

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Board of Zoning Adjustment**



**Application No. 19127 of 2800 Sherman, LLC**, as amended,<sup>1</sup> pursuant to 11 DCMR §§ 3103.2 and 3104.1,<sup>2</sup> for variances from the lot area requirements under § 401.3, the lot occupancy requirements under § 403.2, the rear yard requirements under § 404.1, and the limitation on compact parking space requirements under § 2115.2, and special exception relief from the lot width requirements under § 2604.3, the accessory parking space location requirements under § 2116.5, and the penthouse requirements of § 411.5 to construct ten flats in the R-4 District at premises 2800 Sherman Avenue, N.W. (Square 2857, Lot 818).

**HEARING DATES:** December 8, 2015, and February 2 and 9, 2016  
**DECISION DATE:** February 23, 2016

**DECISION AND ORDER**

The owner of the subject property, 2800 Sherman, LLC (the “Applicant”), submitted a self-certified application on August 25, 2015, seeking variances from 11 DCMR §§ 401.3 (lot area and lot width), 403.2 (lot occupancy), 404.1 (rear yard), and 2115.2 (compact parking spaces), and special exception relief from 11 DCMR §§ 400.23 (height), 2604.3 (lot width for an Inclusionary Zoning development), and 2116.5 (accessory parking space location), to construct 11 flats on 11 new record lots in the R-4 District at 2800 Sherman Avenue, N.W. (Square 2857, Lot 818) (the “Site”). Based on subsequent revisions to the site layout and simultaneous changes to the Zoning Regulations, the Applicant reduced the proposal to ten flats on 10 new record lots and withdrew its request for the variance from the lot width

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<sup>1</sup> The Applicant’s proposal to construct ten flats on the Site was reduced from its original proposal to construct 11 flats by revised plans submitted under Exhibit 39A. The Applicant’s revised zoning calculations under Exhibit 39B reflect the withdrawal of the request for variance relief from the lot width requirements of § 401.3 and the reduction in the extent of relief needed under 11 DCMR §§ 401.3, 2604.3, 403.2, and 404.1. The caption has been revised accordingly.

<sup>2</sup> 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 heard and 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”). The repeal of the 1958 Regulations has no effect on the validity of the Board’s decision or the validity of this order. Pursuant to Subtitle A § 104 of the 2016 Regulations, the construction authorized by this Order is vested as to the area requirements contained in 1958 Regulations as of September 5, 2016.

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requirements of § 401.3 and the special exception relief under the height requirements of § 400.23. The Applicant also amended its application to add a request for special exception relief under § 411.5 following the publication of the new penthouse regulations (Z.C. Case No. 14-13) in the *D.C. Register* on January 8, 2016. Following several public hearings, the Board of Zoning Adjustment (“Board”) voted on February 23, 2016 to grant the application.

**PRELIMINARY MATTERS**

Notice of Application and Notice of Hearing. By letter dated September 1, 2015, the Office of Zoning provided notice of the original application to the Office of Planning (“OP”); the District Department of Transportation (“DDOT”); the Councilmember for Ward 1; Advisory Neighborhood Commission (“ANC”) 1B, the ANC in which the Site is located; and Single Member District 1B09. Pursuant to 11 DCMR § 3112.14, on September 15, 2015, the Office of Zoning mailed letters providing notice of the hearing to the Applicant, ANC 1B, and the owners of property within 200 feet of the Site. The Public Hearing Notice was published in the *D.C. Register* on September 25, 2015. (62 DCR 40.)

Applicant's Case. At the public hearing on December 8, 2015, the Applicant presented its original plans to construct 11 flats at the Site and provided evidence and testimony to assert that the application satisfied all the requirements for special exception and variance relief.

Based on concerns raised by the neighbors’ testimony and by OP, the Board requested additional information from the Applicant and continued the public hearing. In advance of the continued hearing, the Applicant submitted updated architectural plans and elevations reducing the project to ten lots (ten flats, containing 20 units) instead of the originally-proposed 11 lots (11 flats, containing 22 units) and a slightly revised site layout. (Exhibit 39A.) At the limited public hearing on February 2, 2016, the Board considered the information submitted by the Applicant and by the neighbors opposing the project. The Board requested that the Applicant and the neighbors in opposition meet with Ms. Tania Jackson of the Ward 1 Councilmember’s office to resolve issues regarding the project’s alleged encroachment into neighboring property and the possible existence of an easement across the Site. The Board scheduled a continued limited hearing on February 9, 2016.

