

**BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA**

**AREA VARIANCE APPLICATION
OF 1106 MONTELLO AVE, LLC**

**1140 FLORIDA AVE, NE
BZA APPLICATION NO. 19061**

PREHEARING STATEMENT

I. Nature of Relief

This Statement is submitted on behalf of 1106 Montello Ave, LLC, owner of the property located at 1140 Florida Avenue NE (Square 4070, Lot 84) (the “Property”). As discussed more fully below, the Property’s unique features and conditions justify the granting of area variance relief from the floor area ratio requirements of Section 771.2, the lot occupancy requirements of Section 772.1, and the parking space requirement of Section 2101.1, as strict compliance with these requirements would be unnecessarily burdensome for the Applicant.

II. Background

A. Description of the Property.

The Property is a large, rectangular corner lot measuring 2,500 square feet in area. It is bound by Florida Avenue to the south and Montello Avenue to the east. The Property also shares a lot line with 1138 Florida Avenue to the west and 1112 Montello Avenue to the North. The building is currently a two-story masonry building with commercial retail use on the first floor. The corner retail space is currently vacant and was formerly a retail liquor establishment. There is also a take-out restaurant at the north end of the property. The other two floors are used as residential space and contain four apartment units.

The Property is located near the H Street Corridor and the HS-A Overlay. The area is characterized by a mixture of apartment houses and commercial use buildings along Florida Ave NE. Neighborhoods to the north and south of Florida Ave are characterized by two unit flat and single family row dwellings. Of note are several apartment projects either planned or currently under construction.

B. Proposed Project.

The Applicant is seeking to renovate the current building and maintain 50% of the existing façade and walls. The Applicant also proposes to add two stories to the existing structure, resulting in a four-story building. The Project, including the additional stories, would allow the Applicant to provide six (6) apartment units.

III. Burden of Proof.

The burden of proof for an area variance is well established. The Applicant must demonstrate three elements: (1) unique physical aspect or other extraordinary or exceptional situation or condition of the property; (2) resulting in practical difficulty in complying with a strict application of the Zoning Regulations; and (3) no harm to the public good or the zone plan. *Gilmartin v. D.C. Board of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990). As set forth below, the Applicant meets the three-part test for the requested area variance.

A. Unique Physical Aspect or Other Extraordinary or Exceptional Situation or Condition of the Property.

The Court of Appeals held in *Clerics of St. Viator v. D.C. Bd. of Zoning Adjustment*, 320 A.2d 291 (D.C. 1974) that the exceptional situation or condition standard goes to the property,

not just the land; and that “...property generally includes the permanent structures existing on the land.” *Id.* at 293–94. The Court held that the exceptional situation standard of the variance test may be met where the required hardship is inherent in the improvements on the land (*i.e.*, the building or structure) and not just the land itself. Furthermore, the Court of Appeals held in *Gilmartin v. D.C. Board of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990), that it is not necessary that the exceptional situation or condition arise from a single situation or condition of the property. Rather, it may arise from a “confluence of factors.”

The Property is characterized by an exceptional situation and condition as the result of a confluence of factors: (1) the Applicant is maintaining the existing structure; (2) the location and size of the Property; (3) preservation of the existing façade; and (4) proximity of the Property to the HS-A Overlay.

1. Existing Structure and Use

The Applicant is maintaining both the existing structure of the building, including 50% of the existing walls and façade, and the existing use of the building, including both residential and commercial space, to benefit the community and to promote the intention of the Zoning Plan. However, several problems are associated with maintaining the existing footprint; as the existing building is over lot occupancy by 21 percent, for a total of 81% lot occupancy.

2. Location and Size

Another unique condition is the location and size of the Property. The Property is a landlocked corner lot with no alley access. The property is bound by Florida Avenue to the South and Montello Avenue to the East. The Property also shares a lot line with 1138 Florida Avenue to the west and 1112 Montello Avenue to the North. Additionally, the Property is bound by Florida Avenue to the South and Montello Avenue to the East. There are no other properties in

neighborhood that are similarly situated as a large corner lot with no alley access in a C-2-A zone.

3. Preservation of the Existing Façade

The Applicant is preserving the existing two-story façade. While the property is just outside of the HS-A Overlay, preservation of the existing façade effectuates an important goal of the Overlay. The HS-A Overlay promotes the preservation of the existing facades as a way of encouraging rehabilitation that is consistent with the historic character of the area and reuse of existing buildings. The Applicant is proposing to reuse the façade, rather than demolishing and rebuilding, in order to conserve resources, reduce waste, and reduce environmental harm caused by new materials being manufactured and transported to the site.

4. Proximity to the HS-A Overlay

The Property is included in the extension of the HS-A Overlay as intended by 10-A2 DCMR §2412.9(a) of the regulations which states that Overlay was intended to “promot[e] development of an arts district along the eastern end of Florida Avenue NE by considering linkages with the H Street NE arts and entertainment district and planned development on lower Bladensburg Road, support of additional development on the corridor, and support of visual improvements.” Even though the Property is not technically zoned in the HS-A Overlay, the regulations pertaining to the description of the HS-A Overlay clearly intend for this area of Florida Avenue to be included in the Overlay. Pursuant to §1324.3, any new construction that preserves an existing façade constructed before 1958 is granted a 0.5 FAR bonus for residential use. The Property therefore must comply with the HS-A Overlay requirements in order to receive support for the project by the ANC, while not receiving any of the benefits of the HS-A overlay such as the additional FAR.

