

Holland & Knight

800 17th Street, NW, Suite 1100 | Washington, DC 20006 | T 202.955.3000 | F 202.955.5564
Holland & Knight LLP | www.hklaw.com

Christine Moseley Shiker
202.457.7167
christine.shiker@hklaw.com

February 3, 2016

VIA HAND DELIVERY

D.C. Board of Zoning Adjustment
Suite 210
441 4th Street, N.W.
Washington, D.C. 20001

Re: **Board of Zoning Adjustment Appeal No. 19174**
Owner's Statement in Opposition to Appeal

Dear Members of the Board:

Enclosed please find one original and two copies of the Owner's Statement in Opposition to Appeal regarding the above-referenced Board of Zoning Adjustment appeal case. Should you have any questions, please do not hesitate to have staff contact me.

Sincerely,

HOLLAND & KNIGHT LLP



Christine Moseley Shiker

Enclosures

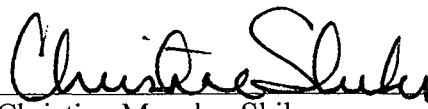
PROOF OF SERVICE

I hereby certify that a copy of the foregoing Owner's Statement in Opposition to Appeal was filed via hand delivery with the Board of Zoning Adjustment and was sent by first class mail, this 3rd day of February 2016, to the following:

Matthew LeGrant
Zoning Administrator
Department of Consumer and Regulatory Affairs
1100 4th Street, SW
3rd Floor
Washington, DC 20024

Maximilian Tondro, Esq.
Associate General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street, SW
Room E-500
Washington, DC 20024

Laurie B. Horvitz
Law Office of Laurie B. Horvitz
4520 East West Highway, Suite 700
Bethesda, MD 20814
Counsel for Appellants


Christine Moseley Shiker

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

Appeal of Unit Owners' Association of the
Erie Condominium and Individual Unit Owners
2337 Champlain Street, NW (Square 2563, Lot 887)

Appeal No. 19174

OWNER'S STATEMENT IN OPPOSITION TO APPEAL

**I.
INTRODUCTION**

A. Background on Appeal

2337 Champlain, LLC, (the "Owner"), the owner of the property at 2337 Champlain Street, NW (Square 2563, Lot 887) (the "Property"), submits this Statement in Opposition to Appeal¹ to the Board of Zoning Adjustment (the "Board" or "BZA") along with exhibits that the Owner may rely upon at the hearing on this matter. The Property is located in the R-5-B District and is within the Reed-Cooke ("RC") Overlay District. Pursuant to BZA Order No. 18330, the Board approved development of a new 40-unit residential building on the Property (the "Building"), granting special exception relief for additional height under 11 DCMR § 1403 and a variance from the FAR requirements under 11 DCMR § 402.

The Unit Owners' Association of The Erie Condominium (the "Association") and the individual unit owners within the Erie Condominium (the "Unit Owners") (collectively, "Appellants") are the owners of the Erie Condominium building (the "Erie Building"), which is located immediately to the north of the Property. Appellants challenge the decision by the District of Columbia Zoning Administrator (the "Zoning Administrator") and the Department of Consumer and Regulatory Affairs ("DCRA") to approve building permit plans dated February 6,

¹ This Statement responds to Appellants' initial appeal documentation in the record at Exhibit 3. As of the date of this filing, Appellants have not submitted a prehearing statement as provided for by 11 DCMR § 3112.10.

2015 (the “Building Permit Plans”) and to issue the associated building permit B-1410680, dated June 17, 2015 (the “Building Permit”), specifically as they relate to the height of the penthouse on the Building.

B. Appeal was Untimely Filed and Must Be Dismissed

Pursuant to 11 DCMR § 3112.2, Appellants were required to file the appeal within 60 days “from the date of the administrative decision complained of,” which in this case was the issuance of the Building Permit. Appellants claim that they did not know of the approved penthouse height until early October, 2015, when the Owner was constructing the penthouse on the otherwise fully-constructed Building. However, DCRA issued the Building Permit on June 17, 2015 (132 days before the appeal was filed) and construction under the permit started immediately following the issuance of the Building Permit. Appellants knew or should have known of the approved penthouse height no later than June 17, 2015.

Appellants were actively involved in the development of plans for the Property for numerous years. Appellants met with Owner in March, 2014, and May, 2015, during which Owner presented Appellants with updated plans that showed an increased penthouse height. Owner increased the penthouse height in direct response to Appellants’ request to locate the rooftop air handling units on top of the penthouse and screen them from view. Owner informed Appellants that the penthouse would be constructed in accordance with plans reviewed by Appellants, which indicated the increased penthouse height. Moreover, Owner met with Appellants in May, 2015, during which time Owner showed Appellants the Building Permit Plans that were submitted to DCRA and ultimately approved.

Based upon the facts in the record, Appellants knew of the penthouse height prior to the issuance of the Building Permit, and at the very latest, knew on the date that the Building Permit

was issued. Thus, any appeal was required to be filed within 60 days of issuance of the Building Permit (approximately August 17, 2015), at the latest. Accordingly, this appeal—which was not filed until October 27, 2015—is untimely and the Board should not consider it. A Motion to Dismiss the appeal was filed separately by the Owner on January 26, 2016, and is included in the record at Exhibits 15 and 16A-K (“Motion to Dismiss”).

C. Appeal Must be Dismissed Based on the Merits

If the Board decides to hear this appeal, Appellants’ challenge to the issuance of the Building Permit is without merit and should be dismissed for three reasons:

1. The Zoning Administrator routinely grants building permits for projects that include modifications to BZA-approved plans so long as the plans do not impact the relief granted or the conditions set forth in the BZA order.
2. The appeal is barred by the doctrine of equitable estoppel.
3. The appeal is barred by the doctrine of laches.