At the limited hearing on February 9, 2016, the Applicant and Ms. Jackson of the Ward 1 Councilmember’s Office discussed the outcome of the meeting with the neighbors in opposition, and the Applicant submitted a further revised site plan that specifically included emergency egress gates and a trash storage area for the benefit of the property owners on Sherman Avenue. (Exhibit 45.) The Applicant also testified on February 9, 2016, that it was committed to working with the Sherman Avenue Neighbors to move forward with the project.

OP Reports. By memorandum dated December 1, 2015, OP expressed its general support of the Applicant’s project, but recommended denial of the variance and special exception requests under 11 DCMR §§ 401.3, 2604.3, 403.2, and 404.1. (Exhibit 33.) OP opined that the Applicant did not

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adequately explain the nexus between the unique Site characteristics and the practical difficulty in developing the Site in conformance with the Zoning Regulations. Specifically, OP asserted that the Applicant has not identified a clear practical difficulty related to the shape of the lot that prevented it from being developed into new record lots that are "closer to conformance with the intent of the Zoning Regulations." Nevertheless, OP asserted that it would not oppose the special exception parking relief requested under 11 DCMR §§ 2115.2 and 2116.5.

Following the public hearing on December 8, 2015, and the Applicant's January 26, 2016 post-hearing submission, OP submitted a supplemental report dated January 27, 2016. (Exhibit 41.) OP indicated that the revised project is "generally consistent and compatible with the surrounding community," but reiterated its concerns regarding the nexus between the Site's exceptional situation and the practical difficulty of developing the Site. Based on these concerns, OP noted that it could not support the variance from the lot area requirements of 11 DCMR § 401.3. However, OP asserted that if the Board accepts the nonconforming lot size, then OP would not oppose the remaining special exception and variance relief.

DDOT Report. By memorandum dated December 1, 2015, DDOT filed a report with the Board, expressing no objection to the Applicant's request for variances and special exceptions. (Exhibit 34). DDOT noted that "an appropriate network of pedestrian, bicycle, and transit infrastructure exists in close proximity to the proposed development, and which the Applicant will improve access by improving existing pedestrian facilities adjacent to its proposed development." DDOT also asserted that the provision of "15 vehicular parking spaces and 10 long term bicycle parking spaces is appropriate and meets zoning regulations." Finally, DDOT noted that the Applicant's project would result in the closure of a curb cut on Sherman Avenue.

ANC Report. ANC 1B submitted a resolution to the Board dated November 6, 2015. The resolution noted that at its public meeting of November 5, 2015, at which notice was properly given and a quorum was present, ANC 1B voted 8-0 to support the project. (Exhibit 28.)

Persons in Opposition. Four neighbors testified in opposition to the project. Andrew Scholnick and Mike Warnecke, who reside at 1020 Girard Street, N.W., expressed more general concerns regarding increased density, construction activities, and the impact of the development on on-street parking availability. Two neighbors residing on Sherman Avenue, Willie Jackson, of 2810 Sherman Avenue, N.W. (Square 2857, Lot 45) and Levon Donaldson, of 2814 Sherman Avenue (Square 2857, Lots 137 and 820) (the "Sherman Avenue Neighbors"), alleged that the proposed development on the Site would impermissibly encroach on their properties. Mr. Jackson and Mr. Donaldson also asserted that an easement existed for access from their properties across the Site (or the predecessor Lots 800, 808, and 816), to the north-south public alley located to the west of the Site. Mr. Donaldson and Mr. Jackson submitted documents to the record (Exhibit 40A1 and 40A2) and testified a second time at the limited public hearing of February 2, 2016, but were not present at the February 9, 2016 hearing.

