking.

C. Variance relief required for financial viability.

Finally, denial of the variance application creates an unnecessarily burdensome financial hardship to the Applicant, because the project would be reduced to 21 homes, and any project of that size results in negative returns, making it unfeasible.

At the Board's direction, the Applicant submits as part of this Supplemental Submission, a revised Pro-Forma (the "Revised Pro-Forma") and MRIS listings for the surrounding area for the last six months ("MRIS Listings") as **Exhibits E** and **F** respectively.

The Revised Pro-Forma provides financial analyses for projects on the Property ranging from 15 to 30 units in size. The Revised Pro-Forma differs from previously filed financial analyses in this case because it includes IZ units (at both 50% AMI, which the Applicant is currently proposing for the subject Project, and with half the units at 50% AMI and the other half at 80% AMI, as required by the Department of Housing and Community Development's affordability requirements). Also, it clearly separates the base level construction costs, that would apply to any development on the Property, with project-specific construction costs that are directly tied to the size and scope of each development option.

This Revised Pro-Forma establishes that with the subject Project – 30 homes, three of which being sold as IZ units at 50% AMI – the Applicant is only earning an anticipated 7.23% return.

If the size of the Project is reduced to 21 similarly sized units on larger lots, as suggested by OP, with providing two IZ units – one at 50% AMI and the other at 80% AMI – then the Applicant would lose approximately $1,800 per unit, resulting in a negative return.

If the Applicant wanted to provide a project with 21 larger homes on large lots, the interior layouts would be awkward, and those homes would be less energy efficient and more expensive. The Revised Pro-Forma shows that such a project would result in an approximate return of **-12.28%** – a loss of almost $**61,120** per home. Such returns are patently impossible to carry and would result in making the project so financially ***unfeasible*** that nothing would be constructed on the Property. Such a result is unnecessarily burdensome and would certainly have a negative impact on the surrounding properties and area, and be contrary to the Comprehensive Plan's vision for the Property.

Further, as shown in the Revised Pro-Forma, the proposed Project anticipates a sales price of $359,999 for all the units, except for the three IZ units that would be sold at $236,900. If the number of units are forced to be reduced because the variances are not granted, then the price per unit increases to $449,000 for a 3,100 s.f. unit and $525,000 for a 4,200 s.f. unit. The prices for the IZ units would increase as well, as one IZ unit would need to be sold for 80% AMI, raising the price of that unit to $401,700.

The attached MRIS Summary makes clear that that this Deanwood/ Upper north east submarket cannot support home prices that exceed the proposed $360,000 price point. Indeed, over the past six months, only three houses priced for more than $350,000 have been sold, while only one house priced more than 450,000 has been sold. No houses priced more than $500,000 have been sold during this time period.

Accordingly, if the variances are not granted, then the Applicant, if it proceeds at all, then will be forced to construct homes at the $449,000 or $525,000 price point which this submarket presently cannot sustain. This is clearly unnecessarily burdensome creating a practical difficulty to the Applicant. Without relief, a new development of large, vacant homes will sit on the market for months, potentially causing significant negative impact on the surrounding community by depressing nearby real estate values and potentially attracting crime.

Such a situation could be avoided by granting the requested variances. We note that OP has stated that it "does not accept an economic argument as justifying relief from the zoning regulations" for development on the Property. However, this statement is in stark contrast to the D.C. Court of Appeals decisions discussed above, holding that financial feasibility of a project <u>is a factor</u> that may constitute an unnecessary burden or practical difficulty. *See Tyler, et. al. v. District of Columbia Bd. of Zoning Adjustment* and *Downtown Cluster of Congregations v. District of Columbia Bd. Of Zoning Adjustment*, (discussed *supra).* Indeed, Court in *Tyler* specifically stated that "**increased expense** and inconvenience to applicants for a variance are **among the proper factors** for BZA's consideration." *See Tyler v. D.C. Board of Zoning Adjustment,* 606 A.2d at 1367. (Emphasis added)

Further, the Board has repeatedly found financial hardship to be practical difficulty in variance cases. *See Application No. 17446 of Pauline S. Ney (2006)* (approving area variances to construct new residential units on underutilized property after finding economic burden was a practical difficulty for the applicant); *Application No. 16573 of Martin E. Hardy* (2000)(approving substantial variance relief and finding that the "Board **may consider the economic hardship** in evaluating the applicant's practical difficulties, and **find practical difficulty** where strict compliance with the Zoning Regulations would result in a substantial increase in the cost of the proposed construction plus a significant limitation in the property's overall utility") (emphasis added). Accordingly, OP's flat refusal to consider financial hardship as a practical difficulty in this case goes against substantial Board and Court precedent and should be disregarded.