Each of these reasons is summarized below and discussed in full detail in the following sections.

First, modifications to BZA-approved plans that do not impact the relief granted have been permitted for many years by the Zoning Administrator. Section 3125.8 of the Zoning Regulations requires that “[a]n applicant shall be required to carry out the construction, renovation, or alteration only in accordance with the plans approved by the Board, unless the Board orders otherwise.” This provision has consistently and historically been interpreted to mean that an applicant must carry out construction of a project in accordance with the approved plans as it relates to the relief granted by the Board. Changes to the plans that do not affect the relief granted have been and may be approved by the Zoning Administrator so long as the changes comply with the Zoning Regulations.

In the present case, the Zoning Administrator reviewed proposed modifications to the BZA-approved plans on multiple occasions, and each time determined that the revised plans were within the scope of the plans approved by the BZA, did not extend the relief granted by the BZA, and did not create any other areas of non-conformity. Thus, the Zoning Administrator's determinations to approve the modified plans for the Building were appropriate, and DCRA's ultimate issuance of the Building Permit based on the approved Building Permit Plans was appropriate.

Second, the appeal is barred by the doctrine of equitable estoppel. The elements of estoppel are as follows: "a party (a) acting in good faith; (b) on affirmative acts of a municipal corporation; (c) makes expensive and permanent improvements in reliance thereon; and (d) the equities strongly favor the party seeking to evoke the doctrine." *Wieck v. D.C. Bd. of Zoning Adjustment*, 383 A.2d 7 (D.C. App. 1978). In the present case, Owner meets all four elements of the doctrine of estoppel because:

- (a) Owner acted in good faith by (i) repeatedly seeking the Zoning Administrator's approval for plan modifications and receiving determinations that the project was in compliance with the Zoning Regulations, (ii) filing all required plans with DCRA, (iii) obtaining all issued permits and posting them in a conspicuous location on the Property, (iv) and seeking Appellants' support for refinements to the project throughout the process;
- (b) there was an affirmative act of a municipal corporation by virtue of the issuance of multiple determination letters and the Building Permit by the properly empowered administrative official;

(c) Owner made expensive and permanent improvements in reliance on the Zoning Administrator's determinations and the issuance of the Building Permit, such as excavating the Property, constructing the Building to its full height under roof, and expending a tremendous amount of time, energy, and money in construction of the Building; and

(d) equities favor the Owner since revocation of the Building Permit would result in the Owner being unable to occupy or sell units in the fully constructed Building.

Third, the appeal is barred by the doctrine of laches. The doctrine of laches comprises two basic elements, namely (a) unreasonable delay in bringing the appeal; and (b) prejudice to the party asserting laches. *Goto v. D.C. Bd. of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. App. 1980). In the present case, Owner meets both elements of laches because:

(a) Appellants knew of Owner's plans to construct the Building according to the approved Building Permit Plans since at least May, 2015 (when Owner showed Appellants the Building Permit Plans and told Appellants those plans had been submitted for permit), and June, 2015, at the very latest (when the Building Permit was issued), yet waited to file an appeal until construction was nearly complete; and (b) Owner would be prejudiced upon granting the appeal because doing so would prevent Owner from occupying the already constructed Building, which was constructed in accordance with a validly issued building permit from the District.

Based on the foregoing, if the Board does not dismiss the appeal for timeliness, the Board should dismiss the appeal on the merits.

II. STATEMENT OF THE FACTS

A. BZA Case No. 18330

The Property is located at 2337 Champlain Street, NW, which has frontage on Champlain Street, NW to the west, a public alley to the east, and private property to the north and south. On November 18, 2011, FCP Champlain, LLC, the prior owner of the Property (the "Prior Owner") filed an application with the Board to develop the Property with the Building, having a maximum height of 48'-9" (elevation 198'-10")² to the top of the building roof, elevation 199'-11" to the top of the parapet, elevation 207'-10" to the top of the penthouse, and a maximum density of 2.41 floor area ratio ("FAR")). The application included a request for special exception relief for additional height under 11 DCMR § 1403 and a variance from the FAR requirements under 11 DCMR § 402.

Appellants participated as a party in opposition to the BZA case. The Board considered Appellants' arguments and voted unanimously on May 22 2012, to approve the requested relief. Pursuant to BZA Order No. 18330, effective on July 26, 2012, the Board asserted that the proposed height of the Building would be "compatible with the surrounding area" and "appropriate to the Erie building immediately adjacent." BZA Order No. 18330 Finding of Fact ("FF") No. 20. The Board also concluded that the Building would "not adversely impact the light and air to the Erie," and would "not adversely impact the views from the Erie's roof decks." See BZA Order No. 18330, FF Nos. 30 and 31. Furthermore, the Board gave "great weight" to the reports of Advisory Neighborhood Commission ("ANC") 1C and the Office of Planning, both of which indicated support for the project, and reviewed and acknowledged the report

² All heights are referenced at the actual elevation (i.e., in feet and inches above sea level), not above the building height measuring point.

submitted by the District Department of Transportation ("DDOT"), which recommended approval of the project.

The Board imposed only two conditions as part of the approval: (1) Access to the roof deck shall be limited to occupants of the seven residential units on the top floor of the front bar of the Subject Building, as identified on the plans presented to the Board in the record at Exhibit 44; and (2) The roof deck space for the Subject Building shall be set back at least 20 feet from the north property line and shall be demarcated by an open metal railing. The BZA Order did not impose any condition related to the height of the penthouse, and the approved roof plan complied in all respects with Section 411 of the Zoning Regulations³.