**FINDINGS OF FACT**

**The Site and the Surrounding Neighborhood**

1. The Site is located at 2800 Sherman Avenue, N.W. (Square 2857, Lot 818). The Site has a total land area of 13,900 square feet and is located in the R-4 District. The Site is an irregularly-shaped flag lot, and is the largest lot within Square 2857. The Site is located on the southeast corner of the square, with Sherman Avenue to the east, Girard Street to the south, and a north-south public alley to the west. The Site is otherwise bounded by private property, including Lots 45, 137, and 820.
2. Square 2857 is bounded by Harvard Street to the north, Sherman Avenue to the east, Girard Street to the south, and 11th Street to the west. Square 2857 has a north-south, 15-foot wide alley that runs from Harvard Street to Girard Street.
3. The Site has had a history of nonconforming commercial and industrial uses, including the headquarters of a taxi company. The Site was most recently occupied by the headquarters of Foote's Plumbing and Heating.
4. Due to the Site's former use as a gas station, there is significant petroleum contamination on the Site that requires remediation. Based on the Applicant's drilling and environmental reports, the contamination is up to 16 feet and 18 feet deep. This level of contamination will require the Applicant to over-dig by approximately 10 feet to 12 feet in some locations and bring in a significant amount of clean fill to obtain approval from DDOE and ensure safe residential development. (*See BZA Hearing Transcript ("Tr.") of December 8, 2016, pp. 42-43.*)
5. As a result of the contamination and the associated studies and remediation work, the Applicant will spend approximately \$800,000 additional on redevelopment of the Site. (*See Tr., p. 51.*)
6. The Site is currently improved with a two-story commercial building located at the southeast corner of the Site, a one-story garage building abutting the alley on the west side of the Site that spans the entire north-south west portion of the Site along the alley, and surface parking on the remainder of the Site. The Applicant proposes to raze the existing structures in connection with redevelopment of the Site.
7. The Site is located in Columbia Heights, with frontage on Sherman Avenue. Sherman Avenue is a major north-south corridor in the District that is primarily developed with one- and two-family row dwellings, many of which are nonconforming as to lot width and lot area. The majority of the area surrounding the Site is zoned R-4.

**The Applicant's Project**

8. The Applicant proposes to remove the existing commercial building and garages on the Site and to subdivide the Site into ten individual record lots in order to construct ten two-family row dwellings (the "Proposed Flats").
9. Six of the new lots will have frontage on Girard Street (referred to herein as "Lots A-F") and four of the new lots will have frontage on Sherman Avenue (referred to herein as "Lots G-H and J-K").

**The Proposed Lot Dimensions**

10. The three western-most lots fronting on Girard Street (Lots A, B, and C) are irregular in shape and size, but all comply with the minimum required lot dimensions for a project with Inclusionary Zoning ("IZ") units in the R-4 District.
11. Certain lots fronting on Girard Street (Lots D, E, and F) have a lot area of 1,275 square feet where a minimum lot area of 1,500 square feet is required, pursuant to 11 DCMR § 401.3.
12. Lots D, E, and F match Lots A, B, and C in the permitted lot width, but because of the shallow north-south depth of 75 feet for this portion of the Site, Lots D, E, and F require variances from the lot area requirements.
13. Lots D, E, and F would need to be 93.75 feet deep in order to provide the minimum required lot area of 1,500 square feet and the minimum required lot width of 16 feet.
14. The lots along Sherman Avenue (Lots G, H, J, and K) each have a lot width of 18.75 feet and 994 square feet of lot area, where 1,500 square feet is required, pursuant to 11 DCMR § 401.3.
15. Lots A, D, E, and F are all 17 feet wide and Lot C is 17 feet and one inch wide. The widths of these lots are permitted by special exception pursuant to 11 DCMR § 2604.3 for IZ developments in the R-4 District.
16. The average lot width in the surrounding area is 17.1 feet (a range of 12.5 feet to 26 feet). The proposed lot widths will allow for an appropriate interior layout for the flats, which are designed to accommodate families.

**The Proposed Flats**

17. On average, the lot occupancy for the proposed flats will be 49% for the new lots, where a maximum lot occupancy of 60% is permitted, pursuant to 11 DCMR § 403.2.
18. On average, the rear yard depth of the proposed flats for the new lots will be 29 feet and

three inches. A minimum rear yard depth of 20 feet is required by 11 DCMR § 404.1.

19. The proposed flats on Lots G, H, J, and K will each have a lot occupancy of 70%, whereas 60% is the maximum lot occupancy permitted, pursuant to § 403.2.
20. The proposed flats on Lots G, H, J, and K will each provide a rear yard of 16 feet, where 20 feet is required, pursuant to § 404.1.
21. The proposed flats will each have a penthouse that provides roof access to the residents. The penthouses will not exceed 10 feet and one story in height and will contain only stair access to the roofs. The penthouses will be set back at least 1:1.

