

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 19103-A of TPC 5th & I Partners LLC, as amended, pursuant to 11 DCMR §§ 3103.2¹ for variances from the rear yard requirements under § 774.1, the closed court requirements under §§ 776.1 and 776.2, the off-street parking requirements under § 2101.1, and the parking access requirements under § 2117, and pursuant to § 3104.1 and § 411.11 for special exception relief from the penthouse regulations under §§ 411.18, and 411.9², and the penthouse use requirements under § 411.4(c)³, to allow a new mixed-use development in the DD/C-2-C zone, at premises located at 901 5th Street, N.W. (Square 0516, Lot 0059).

HEARING DATES: November 10, 2015 and December 15, 2015
DECISION DATES: December 15, 2015 and January 12, 2016

CORRECTED DECISION AND ORDER⁴

On July 31, 2015, the Applicant filed an application with the Board of Zoning Adjustment (“Board” or “BZA”) requesting variance and special exception relief to allow a new mixed-use building containing hotel and apartment house uses. The Applicant later amended its application to request that a portion of the proposed penthouse be devoted to a nightclub, bar, cocktail lounge, and/or restaurant use. Following a public hearing on December 15, 2015, the Applicant also made several modifications to its proposed roof plans, resulting in a reduction in the extent of requested penthouse setback relief, but adding a request for relief from the penthouse height requirements to

¹ This and all other references in this Order to provisions contained in Title 11 DCMR, except those references made in the final all-capitalized paragraphs, are to provisions that were in effect on the date this Application was decided by the Board of Zoning Adjustment (“the 1958 Regulations”), but which were repealed as of September 6, 2016 and replaced by new text (“the 2016 Regulations”). Also all zone districts described in this Order were renamed as of that date. The repeal and replacement of the 1958 Regulations and the renaming of the zone districts has no effect on the validity of the Board’s decision or the validity of this Order.

² Relief under this provision was requested after the initial hearing on December 15, 2015. (Exhibit 38.)

³ Relief under this provision was requested in an amendment to the initial application. (Exhibits 14 and 15.)

⁴ This Corrected Decision and Order replaces the Decision and Order issued in Application No. 19103, dated December 14, 2016. It is issued to correct inadvertent errors in certain citation references contained in the caption, Findings of Fact 40 and 42, and in the final Order of relief on page 14. In all other substantive respects, this order remains the same.

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allow enclosing walls to have unequal heights. At a decision meeting on January 12, 2016, the Board voted to approve the amended application, subject to various conditions.

PRELIMINARY MATTERS

Self-Certification The zoning relief requested in this case, as amended, was self-certified pursuant to 11 DCMR §3114.2. (Exhibits 12, 14, and 15.)

Notice of Public Hearing Pursuant to 11 DCMR § 3113.13, notice of the hearing was sent by the Office of Zoning to the Applicant, all owners of property within 200 feet of the subject site, Advisory Neighborhood Commission (“ANC”) 6E, and the District of Columbia Office of Planning (“OP”). The Applicant posted placards at the property regarding the application and public hearing in accordance with 11 DCMR §§ 3113.4 through 3113.20. (Exhibit 32.)

ANC 6E Report

The property is located within the area served by ANC 6E, which is automatically a party to this application. ANC filed two reports in this case. The first report, dated October 9, 2015, indicated that, at a properly noticed meeting on September 1, 2015, with a quorum present, the ANC voted 4-1-2 to oppose the application due to its opposition to the parking reduction variance that was requested. (Exhibit 33.) In its report, the ANC stated that a minimum of 127 parking spaces was required at the project and that only 86 spaces were proposed. The ANC noted concerns that the proposed uses would “generate additional parking burdens in an area [that] has a demonstrated parking deficit”, and that the Applicant had not proposed any off-site parking to offset the proposed parking reduction.

The initial ANC report did not address the request for special exception relief from the penthouse use requirements. Thus, the Board requested that the ANC also consider this relief, and the ANC submitted a second report. This undated report was submitted on January 11, 2016 and indicated that, at a properly noticed meeting on January 5, 2016, with a quorum present, the ANC voted unanimously (7-0) to support the Applicant’s request for a special exception to allow a restaurant, bar, and/or cocktail lounge use within the habitable portion of the proposed penthouse, but that no portion of the space be devoted to a nightclub use. (Exhibit 40.)

Requests for Party Status There were no requests for party status, either in opposition or in support.