B. Appeal of BZA Case No. 18330 and Settlement Agreement

Appellants appealed BZA Order No. 18330 to the District of Columbia Court of Appeals. To settle the appeal and address Appellants' ongoing concerns, Prior Owner agreed to make certain design revisions to the approved project and impose additional conditions that were not part of BZA Order No. 18330. The agreements were set forth in the Adjacent Property Owner Agreement (the "Agreement"), dated January 22, 2013, and attached hereto as Exhibit A. The Agreement required, among other things, that Prior Owner: (i) reduce the height of the Building by at least 12 inches from the height approved in BZA Case No. 18330 (elevation 198'-10") to an elevation of 197'-10", and (ii) lower the elevation of the parapet to be equal in height or lower than the existing parapet of the Erie, which was at elevation 199'-6". *See* Agreement, p. 2. The Agreement required Prior Owner to obtain a reliance letter from the Zoning Administrator confirming that the proposed height modifications were within the scope of the plans approved in BZA Order No. 18330. The Agreement also required Prior Owner to ensure that the mechanical

³ The referenced Section 411 of the Zoning Regulations includes those regulations in effect at the time the Building Permit was issued.

penthouse and all rooftop structures, railing, equipment, furnishings, and improvements on top of the Building be set back at least 20 feet from the Property's northern lot line. The Agreement did not impose any restrictions on the penthouse's height.

Pursuant to the Agreement, Prior Owner prepared revised plans showing the height of the Building at elevation 197'-10" and the height of the parapet at elevation 199'-6." The revised penthouse continued to comply in all respects with Section 411 of the Zoning Regulations. Prior Owner submitted the revised plans to the Zoning Administrator, and by letter dated April 9, 2013, the Zoning Administrator found the following:

the proposed modifications are within the scope of the plans approved by the BZA. The proposed modifications reduce the extent of the special exception relief approved by the BZA and do not create any other area of non-conformity... Therefore, upon proper presentation of plans, I will approve a building permit application for this proposed development.

See Exhibit A to the Motion to Dismiss, in the record at Exhibit 16A.

C. Owner's Revised Plans

Owner purchased the Property from Prior Owner in November, 2013. Upon doing so, Owner made refinements to the approved building plans to incorporate more efficient layouts and establish a more cohesive residential building design. Specifically, the modified plans included relocating parking and pedestrian entrances, eliminating the previously-proposed central courtyard, and incorporating conforming side yards. The Building's height was maintained at elevation 197'-10" to the top of the roof and elevation 199'-6" to the top of parapet (as set forth in the Agreement and as previously approved by the Zoning Administrator). The FAR of the project did not change. Refinements also included moving the penthouse farther from the north property line abutting the Erie Building and slightly increasing the height of the

penthouse from 207'-10" to 208.78' (i.e. 208"-9.36"). The height of the revised penthouse complied with the height requirements of 11 DCMR § 411.

Owner met with the Zoning Administrator to determine whether the proposed modifications were consistent with the BZA-approved plans and the Zoning Administrator indicated that they were. On December 27, 2013, the Zoning Administrator issued a determination letter to Owner, finding that the "proposed plan modifications will have an imperceptible or even positive effect on the project, will reduce or keep the extent of special exception relief as previously approved by the BZA, and will not create any new areas of nonconformity." See Exhibit B to the Motion to Dismiss, in the record at Exhibit 16B.

Contemporaneously with the initial discussions with the Zoning Administrator, Owner also reached out to Appellants through appellant Richard Wiedis ("Wiedis"), president of the Association, and met with Wiedis on December 10, 2014, to discuss the proposed changes to the project. On January 2, 2014, Wiedis emailed Owner expressing his general support for the revised plans and indicating that had Owner proceeded with Prior Owner's plans additional objections would have been raised by Appellants. See Exhibit D to Motion to Dismiss, in the record at Exhibit 16D.

Based on these discussions, Owner returned to the Zoning Administrator for a second time to get approval of the further revised plans and provide updates on the status of discussions with the Appellants. These plans continued to show a building height of elevation 197'-10," a parapet height of elevation 199'-6," and a penthouse height of elevation 208.78'. By determination letter dated February 10, 2014, the Zoning Administrator found the following:

[the] proposed changes are all designed to be within the scope and intent of [the] BZA approval in Order No. 18330. The general design and architectural treatment of the exterior façade, including the proposed materials, are the same as

approved in Order No. 18330. In addition, the revisions will not change any area of relief and will not create any new areas of nonconformity.

See Exhibit C to Motion to Dismiss, in the record at Exhibit 16C. As it related to the Building's height, the Zoning Administrator specifically found that:

[b]y keeping the building the same height as the previous building design and matching the parameters for roof structure setback and other regulations, the proposed modified building plans will be consistent with Order No. 18330. In addition the proposed roof structure and roof decks will be reduced in overall size and comply with Section 411 of the Zoning Regulations. The reduction in size minimizes the impact on the views from the adjacent Erie Condominium building to the north.

Id. Thus, for a second time, the Zoning Administrator determined that the revised plans were within the scope of the plans approved by the BZA, did not extend the relief granted by the BZA, and did not create any other areas of non-conformity. Owner proceeded with development of the plans for the Building in reliance on the Zoning Administrator's consistent findings.

Following the Zoning Administrator's February letter, Owner continued to review the plans with Appellants and revise the plans in response to specific feedback. Owner and Appellants exchanged emails specifically regarding the proposed penthouse and Appellants' concerns regarding the location of the rooftop air handling units. See Exhibit E to Motion to Dismiss, in the record at Exhibit 16E. At the time, the air handling units were proposed to be unscreened and located on the northeast portion of the main roof of the Building, as permitted by the Building Code and the Zoning Regulations.