Parking

22. Fifteen compact surface parking spaces will be provided on the Site, all of which will be accessed from the public alley. A variance is required for the use of compact parking spaces, as set forth in 11 DCMR § 2115.2.
23. Thirteen spaces will be located in the north-south stem portion of the flag lot located along the alley, and two spaces will be located behind Lots C and D. A centralized trash area located on the rear portion of Lots D and E will be provided on the Site.
24. Because the proposed parking spaces for the project are located on the western portion of the Site adjacent to the alley, rather than on the individual lots upon which the parking spaces are intended to serve, two of the new record lots will have more than one parking space, two others will have a portion of a parking space, and the remainder will have no parking spaces. Subsection 2116.5 of the Zoning Regulations permits off-site parking for flats by special exception.
25. Cross-easements will be recorded to allow access and use of the parking by the residents of the project.
26. The location of the parking spaces grouped on the western portion of the Site is the most efficient use of the Site's irregular shape, creates a better design, provides safe ingress and egress to the street, and results in minimal impact on neighboring properties.
27. All ingress and egress will occur from the public alley. This type of access will result in the closure of an existing curb cut on Sherman Avenue and will permit the Applicant to eliminate all vehicle entrances and curb cuts onto the Site from the surrounding streets.
28. The accessory parking spaces will be located so as to furnish reasonable and convenient parking facilities for the occupants or guests of the building or structures that they are designed to serve.

*General Project Considerations*

29. The proposed layout minimizes the gap along the streetscape and maintains the architectural rhythm of the street. The square footages of the units have remained approximately the same as in the original plan, in order to respond to the market in that area for units of a certain size and a certain cost per square foot.
30. The alternative site configurations and testimony regarding the project financing provided by the Applicant demonstrate that a matter-of-right development would result in units that are out of character with the surrounding neighborhood that would create difficulties in the marketing of those units. The significant cost of environmental remediation required to be undertaken by the Applicant also factors in to the practical difficulty of developing the project as a matter of right. (*See Tr.*, pp. 49-52.)
31. The project is consistent with the surrounding residential neighborhood. The proposed lot dimensions, lot occupancies, and rear yards are consistent with those of other residential dwellings in the surrounding area.
32. Each record lot will provide substantial open space, light, and air to its residents, and each flat is designed to maximize space to comfortably accommodate families.
33. The project is consistent with the Comprehensive Plan for the National Capital (the “Comprehensive Plan”), which encourages infill development on underutilized land within the city, particularly in areas where there are unimproved lots that create gaps in the urban fabric.

*Revisions to Project to Address Neighbors’ Concerns*

34. During the December 8 and February 2 public hearings, the Sherman Avenue Neighbors (Mr. Jackson, who owns Lot 45, and Mr. Donaldson, who owns Lots 137 and 820) testified in opposition to the project regarding two main issues: (1) that the proposed development would impermissibly encroach on Lots 45, 137, and 820; and (2) that an easement exists for access from Lots 45, 137, and 820 across the Site, to the north-south public alley to the west of the Site. The Neighbors in Opposition raised a general concern with emergency egress out of their properties that they believed would be hampered by the proposed development of the Site.
35. Following the limited public hearing on February 2, 2016, and as requested by the Board, the Applicant met with Mr. Jackson and Mr. Donaldson in a meeting facilitated by Ms. Tania Jackson, Chief of Staff to the Councilmember for Ward 1. The Applicant submitted relevant information and documents to the Board regarding this meeting (Exhibits 44 and 45), as follows:
36. The Applicant submitted a Neighbor Emergency Egress Plan (Exhibit 45, Sheet 1) showing

proposed emergency exit gates for egress from Mr. Jackson's property (Lot 45), Mr. Donaldson's property (Lots 137 and 820), and the intervening Lot 822, onto the Site. The Applicant offered to install the emergency exit gates shown on Exhibit 44 if accepted by the neighbors. Egress from these gates to the alley would be through a pedestrian gate located behind the flat on Lot A. This would be for emergency egress only.

37. The Applicant provided a Neighbor Trash Removal and Emergency Egress Plan (Exhibit 45, Sheet 2) showing a proposed access way from the neighboring properties to the public alley, across Lot 813, for use by the neighbors to store their trash cans so that they can have trash pickup from the alley, rather than from the front of their properties. The Applicant offered to provide this access if and when the Applicant is successful in completing the purchase of Lot 813 in a tax sale, and if the neighbors agree that they want it.

## **CONCLUSIONS OF LAW**

### **Variance Relief**

#### ***Standard of Review***

The Board is authorized under § 8 of the Zoning Act of 1938, D.C. Official Code § 6- 631.07(g)(3), to grant variance relief where, "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property," the strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, provided that relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. (*See* 11 DCMR § 3103.2.)