Persons in Support/Opposition No persons appeared at the hearing to testify in opposition or in support to the application. Nor were any letters received from persons in support of, or in opposition to, the application.

Government Reports

Office of Planning (“OP”) Report

OP reviewed the application and submitted a report recommending approval of the requested relief, including the request for amended relief under the penthouse use requirements. (Exhibit 30.) OP’s representative, Stephen Cochran, discussed OP’s position during testimony at the public hearing on December 15, 2015.

Department of Transportation (“DDOT”) Report

DDOT reviewed the application and submitted a report⁵ stating that it had no objection to the approval of the requested relief, subject to specific conditions designed to mitigate any potential vehicle traffic impacts. (Exhibit 37.) DDOT’s representative, Evelyn Israel, appeared during the public hearing to confirm DDOT’s position. (Hearing Transcript of December 15, 2015, (“Tr.”), p. 326-329.)

DDOT recommended, and the Applicant agreed to the following conditions: (1) The Applicant will appoint a Transportation Demand Management Coordinator to work with residents, hotel guests, and employees to distribute and market various transportation alternatives and options; (2) The Applicant will provide a public transportation screen, showing real-time information on nearby transit services, in the residential and hotel lobbies; (3) The Applicant will provide all hotel guests free Capital Bikeshare passes upon request for the life of the hotel project and actively promote this incentive through the marketing plan outlined by the Applicant; and (4) The Applicant will provide a one-year bike share membership, car share membership, or \$100 SmarTrip card to all lessees on a yearly basis for a total of 10 years or a three-year membership at the initial sale of the units.

FINDINGS OF FACT

The Subject Property

1. The property that is the subject of this Application (the “subject property”) is owned by the District of Columbia and is being used by a private entity as a surface parking lot.
2. The Applicant was selected by the District as the developer of the subject property after demonstrating, among other things, that it would develop a “transit oriented development that reflects the project’s adjacency to multiple metro stations”. (Exhibit 29.) The subject property will either be ground leased or sold to the Applicant. (Exhibit 29 Tab A.)

⁵ DDOT acknowledged that its report, which was filed on November 6, 2015, was not filed seven days before the initial public hearing (as required) on November 10, 2015. However, because the Board continued the initial hearing to December 15, 2015, the parties and the Board had ample time to consider the report.

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3. The subject property is located at 901 5th Street, N.W., Square 516, Lot 59, in the Downtown Development Overlay (DD) /C-2-C zone district.
4. The subject property is part of the Mount Vernon Triangle Historic District and any demolition, alteration, or new construction on or subdivision of the property is subject to review by Mayor's Agent for Historic Preservation ("Mayor's Agent"), who is required to consider the advice of the Historic Preservation Review Board ("HPRB").
5. The subject property consists of an irregular L-shaped, 20,614 square foot ("sf") lot that is on the northeast corner of the intersection of 5th and I Streets, N.W.
6. The size of the lot is relatively small for a downtown location. (OP Report, Exhibit 30.)
7. The Square in which the subject property is located is served by an alley system. The subject property has very limited alley access at the northeast corner.
8. The subject property has approximately 110 feet of frontage along 5th Street, which is 80 feet wide, and approximately 170 feet of frontage along I Street, which is 90 feet wide.
9. The Applicant has selected 5th Street (to the west of the site) as the "front" of the building. Subsection 199.1 defines "Street frontage".⁶ As a result, the lot line east of the subject property would be designated as the "rear" lot line. The rear lot line is adjacent to a building.
10. The lot's northern lot line includes a six-foot deep by four-foot wide "bumpout" from that lot line into the neighboring property. The northern lot line also has several odd jogs along the portion adjacent to the alley.
11. Prior use of the site has led to some soil contamination that will require remediation.

The Surrounding Area

12. The area surrounding the subject property consists of a high-density, mixed-use neighborhood comprised of commercial, residential, and retail and service uses.
13. A surface parking lot is located to the northwest of the subject property.

⁶ The definition of "street frontage is as follows:

Street frontage - the property line where a lot abuts upon a street. When a lot abuts upon more than one (1) street, the owner shall have the option of selecting which is to be the front for purposes of determining street frontage.