On March 18, 2014, Owner met with Appellants to present an update on the development of the project and to review the proposed modifications on the roof in response to issues raised by Appellants concerning location of the air handling units. Owner presented drawings showing a modified penthouse with the air handling units located on top of the penthouse and a 3.5' parapet to screen the air handling units. The height of the penthouse on the plans shown to

Appellants on March 18, 2014 (the “March Plans”) was at elevation 212.28’ (previous penthouse height of 208.78’ plus a 3.5’ parapet). Despite the increase in height, the penthouse still complied with the height requirements of Section 411 of the Zoning Regulations. At the March 18, 2014 meeting, Appellants represented to Owner that this solution was best.

On March 19, 2014, Owner emailed Wiedis a copy of the March Plans. The March Plans clearly showed the penthouse at elevation 212.28’ (208.78’ to the top of the penthouse roof, plus a 3.5’ parapet). The March Plans also included comparative plans for the Appellants’ review and information. *See* Exhibit F to Motion to Dismiss, in the record at Exhibit 16F.

On April 29, 2014, Owner again emailed a copy of the March Plans to Wiedis and affirmatively stated that Owner was nearing completion of the Building Permit Plans in accordance with the March Plans. *See* Exhibit G to Motion to Dismiss, in the record at Exhibit 16G. Relying on Appellants’ representation that the penthouse shown in the March Plans was the best solution, Owner finalized the plans and submitted them for approval to DCRA in July, 2014. The submitted Building Permit Plans showed a penthouse that was 10” taller than the penthouse shown on the March Plans. The increase was required in order to provide a parapet that fully screened the air handling units from sight and fully mitigated their noise impacts. Owner moved forward with the slightly increased penthouse height with the understanding that the increase was consistent with the concept agreed upon by the Appellants—that is, to fully screen the air handling units on top of the penthouse. The penthouse height, including the parapet, in the Building Permit Plans was at elevation 213.10’ (elevation of penthouse roof at 209.08’ plus a 4.02’ parapet), still well within the requirements of Section 411. The Building Permit Plans were dated for permit as of July 18, 2014, and revised as of February

6, 2015, for construction drawings. *See* Exhibit K to Motion to Dismiss, in the record at Exhibit 16K.

On September 27, 2014, Wiedis emailed Owner noting that there was activity on the Property and requesting a status update. Owner replied on September 30, 2014, stating that Owner would be constructing the Building generally in accordance with the March Plans. *See* Exhibit H to Motion to Dismiss, in the record at Exhibit 16H.

Several months later, on February 17, 2015, Wiedis emailed Owner with questions regarding site work and requested further clarification on the plans. Owner replied on the following day, reaffirming that the Building would be constructed in accordance with the March Plans. Owner offered to meet with Appellants to review the plans again, and the two exchanged multiple emails regarding the status of permits. Owner provided the Foundation to Grade permit to Appellants when requested. *See* Exhibit I to Motion to Dismiss, in the record at Exhibit 16I.

On May 12, 2015, Owner met with Appellants to further discuss the project. At this meeting, Owner presented the Building Permit Plans, which showed the penthouse at its full height of 213.10', including the 4.02" parapet. Owner and Appellants visited the roof of the Erie Building to review the proposed penthouse's height and setbacks. Owner informed Appellants that the Building Permit Plans were final and had been submitted for approval to DCRA in July, 2014.

On June 17, 2015, DCRA issued the Building Permit, and Owner began construction under that permit immediately thereafter. Foundation to grade construction had commenced in April, 2015. Owner posted the Building Permit, as well as other required permits and Traffic Control Plans, on a plywood board at the front of the Property. The permits were laminated and

clearly displayed in a visible location, particularly to Appellants who live in the adjacent property.

By the time the appeal was filed (132 days after DCRA issued the Building Permit), construction of the Building was nearly complete. Construction of the Building's main roof and all parapet walls were complete. The overbuild of the roof (i.e., the waterproofing, membranes and pavers) was 80% complete. The elevator shaft and stair towers were constructed at full height and the roof was framed. The penthouse walls were erected and most of the roof trusses were in place.

In early October, 2015, Appellants notified Owner of their opposition to the constructed penthouse, and on October 27, 2015, Appellants filed the instant appeal. Prior to receiving notice from Appellants in early October, Owner had no knowledge of Appellants' concern with the penthouse, particularly given the numerous occasions that Owner and Appellants had met to discuss the project, particularly the penthouse, the extensive discussions and changes that had occurred in response to issues and requests from Appellants.

Despite Appellants' awareness of the approved Building Permit Plans and its numerous meetings with Owner to review those plans, Appellants did not file their appeal until well after the Building was under roof and the penthouse was almost complete. Appellants argue that Owner is "building tall roof structures that are inconsistent with the special zoning relief that was provided to this Property previously," and that "[t]he new penthouse structures... are inconsistent with previously disclosed plans for the Property. They are also inconsistent with prior zoning determinations by BZA and the Zoning Administrator." *See Appeal of Permits Issued for 2337 Champlain St., N.W.*, p. 2. Appellants argue that Owner was "obligated to build in accordance with the plans that it submitted to BZA, as modified in accordance with proper

procedures. With respect to the height of the roof structures, the Owner has deviated from those plans.” *Id.*

As described below, the constructed penthouse height is consistent with the approved Building Permit Plans, which the Zoning Administrator reviewed and determined were consistent with the approved BZA plans. Owner shared the Building Permit Plans with Appellants in May, 2015, and clearly indicated to Appellants that the Building would be constructed in accordance with those plans. Although the Building Permit Plans depict a slightly taller penthouse parapet than the penthouse parapet depicted on the March Plans, Owner shared the Building Permit Plans with Appellants in May, 2015, such that Appellants should have known of the approved penthouse height.