The District of Columbia Court of Appeals has held that "an exceptional or extraordinary situation or condition" may encompass the buildings on a property, not merely the land itself, and may arise due to a "confluence of factors." (*See Clerics of St. Viator v. District of Columbia Bd. of Zoning Adjustment*, 320 A.2d 291 (D.C. 1974); *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990).) The Court of Appeals has also held that "economic use of property may be properly considered as a factor in deciding the question of what constitutes an unnecessary burden or practical difficulty in area variance cases." (*Tyler, et. al. v. District of Columbia Bd. of Zoning Adjustment*, 606 A.2d 1362 (D.C. 1992).)

The Applicant is seeking variances from the lot area requirements under § 401.3, the lot occupancy requirements under § 403.2, the rear yard requirements under § 404.1, and the limitation on compact parking space requirements under § 2115.2. As discussed below, the Board concludes that the Applicant has met its burden of proof for the requested area variances in this case.



***Exceptional Situation or Condition Related to the Site***

The Board concludes that the Site is affected by a confluence of several factors that create an exceptional and extraordinary condition on the Site. First, the Site is exceptionally narrow and shallow in certain locations and has an unusual flag shape. The Site has approximately 13,900 square feet of land area and is roughly comprised of two rectangles due to the creation of Lot 818 from three separate lots (Lots 800, 808, and 816). These two segments of the Site together create an irregularly shaped and sized flag lot with unusual dimensions that significantly impact the ability to create an appropriate matter-of-right development on the Site.

In addition, there exists significant petroleum contamination on the Site that further results in an exceptional situation. The Applicant has undertaken drilling activities on the Site that indicate the existence of contamination up to 16 feet and 18 feet deep. This level of contamination will require the Applicant to over-dig by approximately 10 feet to 12 feet in some locations and bring in a significant amount of clean fill to obtain approval from DDOE and develop the Site in a safe manner. Thus, when taken as a whole, the Board concludes that the irregularly shaped and sized lot, plus the existence of extensive environmental contamination, together create exceptional and extraordinary conditions.

***Practical Difficulty in Complying with the Zoning Regulations***

The Board concludes that the Site's exceptional and extraordinary conditions create practical difficulties in complying with the Zoning Regulations. The size, shape, and dimensions of the Site present limited options for appropriate development with matter-of-right lot sizes, residential dwellings, and parking layouts. The Board considered the alternative configurations of the project, as created by the project architects, and determined that those alternative plans would result in inefficient Site layouts that are not in character with the surrounding neighborhood. Further the Board finds that important factors in developing the final site plan included orienting the flats to face Sherman Avenue, minimizing the rear yard gap along Girard Street, maintaining the height, width, design, rhythm, and size of the flats to be consistent with the surrounding residential neighborhood, providing adequate off-street parking and trash storage, and eliminating curb cuts.

In addition to the lot size, shape, and dimensions, the significant environmental contamination of the Site creates a practical difficulty in developing this Site in conformance with the Zoning Regulations. As indicated by the Applicant, the necessary environmental testing and remediation work on the Site will result in an additional \$800,000 in fees. The Applicant provided evidence and testimony supporting the assertion that the significant cost of environmental remediation for the project directly impacts that financial feasibility of the development. (*See Tr.*, pp. 49-52.)

***Variances for Lots G, H, J, K (Sherman-fronting Lots)***

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The Board finds that it is practically difficult to provide zoning-compliant lot areas, rear yards, and lot occupancies for Lots G, H, J, and K. Each lot fronting Sherman Avenue will have a lot width of 18.75 feet where 16 feet is permitted for IZ developments by special exception under § 2604.3; a lot area of 994 square feet where 1,500 square feet is required under § 401.3; a lot occupancy of 70% where a maximum 60% is allowed under § 403.2; and a rear yard of 16 feet where a minimum depth of 20 feet is required under § 404.1.

To provide 1,500 square foot lots, each lot would need to be 80 feet deep, instead of 53 feet deep as proposed. The flats are each proposed to be 37 feet deep. Thus, creating 80 feet deep lots would result in a 43-foot rear yard gap along Girard Street, which creates a dead space along the street and is generally an inefficient use of the Site. The more practical way to lay out four lots along Sherman Avenue with the building square footages as proposed is to provide slightly noncompliant lot areas, which results in slightly noncompliant rear yards. This proposed lot area and layout is consistent with what is found in the surrounding neighborhood. Providing compliant rear yards would result in removing square footage from each flat, thus hindering the creation of appropriately sized and designed three-bedroom units for families. The proposed site plan minimizes the gap along Girard Street and maintains the architectural rhythm of the street. Providing lots along Sherman Avenue that meet the lot area, lot occupancy, and rear yard requirements is therefore practically difficult.