In sum, as described above, strict application of the Zoning Regulations regarding lot area, lot occupancy and side yard result in practical difficulties to the Applicant that result directly from the exceptional conditions of the Property.

D. <u>The Requested Relief Will Not Result in a Substantial Detriment to the Public Good nor a Substantial Impairment to the Intent, Purpose and Integrity of the Zone Plan.</u>

OP has concluded that the proposed lot area, lot occupancy and side yard relief would cause detriment to the public good because proposed lot sizes were "inconsistent with the existing pattern of development" and would impair the Zone Plan, because the project would "introduce a level of density to the neighborhood that is not anticipated" in the R-2 zone. Both statements are incorrect.

Taking the issue of "substantial detriment to the public good" first, contrary to OP's assertions, as documented in **Exhibits C** and **D**, the surrounding neighborhood is not "cookie cutter" with uniformly-sized and shaped lots. Instead, like many of the District's older neighborhoods, the areas of Deanwood and Upper Northeast have evolved organically, and, consequently, include a range of different types and sizes of lots, side yards and uses. There are many lots that are similar in lot size, side yard and lot coverage to the lots proposed by the Applicant.

In sum, the Project does not propose lots or yards sizes that are out of character with the greater, surrounding neighborhood, because the neighborhood itself is filled with various lot and yard sizes. Instead, the opposite is true. The images provided in **Exhibit C** and the chart in **Exhibit B** demonstrate that the proposed lots, side yards and uses more closely mirror the dimensions of authentic, established surrounding neighborhood lots than would the larger lots mandated by the R-2 zone. Therefore, by reflecting the lot and yard sizes of the existing neighborhood, rather than the ideal lot dimensions of a hypothetical, R-2 zoned lot, the Project does not cause any detriment to the public good.

Also, as discussed above, the Project provides **substantial benefits** to the neighborhood and the District through construction of high quality affordable housing, including three new IZ units, as well as a new sound wall and a playground. These attributes help to improve the broader community, thereby providing a public good.

The Project's improvement of the surrounding neighborhood is a matter that is to be considered by the Board upon review of the variance application. In the *Application No. 17316 of Randle Highlands Manor Limited Partnership* (2005), the Board approved variances to allow the development of a new residential neighborhood upon finding

> Granting the variance will not only have no adverse impact, but it will also further the public good. It will provide affordable housing in furtherance of specific policies of the District of Columbia set forth in the Comprehensive Plan, and specifically the Ward 7 objectives stated therein – to provide affordable housing, particularly for low to moderate income households, and to encourage home ownership. 'Important public interest concerns as well as potential hardship to the public are properly considered as factors in BZA determinations of variance relief'" Citing *Williams v. Board of Zoning Adjustment, 535 A.2d 910, 911 fn. 2 (D.C. 1988),* citing *National Black Child*

Development Inst. Inc. v. Board of Zoning Adjustment, 483 A.2d 687, 690 (D.C. 1984).

Finally, as to the issue of the "impairment to the Zone Plan", it is well settled that the Board should take direction from the neighborhood recommendations in the Comprehensive Plan and the permitted uses in the R-2 to understand if the relief requested is consistent with the Plan, rather than OP's generalized statement that the Project proposes a "level of density ... [that] is not anticipated" in the R-2 zone.

In this situation, the Comprehensive Plan expressly recommends construction of new one and two family homes for families on vacant lots that provide noise buffering from the CSX railroad line. *See* 10 DCMR §§1700 *et seq.*) Also, because the Property is located in an area identified as a "Neighborhood Enhancement Area" in the Generalized Land Use map, the Property is specifically identified as "present[ing] opportunities for compatible" infill development including "town homes and other density types". Further, it is an undisputed fact that semi-detached homes are permitted uses in the R-2 zone. (11 DCMR § 300.3(c))

Taken together, it is clear that this <u>exact</u> type of development (semi-detached homes for families that provide noise buffering) was both "anticipated" and, indeed, recommended on this Property. Accordingly, any claim that the Project impairs the Zone Plan has no merit.