III. THE ZONING ADMINISTRATOR PROPERLY APPROVED MODIFICATIONS TO THE APPROVED PLANS

Appellants’ challenge to the Zoning Administrator’s decision is baseless. Modifications to BZA-approved plans that do not impact the relief granted have been permitted for many years by the Zoning Administrator. Section 3125.8 of the Zoning Regulations requires that “[a]n applicant shall be required to carry out the construction, renovation, or alteration only in accordance with the plans approved by the Board, unless the Board orders otherwise.” This provision has consistently and historically been interpreted to mean that an applicant must carry out construction of a project in accordance with the approved plans as it relates to the relief granted by the Board. Changes to the plans that do not affect the relief granted have been and may be approved by the Zoning Administrator so long as the changes comply with the Zoning Regulations.

In the present case, the Zoning Administrator reviewed proposed modifications to the plans multiple times:

- In April, 2013 for the Prior Owner, to confirm that the revised plans were consistent with the BZA-approved plans (Exhibit A to Motion to Dismiss, in the record at Exhibit 16A). These plans were also consistent with the Agreement between Prior Owner and Appellants;
- In December, 2013 for the Owner, to confirm that the revised Building design and layout were consistent with the BZA-approved plans (Exhibit B to Motion to Dismiss, in the record at Exhibit 16B);
- In February, 2014 again for the Owner, to confirm that modifications to the plans were still consistent with the BZA-approved plans (Exhibit C to Motion to Dismiss, in the record at Exhibit 16C); and
- In June, 2015 for the Owner, with the issuance of the Building Permit (Exhibit K to Motion to Dismiss, in the record at Exhibit 16K).

The Zoning Administrator's determination letter of April 9, 2013, states that "the proposed modifications are within the scope of the plans approved by the BZA. The proposed modifications reduce the extent of the special exception relief approved by the BZA and do not create any other area of nonconformity." The Zoning Administrator's determination letter of December 27, 2013, also states that "the proposed plan modifications... will reduce or keep the extent of special exception relief as previously approved by the BZA, and will not create any new areas of nonconformity." The Zoning Administrator's determination letter of February 10, 2014, reaffirms that "[the] proposed changes are all designed to be within the scope and intent of [the] BZA approval in Order No. 18330... the revisions will not change any area of relief and will not create any new areas of nonconformity." Based on the Zoning Administrator's repeated findings that the plan modifications did not increase the extent of the relief approved by the BZA or create any new areas of non-conformity, Appellants have no basis on which to challenge the issuance of the Building Permit.

The Zoning Administrator routinely grants building permits for projects that include modifications to BZA-approved plans so long as they do not impact the relief granted or the conditions set forth in the BZA order. The Zoning Administrator's office has taken this position in numerous cases over the years, including the following examples:

- Zoning Administrator Determination Letter dated November 16, 2011 (Exhibit B), regarding BZA Case No. 18167/17431 for 2329 and 2335 Champlain Street, N.W. (immediately to the south of the Property). This determination reviewed a variety of changes to the BZA-approved plans and concluded that the "proposed modifications reduce the extent of the variances approved by the BZA and do not create any other area of nonconformity."
- Zoning Administrator Determination Letter dated December 17, 2012 (Exhibit C), regarding BZA Case No. 17860 for 1442 Pennsylvania Avenue, SE, stating "...the developer has proposed to revise the plans to put a different façade on the building and to make other minor changes to the design... The revised plans require no greater relief than was approved by the BZA;"
- Zoning Administrator Determination Letter dated October 11, 2011 (Exhibit D), regarding BZA Case No. 17600, 17600-A and 17600-B, confirming that the revised plans were in accordance with the BZA approval.
- Zoning Administrator Determination Letter dated July 14, 2011 (Exhibit E), regarding BZA Case No. 17673 for 627 H Street, NW, stating "[s]ince the BZA approved the application and the extension, the property has been acquired by a new owner... At the owner's direction, the architect has revised the plans to reverse the elevation of the building, i.e., the office entry on the ground floor and the core of the

building above have been moved to the north side of the property from the south side.

In all other respects, the plans remain the same. The “flip” in the elevation results in no further or different relief from the BZA.”

- Zoning Administrator Determination Letter dated June 18, 2012 (Exhibit F), regarding BZA Case No. 18227 for 1700 New York Avenue, NW. In that case, changes resulted to the configuration of the garage that resulted in a loss of parking spaces which impacted the relief. That issue was required to be submitted to the BZA for consideration because it impacted the relief granted. However, this determination letter found that any additional parking that was constructed – including in additional below-grade levels not previously shown on the plans – would be permitted.

In the present case, although the approved Building Permit Plans show a slightly different building design than the design approved in BZA Order No. 18330, the Zoning Administrator properly approved the revised plans since they were in accordance with the approved plans as they relate to the relief granted by the Board. Moreover, the penthouse height shown on the Building Permit Plans is within the height limitations set forth in Section 411 of the Zoning Regulations. Thus, the Board should dismiss this appeal based on the appropriate actions taken by the Zoning Administrator.

IV.

THE APPEAL IS BARRED BY THE DOCTRINE OF EQUITABLE ESTOPPEL

To invoke the doctrine of equitable estoppel, Owner must show that it (a) acted in good faith; (b) on affirmative acts of the District; (c) made expensive and permanent improvements in reliance thereon; and (d) the equities strongly favor the Owner.” *See Wieck*, 383 A.2d at 11. Reliance must be “justified” in order to satisfy the “reliance” requirement of the third element. *See, e.g., Interdonato v. D.C. Bd. of Zoning Adjustment*, 429 A.2d 1000, 1003 (D.C. 1981)

(setting forth a slightly different repetition of the estoppel elements, *Interdonato* lists the third element as "justifiable and reasonable reliance.") In order to prevail with an estoppel argument, the party invoking the doctrine must meet all four elements. In this case, all four elements of estoppel have been met, and the Board should therefore dismiss this appeal.