*Variances for Lots D, E, F (Girard-fronting Lots)*

The Board also finds that it is practically difficult to provide zoning-compliant lot areas for Lots D, E, and F. Each of these lots will have a lot area of 1,275 square feet where 1,500 square feet is required. Due to the Site's irregular shape, the three western-most lots fronting Girard Street (Lots A, B, and C) are all irregular in shape and size, but all comply with and exceed the minimum required lot dimensions for a project with IZ units in the R-4 District. Lots D, E, and F match Lots A, B, and C in lot width, but because of the shallow north-south dimension of 75 feet on this portion of the Site, Lots D, E, and F require variances from the lot area requirements.

As previously described, Lots D, E, and F would each need to be 93.75 feet deep to provide a 1,500 square foot lot, while still maintaining a minimum lot width of 16 feet. Making Lots D, E, and F 93.75 feet deep would result in an encroachment on the adjacent property to the north (Lot 45) by approximately 19 feet, which imposes an undue burden on the Applicant. Alternatively, Lots D, E, and F would each need to be 20 feet wide to provide a 1,500 square foot lot area while still fitting within the Site's lot lines. Providing 20-foot-wide lots would be inconsistent with the widths of adjacent Lots A, B, and C and with other residential lots in the surrounding neighborhood. Moreover, providing 20 feet lot widths for Lots D, E, and F would add 12 feet to the Girard Street frontage, thus significantly encroaching on the rear yards of Lots G, H, J, and K, which are already nonconforming. Thus, the Board concludes that it is practically difficult to provide 1,500 square foot lot areas for Lots D, E, and F.

*Variance from the Compact Parking Space Requirements*

The Board finds that the unique shape of the Site creates a practically difficult in providing full-size parking spaces on the Site. Fifteen compact, surface parking spaces will be located on the north-south stem of the Site along the alley and behind Lots C and D. If the parking spaces were standard-sized, there would not be enough room on the Site to provide the total number of required parking spaces and the required space for drive aisles. Full-sized parking spaces would also eliminate space devoted to the on-site trash area, which is centrally located to allow convenient access by all residents. Thus, the Board concludes that providing full-sized, on-site parking spaces would result in a practical difficulty to the Applicant, based on the unusual shape of the Site.

***No Substantial Detriment to the Public Good or Zone Plan***

The Board concludes that the requested variances can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan. The proposed development plan is a logical layout given the Site's physical constraints, and is consistent with the dimensions and character of the surrounding neighborhood. Although up to three variances are required for some of the proposed new record lots, many of the variance requests are *de minimis*, consisting of several feet at most. Each new lot will have adequate open space to provide light and air to its occupants.

With respect to the zone plan, the Board finds that the project fits well within the character of the neighborhood, particularly since the proposed lot dimensions, lot occupancies, and rear yards are consistent with those of other residential dwellings in the surrounding area. Furthermore, the Board finds that the project is consistent with the Comprehensive Plan, which encourages infill development on underutilized land within the city, particularly in areas where there are unimproved lots that create gaps in the urban fabric, as is the case here. The proposed development complements the established character of the area while turning a mostly vacant lot into a productive housing use, which is desperately needed in the District. Thus, the Board concludes that the public good will be well-served by the proposed infill residential development in this area of the city.

**Special Exception Relief**

***Standard of Review***

Under D.C. Official Code § 6-641.07(g)(2) and 11 DCMR § 3104.1, the Board is authorized to grant a special exception where it finds that the special exception will be in harmony with the general purpose and intent of the zone plan and will not tend to adversely affect the use of neighboring property, subject in each case to the special conditions specified. 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 requested relief 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 regulation.” *First Baptist Church of Washington v. District of Columbia Bd. of Zoning Adjustment*,

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423 A.2d 695, 706 (D.C. 1981) (quoting *Stewart v. District of Columbia Bd. 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.*

The Applicant seeks special exception approval under the lot width requirements of § 2604.3, the parking space location requirements of § 2116.5, and the penthouse requirements of § 411.5.