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14. A one-story commercial property is located to the east of the subject property on a site that has been assembled for larger-scale development under previous Mayor's Agent and Board approvals.
15. The subject property confronts a park reservation to the south, adjacent to Massachusetts Avenue.
16. A 12-story apartment-hotel building is located to the west of the subject property.
17. The nearby area contains several 12- and 13-story apartment buildings and some similarly sized office buildings.
18. The Gallery Place metro station is three blocks to the southwest of the subject property.
19. The subject property is also accessible by several Metrobus routes, as well as the DC Circulator which operates along Massachusetts Avenue and 7th Street.
20. A Capital Bikeshare station is located to the south along Massachusetts Avenue.

The Proposed Project

21. The Applicant proposes to construct a 130-foot-high, 12-story building containing hotel and apartment house uses.
22. No rear yard will be provided.
23. Because the subject property's north lot line follows an irregular path with several odd jogs, there is a small area of the lot that is too small to build on. The north wall of the proposed building does not encompass this area, which will result in a closed court being formed, as defined under the Zoning Regulations. (See, 11 DCMR § 199.1 Definition of "Court, closed"⁷.) The closed court will be four feet wide and approximately 24 square feet in area.
24. The hotel use will occupy floors two - eight of the proposed building and will contain approximately 175 guest rooms.
25. The apartment house use will occupy floors nine - 12 of the proposed building and will contain approximately 48 dwelling units.

⁷ The definition of a closed court is as follows:

Court, closed - a court surrounded on all sides by the exterior walls of a building, or by exterior walls of a building and side or rear lot lines, or by alley lines where the alley is less than ten feet (10 ft.) in width.

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26. The proposed hotel will contain approximately 108,810 square feet of gross floor area (“GFA”), and the residential component of the project will consist of approximately 65,093 square feet of GFA.
27. The ground floor of the proposed building will contain lobby space for the hotel and residential uses, as well as a restaurant, a fire control room, and loading facilities.
28. There will be one level of the building, plus a mezzanine, that will be located immediately below the ground floor. The below grade level will contain, among other things, a 5,500 square foot ballroom.
29. The Applicant proposes to provide 92 parking spaces located on one level, located below the ballroom.
30. The parking spaces will be accessed through a vehicular elevator system.
31. The Applicant proposes to provide 28 long term bicycle spaces.
32. The roof level of the building will contain residential and hotel outdoor terraces, a pool, and two roof structures.
33. The main roof structure contains the elevator cores for the hotel and apartment house uses, mechanical equipment, and residential amenity space.
34. As revised, only a small portion of the elevator core enclosure will not be set back from the exterior wall at a ratio of one foot of setback from an exterior wall, for each one foot of the enclosure height. (Exhibits 38 and Revised Plans, Exhibit 39, p.26.)
35. The revised rooftop plan results in multiple mechanical penthouse heights and multiple habitable penthouse heights. (Exhibit 38 and Revised Plans, Exhibit 39.)
36. The Applicant proposes that a portion of the proposed penthouse be devoted to a bar, cocktail lounge, and/or restaurant use.

The Zoning Relief

37. Subsection 774.1 of the Zoning Regulations requires that a minimum rear yard of 15 feet be provided in the C-2-C zone. Because no rear yard is proposed, relief is required under this provision.
38. Subsection 776.1 of the Zoning Regulations requires a minimum closed court width of 21 feet for a closed court at a non-residential building. Because the closed court width for the proposed building is only four feet, relief is required under this provision.

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39. Subsection 776.2 of the Zoning Regulations provides that the area of the closed court for a non-residential building be two times the square of the required width (i.e. 21 ft. squared times two), or 882 square feet. Because the area of the proposed closed court is only 24.3 square feet, relief is required under this provision.
40. Subsection 2101.1 of the Zoning Regulations provides that the proposal will include one parking space for each four dwelling units (12 spaces for 48 dwelling units), one parking space for each two sleeping rooms (88 spaces for 175 sleeping rooms), and one parking space for each 150 square feet of floor area in the largest function room (37 spaces for 5,500 sf ballroom), for a total of 127 parking spaces. Because the Applicant proposes to provide 92 parking spaces, relief is required under this provision.
41. Section 2117 of the Zoning Regulations provides that access to parking spaces be provided with a continuous driveway from a street or alley. Because the Applicant proposes to provide access with a vehicle lift system, and no ramp or driveway will be provided, relief is required under this provision.
42. Subsection 411.18 requires that roof structures be setback at a 1:1 ratio from the nearest exterior building wall. As revised by the Applicant, a small portion of the elevator core will be set back at less than a 1:1 ratio from the nearest building wall. However, § 411.11 of the Zoning Regulations allows for special exception relief from the setback requirements, subject to specified criteria. The Applicant seeks relief from § 411.18 under § 411.11.
43. Subsection 411.9 allows special exception relief to allow penthouse enclosure walls of unequal heights. As the Applicant's revised rooftop plans provide for unequal heights of the penthouse enclosures, the Applicant seeks relief under this provision.
44. Subsection 411.4(c) allows a portion of a rooftop penthouse to be used as a bar/cocktail lounge/restaurant⁸. The Applicant seeks approval for this use.