A. Good Faith

Owner acted in good faith through repeatedly seeking the Zoning Administrator's approval for plan modifications and receiving determinations that the project was in compliance with the Zoning Regulations and the BZA-approved plans, continually seeking Appellants' support for refinements to the project, filing all required plans with DCRA, obtaining all issued permits and exhibiting them in a conspicuous location at the front of the Property.

In BZA Appeal No. 14110, the Board found that the property owner met all procedural and substantive requirements in good faith by

“obtaining all issued permits for the construction of the building. Through the issuance of building permits with prior zoning approval, the property owner reasonably assumed it was proceeding in full conformity with the Zoning Regulations and the Building Code. All required plans were filed. Such plans were reviewed and determined to be in compliance by the appropriate city officials. Permits were obtained and substantial expenditures incurred as a result of that reliance.”

BZA Appeal No. 14110, FF No. 18. Moreover, the Board has found good faith when “the property owner had no reason to suspect that an appeal would be filed... since the project had been known to the community for two years and construction had commenced.” BZA Appeal No. 14110, FF 19. In that case, the appeal was filed six months after the building permit was issued and five months after construction began, during which time the property owner had no reason to suspect that there was any community opposition.

In the present case, Owner met all procedural and substantive requirements in good faith. Owner filed all required plans with DCRA, obtained all required permits for the construction of

the Building, and exhibited the permits in a conspicuous location. Owner reasonably assumed it was proceeding in full conformity with the Zoning Regulations and the Building Code since the Building Permit Plans were reviewed and determined to be in compliance by the appropriate District officials. Owner obtained the required permits, constructed the Building, and incurred substantial expenditures as a result of that reliance.

Moreover, Owner acted in good faith in meeting with Appellants on multiple occasions. Owner spent a significant amount of time and money working with Appellants to ensure that the project complied with the applicable regulations and was acceptable to Appellants. Changes that Owner made to the project—particularly those related to the penthouse and the relocation of the air handling units—were in direct response to concerns raised by Appellants, and Owner presented these changes to Appellants on multiple occasions and in many formats, including through formal meetings and presentations, emails, and discussions from the roof of the Erie Building. Upon purchasing the Property in late 2013, Owner contacted Appellants to present revised plans and discuss potential concerns. Owner described the modifications, including the revised roof plan, which complied with all penthouse regulations set forth in Section 411. Owner received positive feedback from Appellants and received a determination letter from the Zoning Administrator that the revised plans would reduce or keep the extent of special exception relief approved by the BZA, and would not create any new areas of non-conformity.

Throughout the beginning of 2014, Owner continued to revise the plans in good faith in response to ongoing discussions with Appellants and the Zoning Administrator. Owner returned to the Zoning Administrator for a second time, and once again received a determination that the proposed changes were within the scope of the original BZA approval, did not change any area of relief, and would not create any new areas of nonconformity. Owner continued to meet with

Appellants, rearranged the air handling units and increased the height of the penthouse to address Appellants' specific concerns, and presented and provided plans to Appellants when requested. Owner clearly, consistently, and in good faith told Appellants that it would be constructing the Building in accordance with the March Plans presented to the Appellants in person and via email. In particular, Owner met with Appellants in May, 2015, to review the Building Permit Plans which depicted the penthouse at a height of elevation 213.10, including the parapet. Throughout this process, Appellants did not give Owner any indication of renewed opposition to the project until October, 2015, shortly before the appeal was filed. During construction Owner had no reason to believe that Appellants had any further concerns with the revised plans and had no reason to suspect that an appeal would be filed.

Based on the foregoing, Owner acted in good faith throughout the development entitlement and construction process, such that the first prong of the estoppel test is clearly met.

B. Affirmative Act of the District

“The issuance of [a] building permit [is] an affirmative act of the District government, satisfying the second element of estoppel.” BZA Appeal No. 18181, p. 8; *see also* BZA Appeal No. 14127, FF No. 38 (“lessee acted in good faith, in reliance on the affirmative action of the District of Columbia evidenced by the issuance of permits”). A developer’s reliance on a building permit to construct a building is justifiable “if the person who approved the building permits was the properly empowered administrative official to make such a decision.” *See* BZA Appeal No. 16246, FF No. 19.

In the present case, the Zoning Administrator approved the Building Permit Plans submitted by the Applicant, thus resulting in an affirmative act of the District government. The Zoning Administrator is the properly empowered administrative official to review building

permit plans and make decisions regarding their compliance with the Zoning Regulations. As described above, Owner acted in good faith on the affirmative decision of DCRA to issue the Building Permit in June, 2015. Furthermore, the District made an affirmative act when the Zoning Administrator issued two determination letters stating that the modified plans were consistent with the BZA-approved plans, did not change any area of relief, and would not create any new areas of nonconformity. Owner relied on the Zoning Administrator's determinations in moving forward with the project, submitting its Building Permit Plans, receiving the Building Permit, and ultimately constructing the Building in accordance with the approved Building Permit Plans.

It is therefore clear that in this case there was an affirmative act made by the District, thus meeting the second prong of the test for equitable estoppel.