Lot Width

Lots A, D, E, and F are each 17 feet wide and Lot C is 17 feet, one inch wide. These lot widths are permitted by special exception pursuant to 11 DCMR § 2604.3 for IZ developments in the R-4 District. The average lot width in the surrounding area is 17.1 feet, with a range of 12.5 feet to 26 feet. Thus, the Board finds that the proposed lot widths of 17 feet and 17 feet, one inch for Lots A, C, D, E, and F are consistent with, and proportionate to, the lot widths found in the surrounding neighborhood. Moreover, the proposed lot widths will allow for appropriately scaled and sized interior layouts designed to accommodate families in three bedrooms. Therefore, the Board concludes that the grant of this special exception is in harmony with the general purpose and intent of the Zoning Regulations and will not tend to adversely affect the use of neighboring property.

Parking Other Than on the Lot Where the Principal Use is Located

Subsection 2116.5 of the Zoning Regulations permits off-site parking for flats by special exception. Given the size, shape, and dimensions of the Site, and the layout of the proposed development, all of the parking for the project is located on the western portion of the Site adjacent to the alley, rather than on the lot upon which the flat the parking spaces are intended to serve is located. The Board finds that the proposed parking layout is the most efficient use of land and complies with the standards of 11 DCMR §§ 2116.5 through 2116.9.

The location of the parking spaces clustered on the western portion of the Site creates the most efficient layout for each new lot, results in safe ingress and egress to the street, minimizes pedestrian-vehicle conflicts, and results in no negative impacts to neighboring properties. All ingress and egress to the Site will occur from the public alley, thus resulting in the closure of the existing curb cut on Sherman Avenue and eliminating vehicular access from the surrounding streets. The Board finds that providing this type of site access will improve pedestrian safety and limit potential traffic hazards surrounding the Site. Moreover, the Board finds that the location of the parking spaces is conveniently located for occupants of the proposed development, since cross-easements will be recorded to allow direct access from all flats. Accordingly, the Board concludes that the grant of this special exception is in harmony with the general purpose and intent of the Zoning Regulations and meets the test for special exception relief under 11 DCMR § 2116.5.

Penthouses

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Pursuant to 11 DCMR §§ 3104 and 411.5, the Board may approve as a special exception a penthouse on the roof of a flat, provided that the penthouse: (a) is no more than 10 feet in height and contains no more than one story, and (b) contains only stair or elevator access to the roof and a maximum of 30 square feet of storage space ancillary to a rooftop deck.

In this case, the flats will have penthouses to provide roof access for their residents. The Board finds that the penthouses meet the requirements of 11 DCMR § 411.5, since: (a) the penthouses will not exceed 10 feet and one story in height, and (b) the penthouses will contain only stair access to the roofs. Moreover, the penthouses will meet or exceed the 1:1 setback requirements set forth in the penthouse regulations, such that they will not have any perceived impact on surrounding properties. Thus, the Board concludes that the proposed penthouses also meet the requirements of 11 DCMR § 3104 as being in harmony with the general purpose and intent of the zone plan and will not tend to adversely affect the use of neighboring property.

**Issues Raised by Neighbors in Opposition**

Regarding the allegations of an easement on the subject property and encroachment made by the Sherman Avenue Neighbors in Exhibits 40A1 and 40A2, the Board lacks authority to find that an easement exists in the absence of any record of the Surveyor of the District of Columbia or the Recorder of Deeds or court order indicating that such an easement exists. Further, the Board finds that, even if an easement exists, the easement alone would not be relevant to the Board's determination in this case. The Board cannot deny an application based on an assertion that private rights granted by an easement would be violated, as only a court may make a finding of such a violation and issue an injunction halting the project. In addition, the Board would nonetheless have to find that the violation resulted in the type of adverse impact that would justify the denial of the application or the imposition of a mitigating condition.

The Board did, however, request that the Applicant work with the Sherman Avenue Neighbors by having discussions with staff from the Ward 1 Councilmember's office in advance of the Board's February 9, 2016 public hearing. The Board has also carefully reviewed the Applicant's proffer of emergency gates and egress ways for the Sherman Avenue Neighbors to address their concerns about access from their properties, across the Applicant's property, to the public alley to the west. (*see* Exhibit 45, Sheets 1 and 2.) The Board believes that the Applicant has attempted to address these issues in good faith, but also notes that the Applicant's proposal requires in one instance that the Applicant obtain title to the neighboring Lot 813 in a tax sale, and also requires in both instances the assent of the Sherman Avenue Neighbors, who did not appear at the February 9, 2016 public hearing to indicate their acceptance of the Applicant's proffers.