Constraints of the Subject Property

45. If the Applicant were to provide a rear yard to the east, there would be a 15-foot wide and 130-foot tall gap in the streetwall on I Street. Such a gap would be inconsistent with the traditional building pattern in the Mount Vernon Triangle historic district. (OP Report, Exhibit 30.)
46. It is impractical to fill in the noncompliant 24-square foot closed court area to the building's height of 130 feet, as the result would be either a solid block of construction material or an unusable interior space that would be approximately two feet wide, five feet deep, and 130

⁸ Subsection 411.1(c) also allows a nightclub use, if approved by the Board as a special exception. However, the Applicant states it will not seek to operate a nightclub.

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feet high. Alternatively, were the Applicant to provide an 884 square foot compliant open court, an unusable and difficult to maintain exterior space would be created.

47. The geotechnical engineering and groundwater investigation reports submitted by the Applicant (Pre-Hearing Statement, Exhibit 29, Tabs I and J) demonstrate the presence of below-grade soil contaminants and infiltrating groundwater at the prospective third below-grade level, with such infiltration increasing at a fourth below-grade level. The combination of the two would disproportionately result in greater construction-mitigation and operating expenses for each below-grade level, were the Applicant to provide additional levels of underground parking.
48. The Historic Preservation Office (“HPO”) prepared a staff report noting that a prior archeological investigation at the site yielded a high concentration of artifacts and remnants of former structures. The existence of these artifacts will impact the cost of the project and the construction timing, due to the additional steps that are required in carrying out the excavation, as well as additional documentation and reporting that is required.
49. Were the Applicant to provide a conforming ramping system to provide continuous access to the parking spaces, the required ramp and aisle widths would significantly reduce the number of vehicles that could be parked on any below-grade level.
50. A zoning compliant penthouse setback for the elevator core enclosure would require the relocation of the elevator core. This would negatively impact the corridor widths and parking aisle widths on the western side of the building, and, in turn, would reduce the number of hotel rooms and parking spaces that could be provided.

The Impact of the Proposed Project

51. HPRB conducted a concept review⁹ of the project and found that its scale and massing was compatible with the Mount Vernon Triangle Historic District.
52. The final revised plans submitted by the Applicant reflect refinements made to the building façade to address comments made by HPRB. (Exhibit 38.)
53. The Mount Vernon Triangle’s design principles stress the importance of continuous ground floor frontages on 5th Street. (11 DCMR § 1722.)

⁹ D.C. Official Code § 6-1108(b) permits prospective building permit applicants to apply to the Historic Preservation Review Board for conceptual review of a project for compliance with the historic preservation law.

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54. The lack of a rear yard will not significantly affect available light and air, given the subject property's corner location and the large open court that is provided on the alley side of the building.
55. Because no hotel guest rooms or dwelling units will face the court area, the noncompliant closed court will not result in a lack of light and air being provided to interior spaces that face or open onto the court.
56. Should there be a need to provide more than the 92 parking spaces that are proposed, the Applicant has worked with nearby parking garage operators to confirm the availability of both daily and monthly parking spaces. Paradigm Management Limited Partnership and LAZ Parking have confirmed their ability to accommodate any potential parking demand with nearby garages. (Exhibit 35.)
57. The light and air available to adjacent buildings would not be impacted by the minimal penthouse setback relief that is requested. The side property line of the nearest building to the north will be at least 37 feet from the edge of the proposed roof structure.

CONCLUSIONS OF LAW

The Requested Variances

The Board is authorized under § 8 of the Zoning Act of 1938, D.C. Official Code § 6-631.07(g)(3) (2008) to grant variance relief from the strict application of the Zoning Regulations. As noted by the Court of Appeals, the Applicant must meet a three-prong test for the Board to grant relief:

An applicant must show, first, that the property is unique because of some physical aspect or "other extraordinary or exceptional situation or condition" inherent in the property; second, that strict application of the zoning regulations will cause undue hardship or practical difficulty to the applicant; and third, that granting the variance will do no harm to the public good or to the zone plan.