C. Expensive and Permanent Improvements in Reliance

Owner made expensive and permanent improvements in reliance on the affirmative acts of the District. The Board has found sufficient evidence of expensive and permanent improvements through the expenditure of "\$45 million" and construction of a "ten story structure... [that] was under roof...[and] done with the appellant's full knowledge" (BZA Appeal No. 13112, p. 6); "approximately \$15,125,100 [between] the issuance of the permit [and] the time of filing th[e] appeal" (BZA Appeal No. 14110, FF No. 19); and "a closed roof... exterior siding finish already in place... all electrical, plumbing, and HVAC rough-ins were done... and the Appellant had expended approximately \$350,000 in construction costs" (BZA Appeal No. 18181, FF 31-33, which cited *Saah v. D.C. Bd. of Zoning Adjustment*, 433 A.2d 1114, 1116 (D.C. 1981) at p. 8 ("sixty percent completion of building reconstruction at a cost of approximately \$225,000... found to satisfy estoppel requirement"). To the contrary, the Board

has found that the construction of an “attendant’s shelter” does not represent expensive improvements, and the expense of installing “floodlights, painting, signs, parking tickets, a time clock, plus the cost of the lease, insurance, and personnel” does not represent permanent improvements. *See* BZA Appeal No. 14127, FF Nos. 39-40.

In this case, Owner has invested a tremendous amount of time and money into the construction of the Building, including undertaking the following activities:

- Broke ground at the Property at the end of January/beginning of February, 2015;
- Undertook excavation, underpinning, and sheeting/shoring activities at the Property during February and March, 2015;
- Completed the Building’s foundation in April, 2015;
- Constructed the Building’s podium and other items with structural concrete in June and July, 2015; and
- Started framing at the beginning of August, 2015.

By October, 2015, construction of the Building was nearly complete: the main roof and parapet walls were constructed, the elevator shaft and stair towers were built to their full height, the roof was framed, the penthouse walls were erected, most of the roof trusses were in place, and the overbuild of the roof was 80% complete. By the time Appellant filed the appeal, Owner had expended over \$4 million. Appellants were aware of the Building Permit Plans showing the 213.10’ penthouse long before they filed the Appeal or first complained of the penthouse height to Owner. By then, Owner had already made expensive and permanent improvements to the Property in reliance on the District’s affirmative actions and the absence of any opposition from Appellants.

Based on the foregoing, there is substantial evidence that Owner has made expensive and permanent improvements to the Property in reliance on the affirmative acts of the District, thus meeting the third prong of the test for equitable estoppel.

D. Equities Strongly Favor the Owner

Equities in this case strongly favor the Owner. Revocation of the Building Permit would result in the Owner being unable to occupy the constructed five-story Building and would result in the units – both affordable and market rate – not being able to be sold.

In evaluating the balance of equities, the Board has previously found that equities strongly favored the property owner when the appeal would have “cause[d] the revocation of a building permit for a nine-story mixed-use structure six months after the building permit was issued and five months after construction was started.” BZA Appeal No. 14110, FF No. 20. In that case, the appellant “sat by while the property owner changed its position to its substantial detriment. If the appellant had timely filed the appeal, the issues raised in the appeal could have been resolved before the property owner made substantial expenditures pursuant to the issuance of the building permit.” *Id.* Moreover, the Board has found in favor of property owners when balancing equities, asserting that “a redesign and the variance process take time and carry additional costs... without any assurance of success. During this period of time the Applicant will continue to pay the mortgage, insurance, and property taxes... with no offsetting income in sight for months to come.” BZA Appeal No. 18181, p. 9.

In the present case, if the appeal is upheld, Owner would be required to return to the BZA for a modification of plans or to redesign and reconstruct significant elements of the penthouse and the Building. If Owner files an application to the BZA to modify the approved plans to be consistent with the constructed Building, Appellants would likely oppose the project, resulting in additional time and costs to Owner and no assurance of success or approval. As with the

developer in BZA Appeal No. 18181, Owner would have to continue paying fees on the Property (insurance, taxes, etc.) without any offsetting income.

Moreover, Appellants waited until construction of the Building was nearly complete to put Owner on notice of their opposition, despite having a minimum of 132 days of notice that the Building was being constructed (based on the date of issuance of the Building Permit). Appellants sat by while Owner obtained the Building Permit, excavated the Property, constructed the Building, and built the majority of the penthouse, thoroughly changing its position to its substantial detriment. Had Appellants expressed their concerns relating to the penthouse height during the period in which Owner reviewed the plans and responded to Appellants concerns, the issues raised by Appellants could have been resolved before Owner made substantial expenditures. However, between June, 2015, when the Building Permit was issued, and early October, 2015, when Appellants first voiced their concerns, Owner invested significant time and money into construction of the Building, all without knowledge of Appellants' opposition. It was a direct result of Appellants' delay that construction of the Building was nearly complete before Owner was given notice of the challenge.

Based on the facts of this case, the fourth and final prong of the test for equitable estoppel has been met, and the Applicant should dismiss the appeal on the basis of equitable estoppel.

V.

THE APPEAL IS BARRED BY THE DOCTRINE OF LACHES

The doctrine of laches comprises two basic elements, namely (a) unreasonable delay in bringing the appeal, and (b) prejudice to the party asserting laches. *Goto*, 423 A.2d at 923. In the context of BZA appeals, the doctrine asks whether the appellant has inexcusably slept on his rights so as to make a determination against the property owner unfair. *Wieck*, 383 A.2d at 11. Laches may bar a claim that for jurisdictional questions would be timely. The question of

timeliness looks only to the period between notice of the zoning official's determination and the filing of the appeal, while laches is concerned with the entire course of events. *Goto*, 423 A.2d at 925.

"Laches is a species of estoppel, being defined as the omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches." *Wieck*, 383 A.2d at 11. Laches is the principle that "equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant." *American Univ. Park Citizens Assn. v. Burka*, 400 A.2d 737,740 (D.C. 1979), quoting *Russell v. Todd*, 309 U.S. 280, 287 (1940). The "entire course of events," not merely the period from the zoning official's decision to the filing of an appeal, is relevant when determining the validity of a laches defense. *Goto*, 423 A.2d at 925, n.16.