The Board also notes that it cannot impose the gates and access ways shown in the site plans in Exhibit 45, Sheets 1 and 2, as conditions to the Order, because there is no nexus between the zoning relief being requested in this application and the conditions sought to be imposed. (*See* BZA Application No. 18778 of KJ Florida Avenue Property, LLC (June 18, 2014); *see also* BZA Application No. 17165-A of Public Storage, Inc. (August 4, 2004).) However, the Board

encourages the Applicant to continue a dialogue with the Sherman Avenue Neighbors, and will condition this order to allow the appropriate flexibility, should the Applicant succeed in acquiring the additional property and should the Sherman Avenue Neighbors agree to accept the Applicant's offers.

**Great Weight**

The Board is required to give "great weight" to the issues and concerns raised by the affected ANC in its written report. (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) (2001)).) In this case, ANC 1B recommended approval of the requested relief. Based on the Applicant's agreement with ANC 1B, the Applicant will dedicate the two units in the flat on Lot B to two three-bedroom IZ units, both of which will be dedicated to households earning up to 50% of the area median income ("AMI"). The Board accords the ANC recommendation the great weight to which it is entitled and concurs in its recommendation.

The Board is also required to give "great weight" to the recommendation of the Office of Planning. (D.C. Official Code § 6-623.04 (2001).) In this case, OP's initial report expressed general support of the project, but recommended denial of the variance and special exception requests under 11 DCMR §§ 401.3, 2604.3, 403.2, and 404.1. (Exhibit 33.)

Based on the Applicant's revised plans and supplemental information, OP submitted a second report affirming its general support for the project and asserting that the project is "generally consistent and compatible with the surrounding community." (Exhibit 41.) The report also expressed OP's concerns regarding the nexus between the Site's exceptional situation and the practical difficulty of development. OP did not support the requested variance from the lot area requirements of 11 DCMR § 401.3 for the revised ten-lot plan, but OP did assert that if the Board accepts the nonconforming lot area variance, then OP would not oppose the remaining areas of zoning relief.

In this case, the Board does accept the nonconforming lot area variance, because of the practical difficulties associated with creating zoning-compliant lot areas that is a direct result of the Site's narrow dimensions and unusual shape. In addition, when considering the nexus between the Site's exceptional situation and the associated practical difficulty, the Board considered the Applicant's testimony regarding the impact of the environmental contamination as it relates to the financial feasibility of the project. At the hearing of December 8, 2015, OP testified that it declines to consider the Applicant's economic argument as part of its analysis. For these reasons and the other substantive findings and conclusions made in this order, the Board accepts the nonconforming lot areas in the Applicant's ten-lot plan as appropriate under the limited circumstances of this case, and therefore finds OP's objection to the lot area variance unpersuasive.

Based upon the record before the Board, and having given great weight to the ANC and OP reports filed in this case, the Board concludes that the Applicant has met the burden of proof pursuant to 11 DCMR § 3103.2 for area variances under §§ 401.3, 403.2, 404.1, and 2115.2, that there exists

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an exceptional or extraordinary situation or condition related to the Site that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

The Board also concludes that the Applicant has met the burden of proof for special exception relief, pursuant to 11 DCMR §§ 3104.1, 2604.3, 2116.5, and 411.5, and that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

It is therefore **ORDERED** that this application is hereby **GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED SITE PLAN SUBMITTED AS EXHIBIT 42, SHEET 8, AND THE ARCHITECTURAL DRAWINGS AT EXHIBIT 39A, SHEETS 8 THROUGH 18, AND SUBJECT TO THE FOLLOWING CONDITIONS:**

1. The Applicant shall have minor flexibility to modify the site plan in accordance with Exhibit 45, Sheet 1, if the Sherman Avenue Neighbors agree to the installation of emergency access gates as shown on that Exhibit.
2. The Applicant shall have minor flexibility to modify the site plan in accordance with Exhibit 45, Sheet 2, to include the improvements shown on the adjacent Lot 813, if the Applicant is able to acquire Lot 813, and if the Sherman Avenue Neighbors agree, and are able to get the other affected neighbors along Sherman Avenue to agree, to establish the mutual access way across the rear of their properties as shown on that Exhibit.

**VOTE: 4-0-1** (Marnique Y. Heath, Frederick L. Hill, Jeffrey L. Hinkle (by absentee ballot), and Anthony J. Hood (by absentee ballot), to APPROVE; 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:** October 26, 2016

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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 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



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ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED.  
VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.