Capitol Hill Restoration Society v. District of Columbia Bd. of Zoning Adjustment, 534 A.2d 939, 941 (D.C. 1987).

An applicant for a use variance must show that strict compliance with the applicable regulation will result in an undue hardship, while an applicant for an area variance must meet the less stringent standard that compliance will result in exceptional practical difficulties. (11 DCMR § 3103.7.)

As noted, the Applicant is seeking area variances from the rear yard requirements under § 774.1, the closed court requirements under §§ 776.1 and 776.2, the parking requirements under § 2101, and the parking access requirements under § 2117.4. Therefore, the "practical difficult[y]" standard will be applied.

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As discussed below, the Board finds that the Applicant has met its burden of proof for the requested area variances in this case.

Rear Yard Variance

The Board concludes that an exceptional circumstance exists at the subject property. The site is relatively small for a downtown location (Finding of Fact 6) and has a very irregular northern boundary line (Finding of Fact 10.) Particularly given the core-factor requirement for the proposed mixed use development, it would be practically difficult to provide a rear yard to the east of the lot. Furthermore, were the Applicant to provide a rear yard to the east, there would be a 15-foot wide and 130-foot tall gap in the streetwall on I Street. This gap would be inconsistent with the building pattern in the Mount Vernon Triangle historic district (Finding of Fact 45.) As such, granting the requested variance will not harm the public good or the zone plan, and, in fact, furthers both.

Closed Court Width and Area Variances

The noncompliant closed court on the northern boundary stems from an exceptional condition. As explained in the Findings of Fact, a four-foot wide section of the northern lot line jogs six feet deep into the lot to the north. (Finding of Fact 10.) The northern lot line also has several odd jogs along the portion adjacent to the alley. (Finding of Fact 10.) The unusual shape of the northern lot line would lead to a practical difficulty were the closed court regulations strictly applied. It would be impractical to fill in this closed court area, a 24-square-foot area built to the building's height of 130 square feet, consisting of either a solid block of construction material or an unusable interior space that would be two feet wide, five feet deep, and 130 feet high. (Finding of Fact 46.) Because no hotel guest rooms or interior dwelling units will face the proposed court, the noncompliant court will not result in a lack of light and air being provided to interior spaces that face or open onto the court. (Finding of Fact 55.) Thus, granting the requested variances would not harm the public good or the zone plan.

Parking Reduction Variance

As explained, the Applicant proposes 92 parking spaces (of the required 127 spaces). (Finding of Fact 40.) All of the proposed spaces will be located on one level, located below the ballroom. (Finding of Fact 29.) Given the small size of the site, the only way additional parking could be provided would be to provide additional levels of underground parking. However, the Applicant has demonstrated the practical difficulty of providing additional underground levels. Geotechnical engineering reports and groundwater investigation reports show the presence of below-grade soil contaminants and infiltrating groundwater, with such infiltration increasing at each additional below grade level. (Finding of Fact 47.) Furthermore, archeological investigation at the site indicates a high concentration of artifacts at the site. (Finding of Fact 48.) These factors would necessitate greater construction-mitigation and increased operating expenses for any additional below grade levels constructed, which the Board concludes would be unduly burdensome.

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The Board concludes that granting the requested parking reduction variance will not harm the public good or the zone plan. As noted previously, the Gallery Place metro station is near the proposed project, as are several Metrobus routes, the DC Circulator, and a Capitol Bikeshare station. (Findings of Fact 18-20.) In addition, information submitted by the Applicant shows that any additional parking demand could be satisfied using off-site parking garages. (Finding of Fact 56.) Finally, DDOT reviewed the application and stated that it had no objection to the project, provided the Applicant adheres to specific conditions that will mitigate any potential vehicle traffic impacts. Because the Board is imposing the conditions recommended by DDOT as part of its approval, the Board concludes that, as conditioned, the requested parking variance will not result in adverse transportation impacts.