The confluence of the above mentioned factors create a highly unique situation in which the Applicant is trying to simultaneously contribute to the community by maintaining the existing façade and providing commercial space while creating enough residential units to make the project economically feasible. As discussed below, these unique conditions would result in a practical difficulty if the zoning regulation were strictly applied.

B. Strict Application of the Zoning Regulations would Result in a Practical Difficulty

Generally, to warrant granting area variance, it must be shown that strict compliance with area restrictions would be unnecessarily burdensome. *Palmer v. District of Columbia Board of Zoning Adjustment*, 287 A.2d 535 (D.C. 1972). The Court of Appeals has found that financial infeasibility rises to the level of a practical difficulty and satisfies the second prong of the area variance test. *See Downtown Cluster of Congregations v. District of Columbia Bd. Of Zoning Adjustment*, 675 A.2d 484 (D.C. 1996)(finding that an undue hardship existed because a tenant could not be located that offered a “reasonable rate of return to the owner”). In *Downtown Cluster*, the court heard testimony and upheld variance relief based on financial infeasibility, concluding that the 6% return the applicant could achieve as a matter of right was insufficient and the higher return that would be achieved had the applicant been granted relief, was a reasonable return. *Id.* At 487–89.

Additionally, the Court of Appeals affirmed the Board’s approval of 100% parking relief for construction of a YMCA on a vacant lot based on a finding of practical difficulty due to the need to reduce the size of the swimming pool by half to provide parking at grade and the exorbitant cost of providing underground parking in comparison to such costs under ordinary circumstances. *See 1700 Block of N Street, N.W., et. al. v. District of Columbia Bd. of Zoning*

Adjustment, 384 A.2d 674, 676 (D.C. 1978); *see also Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1170-71 (D.C. 1990)(“...1700 Block indicates that at some point economic harm becomes sufficient, at least when coupled with a significant limitation on the utility of the structure.”).

1. *Lot Occupancy and Floor Area Ratio.*

The effort required to maintain the existing use and structure, and simultaneously develop an economically viable project on a large corner lot near the HS-A Overlay, creates a unique situation under which strict application of the zoning regulations would be an unnecessary burden on the Applicant. Maintaining the existing structure takes more time, effort and in turn, money, than razing the structure. Additionally, the Applicant is trying to keep the existing ground floor retail, in order to satisfy the desires of the community. To do this the Applicant must maintain the footprint, but as discussed above, the footprint creates problems with lot occupancy, as well as FAR. The additional units push the building over the permitted FAR, however, the project is not viable without these additional units. As shown on the attached financial projection, without the additional story, the Applicant would likely not be able to break even and would realize a cash return on equity of *negative* 1.78%.

2. *Parking Requirement.*

The unique shape and location of the lot, as well as the proximity to multiple forms of public transportation, makes it so that requiring parking on this lot would be both an unnecessary burden to the Applicant and, although not required under the variance test, practically impossible.

C. No Substantial Detriment to the Public Good or Integrity of the Zoning Regulations.

The Applicant also satisfies the third prong of the variance test, as granting relief from the lot occupancy requirements, floor area ratio requirements and parking requirements would have no substantial detriment to the public good or integrity of the zoning regulations. The Applicant is maintaining the existing façade and character of the building through adaptive re-use of the existing structure. This adaptive re-use improves an aging building, preserves the neighborhood-servicing retail use, and provides housing. Granting relief will not be detrimental to the integrity of the zoning regulations because the building is unique for the reasons listed above and granting relief will be consistent with recent decisions, as discussed below.

D. Previous Board Decisions on FAR

Recently, the Board of Zoning Adjustment, (the “Board”) has granted relief from FAR in BZA Case No. 18688 and 18443. In Case No. 18443, the Board granted FAR relief of 0.33 (total of 2.83) for a project located at 3616 14th St. NW and zoned C-2-A, finding that the applicant satisfied the requirements for an area variance. The applicant argued that the existing building already exceeded the non-residential FAR requirement, and that strict application of the regulations would prevent the applicant from “creat[ing] functional and livable units in an economically viable way”. Similarly in this case, the existing building is over the FAR requirements and, as the supplemental financial documents illustrate, strict application of the regulations would prevent the Applicant from providing functional units in an economically viable way.

In Case No. 18688, the Board granted FAR relief of 0.5 for a project located at 1348-1356 Florida Avenue, NE and zoned C-2-A, finding that the applicant satisfied the requirements

for an area variance because a confluence of factors, including location, prior use, preservation of the existing façade, and proximity to the HS-A Overlay, created an exceptional circumstance under which the “[p]roperty [would] not generate a fair and reasonable return on investment without the requested variances.” That case is similar to this case, as 1140 Florida Avenue is also afflicted by a confluence of factors such as location to the HS-A Overlay, zoned C-2-A, intends to preserve the existing façade and will also not generate a fair and reasonable return on investment without the requested variances.

IV. Conclusion.

For the reasons outlined in this Prehearing Statement, the Applicant respectfully requests the relief as detailed above.

Respectfully Submitted,

A handwritten signature in black ink that reads "Martin P. Sullivan". The signature is written in a cursive, slightly slanted style.

Martin P. Sullivan
Sullivan & Barros, LLP
October 13, 2015