VIII. Community Outreach

The Applicant has conducted significant community outreach. Moreover, it has concrete plans to conduct substantially more community outreach before October 20, including a two-hour site visit and tour of another of the Applicant's projects on October 10, and presenting the Project to the ANC on October 13. Through these actions, the Applicant demonstrates its dedication and intent to work with the community to construct new homes that will that will enhance the surrounding area.

In summary, prior to the July 28th hearing, the Applicant presented the proposed project to some community members at a meeting organized by SMD Commissioner Douglas. The Applicant also presented the Project to a small group of neighbors who reside within 200 feet of the Property during a meeting conducted at a community members' home.

At the hearing on July 28th, the Board encouraged further dialogue with the community. Since the hearing, the Applicant has had numerous conversations with ANC 7D and other members of the community. The Applicant presented to the full ANC on September 8th and plans on presenting to the ANC again on October 13th.

The Applicant has worked to address the primary concerns raised by the community as follows:

- *Environmental Phase I Study Sent to ANC Members on September 9.*

The Property is primarily an unimproved lot. A small portion of the lot is improved with the remnants of an auto repair garage. Due to the previous use of the Property, and in light of a Minnesota Avenue Extension DDOT Environmental Assessment ("DDOT Environmental Assessment") identifying that the Property may have contamination from oil and hazardous material, the ANC requested a copy of the Phase I report performed on the Property. Despite the fact that the information in the Phase 1 has no legal relevancy to the variance request before the BZA, on September 9, 2015, the Applicant sent a copy of the Phase I report to all ANC commissioners via email and through Dropbox.

- *Applicant Has Commissioned a Phase II Study*

Again, although there is no legal relevancy to the subject variance request application, at the ANC's request, the Applicant has retained Professional Service Industries ("PSI") to perform a Phase II Study, even though a Phase II is generally only conducted after concept design approval. In preparation for the Phase II, PSI reviewed the DDOT Environmental Assessment and the Phase I. As the letter from PSI indicates, the DDOT Environmental Assessment and the Phase I did not conclusively determine whether or not there are contaminants on the Property. Moreover, any contamination the Property may have is subsurface contamination, not surface level contamination and can be remediated with the proper measures. The Phase II report will be shared with the ANC when it is completed. If the Phase II determines that remediation is necessary, the Applicant, will perform such remediation.

- *The Applicant will Construct a 16-Foot Sound Barrier Along the Railroad Tracks.*

During the September 8, ANC meeting, some community members expressed concerns about constructing homes near railroad tracks. To address that concern, the ANC Package included a letter from Gary Ehrlich, Principal of Hush Acoustics, LLC. Mr. Ehrlich indicates in his letter that with proper noise mitigation measures, developing a residential community near a railroad is feasible. Mr. Ehrlich will perform a sound analysis at the Property and will be providing recommendations to the Applicant on how to successfully mitigate the noise from passing trains. The Applicant anticipates constructing a 16-foot sound barrier along the railroad tracks that will mitigate the railroad track noise both for its home, as well as for the rest of the nearby community.

- *Applicant has scheduled the October 10 Site Visit*

Members of the community expressed a desire to visit the Property in order to better understand the proposed design. As referenced above, in response to that request, the Applicant has scheduled a site visit for October 10, 2015, from 3PM-5PM. The Applicant welcomes all ANC Commissioners and community members to site visit. After the site visit, the Applicant will be giving tours of a nearby Valor Development project in order to affirm the quality of Valor Development's workmanship.

Based on the above, the Applicant has taken significant steps to work with the community to address their comments and to propose a Project that will result in substantial benefits to the surrounding neighborhood.

IX. Conclusion

For the reasons stated above as well as in the prior submissions and before the Board both during the July 28 hearings and will be presented on October 20, the requested relief meets the applicable standards for special exception and variance relief under the Zoning Regulations. Accordingly, the Applicant respectfully requests that the Board grant the application. The Project is consistent with the Comprehensive Plan recommendations for the Project and proposes a unit type that is permitted by right in the R-2 Zone. Finally, the Project will provide substantial benefits to the surrounding community, including increasing affordable housing options, constructing the extension of Minnesota Avenue and construction of a sound wall that will help to diffuse the railroad track sounds for the broader community.

Respectfully submitted,
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