Parking Access Variance

As explained previously, the Applicant proposes that the parking spaces will be accessed through a vehicular elevator, and not a ramp or driveway. Therefore, the Applicant seeks relief from § 2117 of the Regulations, which requires that access to parking spaces be provided by a continuous driveway from a street or alley. However, the subject property has only limited alley access at its northeast corner. (Finding of Fact 7.) Given the location of the alley access, the turning radii required for vehicles, and the required ramp and aisle widths, it would be difficult to provide the continuous access that is required by the Zoning Regulations. (OP Report, Exhibit 30.) In fact, the Board credits OP's finding that, if a conforming ramping system were provided, it would significantly reduce the amount of space available for parking vehicles. (Finding of Fact 49.)

The Board also concludes that the lack of continuous access to the spaces will not be against the zone plan or the public good. The Applicant proposes to utilize a combination of valet parking, two vehicular elevators and a parking space lift. (Pre-Hearing Statement, Exhibit 29, Tabs K and L.) The Board credits OP's finding that more parking spaces will be provided than with a zoning compliant ramping, and that vehicle entry and exiting will be achieved during peak hour operations. (Exhibit 30.) Thus, it is not likely that granting the requested relief will result in adverse impacts.

Requested Special Exceptions

As revised, the Applicant is also seeking special exceptions from the penthouse setback regulations of § 411.18, the penthouse height regulations of § 411.9, and the penthouse use regulations of § 411.4(c).

As stated in § 3104.1 of the Zoning Regulations (Title 11 DCMR), the Board "is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) ... to grant special exceptions, as provided in this title, where, in the judgment of the Board, the special exceptions will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps, subject in each case to the special conditions specified in this title." In this case, the "special conditions" are those specified in § 411.11 with respect to the setback and

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height relief. Subsection 411.4(c) authorizes the Board to grant a special exception for penthouse use without regard to “special conditions”.

As noted by the Court of Appeals:

In evaluating requests for special exceptions, the BZA is limited to a determination of whether the applicant meets the requirements of the exception sought. “The applicant has the burden of showing that the proposal complies with the regulation; but once that showing has been made, the Board ordinarily must grant the application.” *National Cathedral Neighborhood Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 753 A.2d 984, 986 n. 1 (D.C.2000) (quoting *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1032-33 (D.C.1995)).

Georgetown Residents Alliance v. District of Columbia Bd. of Zoning Adjustment, 802 A.2d 359, 363 (D.C. 2002).

Special exceptions for Penthouse Setbacks, Penthouse Height

In this case, the Board concludes that the Applicant has satisfied the two general tests stated in § 3104.1 and the specific conditions contained in § 411.11.

As to the general test, the Board concludes that the requested special exceptions will “be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps.” (11 DCMR § 3104.1.) The proposed penthouse design will not change the nature of the mixed use development, and will be in harmony with the existing neighborhood, which is a high density, mixed-use neighborhood comprised of commercial, residential, and retail service uses. (Finding of Fact 12.) With respect to whether the special exception will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps, the Board concludes that this standard is satisfied because, as discussed below, the specific conditions of § 411.11 are met.

The “special conditions” for § 411.11

The Board of Zoning Adjustment may grant special exceptions under § 3104 from §§ 411.6 through 411.10 and 411.18 upon a showing that:

(a) Operating difficulties such as meeting Building Code requirements for roof access and stairwell separation or elevator stack location to achieve reasonable efficiencies in lower floors; size of building lot; or other conditions relating to the building or surrounding area make full compliance unduly restrictive, prohibitively costly, or unreasonable;

Subsection 411.18 requires that penthouses and screening around unenclosed mechanical equipment be set back from the edge of the roof at a 1:1 ratio from the wall of the top story of the building. The Applicant substantially reduced the extent of the setback relief it initially requested,

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following direction from the Board on December 15, 2015. The only area of the penthouse now requiring setback relief is a relatively small portion of the elevator core, which cannot be set back further due to operational constraints if the elevator core were shifted. (Exhibit 38.) As OP concluded, providing a 1:1 setback would require relocation of the elevator core, which would negatively impact corridor widths on the western side of the building and reduce the number of hotel room and parking spaces that could be provided.

Relief is also required from § 411.9 to allow enclosing walls to have unequal heights. The Applicant only was able to reduce the extent of setback relief required, through a combination of increased setbacks and unequal penthouse heights. (Exhibit 38.)

(b) The intent and purpose of this chapter and this title will not be materially impaired by the structure;

The penthouse setback relief and the penthouse height relief is minimal.

(c) The light and air of adjacent buildings will not be affected adversely.

Granting the special exceptions will not impact the light and air of adjacent properties. The side property line of the nearest building to the north would be at least 37 feet from the edge of the proposed roof structures. (Exhibit 30.)

Special Exception for Penthouse Use

Subsection 411.4(c) of the Zoning Regulations allows the Board to approve a special exception permitting a portion of a penthouse to be used as a “nightclub, bar, cocktail lounge, or restaurant. The Applicant has indicated that it will not establish a nightclub use and there is nothing in the record to suggest that either a cocktail lounge or restaurant would result in adverse impacts. The uses are otherwise permitted in the zone district and there is no reason to believe that having these uses on the roof of this building would prove more impactful than if the uses were on the ground floor.

ANC

Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code §1-309.10(d)(3)(B) requires that the Board’s written orders give “great weight” to the issues and concerns raised in the recommendations of the affected ANC.

In this case ANC 6E initially recommended denial of the application. However, the issues and concerns raised by the ANC relate to the variance to reduce the required minimum parking, and not the other relief requested by the Applicant. Indeed, the ANC submitted a supplemental report indicating that it recommended approval of the special exception requesting use of the penthouse.

The concerns raised by the ANC relating to the parking variance pertain to the third prong of the variance test discussed above; i.e., whether the proposal will result in a substantial detriment to the

public good. The ANC raised two specific concerns. First, the ANC stated that the Applicant was proposing to provide 86 of the 127 required parking spaces, in an area which it states already has a “parking deficit”. Second, the ANC states that the Applicant did not propose “the use of any offsite parking to offset the lack of sufficient parking on site for the proposed uses.” (Exhibit 33.) While each of these concerns may have had some merit at the time the report was written, the Applicant later modified its proposal to address these concerns. First, regarding the number of proposed parking spaces, the Applicant increased the number of proposed spaces from 86 to 92. (Exhibit 29, Applicant’s Pre-Hearing Statement, p. 10.) Second, after the Applicant presented the project to the ANC and heard the ANC’s concerns relating to parking, the Applicant worked with nearby parking garage operators to confirm the availability of both daily and monthly parking spaces, should there be a need for more than the 92 spaces provided on-site. (Exhibit 35, Finding of Fact 56.) The Board finds that by increasing the number of proposed spaces and by confirming that additional off-site spaces would be available if necessary, the Applicant has established that granting the variance will not result in a substantial detriment to the public good.

OP

The Board is also required under D.C. Official Code §6-623.04(2001) to give “great weight” to OP recommendations. For reasons stated in this Decision and Order, the Board finds OP’s advice to be persuasive.

Therefore, for the reasons stated above, it is hereby **ORDERED** that the application, as amended, is hereby **GRANTED**, to allow variance relief from the rear yard requirements under § 774.1, the closed court requirements under §§ 776.1 and 776.2, the off-street parking requirements under § 2101.1, and the parking access requirements under § 2117, and special exception relief pursuant to § 411.11 from the roof structure requirements under §§ 411.18 and 411.9, and the penthouse use requirements under § 411.4(c), **AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 39 AND WITH THE FOLLOWING CONDITIONS:**

1. The Applicant shall appoint a Transportation Demand Management Coordinator to work with residents, hotel guests, and employees to distribute and market various transportation alternatives and options;
2. The Applicant shall provide a public transportation screen, showing real-time information on nearby transit services, in the residential and hotel lobbies;
3. The Applicant shall provide all hotel guests free Capital Bikeshare passes upon request for the life of the hotel project and actively promote this incentive through the marketing plan outlined by the Applicant; and
4. The Applicant shall provide a one-year bike share membership, car share membership, or \$100 SmarTrip card to all lessees on a yearly basis for a total of 10 years, or a three-year membership at the initial sale of the units.

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5. The penthouse shall not be used as a nightclub.

Vote taken on December 15, 2016:

VOTE: 4-0-1 (Marnique Y. Heath, Frederick L. Hill, Jeffrey L. Hinkle, and Peter G. May to APPROVE the variance relief; one Board seat vacant).

Vote taken on January 12, 2016:

VOTE: 4-0-1 (Marnique Y. Heath, Peter G. May, Frederick L. Hill, and Jeffrey L. Hinkle to APPROVE the special exception relief; one Board seat vacant).

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

A majority of the Board members approved the issuance of this order.

ATTESTED BY:


SARA A. BARDIN

Director, Office of Zoning

FINAL DATE OF ORDER: February 3, 2017

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE

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RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR SUBTITLE A § 303, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ. (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.