"Laches will bar the claim of [Appellants] if they delayed unreasonably in bringing their appeal to the Board to [Appellee's] prejudice. The principal element in applying the doctrine of laches is the resulting prejudice to the defendant, rather than the delay itself." *Id.* at 925. In BZA Appeal No. 14110, the Board found that the doctrine of laches barred the appeal, since

"the appellant was aware of the issuance of the building permit and the onset of construction of the subject site and yet delayed filing of the appeal for several months. The appellant did not notify the owners of the property that the issuance of the building permit was disputed at any time prior to the filing of the subject appeal. Construction was undertaken and continued in good faith. The proper course of action for the appellant was to have brought an immediate appeal and to have sought a judicial stay of construction. The appellant's failure to act in a timely manner permitted the owners to incur substantial expense for construction in good faith reliance upon their building permit."

BZA Appeal No. 14110, p. 8.

In this case, Owner had no knowledge of Appellants' continued opposition to the project when it filed its Building Permit application, was granted the Building Permit, or began and

continued construction on the project. Owner had no reason to believe that Appellants would challenge the issuance of the Building Permit, particularly because Owner had redesigned the roof and relocated the air handling units in direct response to Appellants' requests and specific concerns. As recent as May, 2015, Owner met with Appellants to present the Building Permit Plans that were ultimately approved by DCRA. Appellants did not voice any additional concerns regarding the penthouse height thereafter.

Due to Appellants' knowledge of the Building Permit Plans, it is clear that they "inexcusably slept on [their] rights" for an "unreasonable and unsatisfactorily explained length of time" so as to make a determination against Owner unfair. In reviewing the entire course of events, not just the period of time between the issuance of the Building Permit to the filing of the appeal, it is clear that Appellants knew of the planned height and configuration of the penthouse for many months prior to issuance of the Building Permit.

Appellants were also aware of the issuance of the Building Permit and the onset of construction, yet delayed filing the appeal for several months. Appellants did not notify Owner of its opposition to the Building Permit or the approved Building Permit Plans until the beginning of October, 2015, such that Owner's construction activities were taken in good faith. The prejudice to Owner clearly resulted from the timing of the filing of the appeal, not Owner's purposeful decision to proceed with construction despite clear or ongoing opposition. As a result, Appellants' failure to act in a timely manner permitted Owner to incur substantial expense for construction, such that the doctrine of laches should rightfully bar a successful appeal of this case.

V.
CONCLUSION

For the reasons stated above, and based on prior rulings by this Board, Owner asserts that this Appeal is untimely and should be dismissed. In the event that the Board does not dismiss the appeal for untimeliness, Owner asserts that the allegations contained in the appeal are without merit. The Zoning Administrator appropriately and consistently approved Owner's modified plans; DCRA approved Owner's Building Permit Plans and issued the Building Permit; and Owner carried out construction of the Building in accordance with the Building Permit Plans, which did not increase any of the zoning relief granted by the BZA or create any new nonconformities. Moreover, the appeal should be dismissed on the basis of the doctrines of equitable estoppel and laches, as described above. Owner therefore respectfully requests that the Board affirm the Zoning Administrator's decisions and deny the Appeal.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By:



Christine Shiker

Philip T. Evans

800 17th Street, N.W., Suite 1100

Washington, D.C. 20006

(202) 955-3000

Christine.Shiker@hklaw.com

Philip.Evans@hklaw.com

Counsel for Owner

TAB A

ADJACENT PROPERTY OWNER AGREEMENT

This ADJACENT PROPERTY OWNER AGREEMENT (the "Agreement"), made as of this 22 day of January, 2013, by and among FCP Champlain, LLC (hereinafter the "Developer") and the Erie Condominium Association ("Association") and Richard Wiedis, individually ("Wiedis") sets forth in writing the understanding of the parties with respect to the development of property located at 2337 Champlain Street, NW (Lot 887, Square 2563) (the "Property"), as proposed in Board of Zoning Adjustment Case No. 18330 ("BZA Case No. 18330"), and certain alterations to be made to the Erie Condominium building at 2351 Champlain Street, NW (the "Erie Building").

WITNESSETH

WHEREAS, the Developer is the owner of the Property; and

WHEREAS, the Developer intends to construct a residential building on the Property as generally proposed in BZA Case No. 18330 (the "Residential Building"), with modifications as set forth in this Agreement; and

WHEREAS, the Association and Wiedis have opposed the Residential Building and the zoning relief that was sought by the Developer in BZA Case No. 18330, and have appealed the BZA decision; and

WHEREAS, the Association is comprised of individual unit owners who own and reside in the Erie Building located at 2351 Champlain Street, NW, immediately abutting the Property to the north; and

WHEREAS, the Association appeared as a Party in Opposition to the BZA Case No. 18330 and expressed concerns about several issues with respect to the proposed development on the Property;

WHEREAS, Wiedis was not granted Party Status in Opposition to BZA Case No. 18330 but testified on behalf of the Association regarding concerns relating to the proposed development on the Property; and

WHEREAS, the Board of Zoning Adjustment ("BZA") approved the zoning relief requested for the Residential Building in BZA Case No. 18330 and issued BZA Order No. 18330 having a final date of July 26, 2012 (the "Order"); and

WHEREAS, the Developer desires to address the concerns raised by the Association and Wiedis; and

WHEREAS, the Association and Wiedis have determined that the Developer has reasonably addressed their concerns by entering into this Agreement and performing the promises and covenants stated herein; and

WHEREAS, the Association approved a resolution dated December 13, 2012, agreeing to the terms of this Agreement; and

WHEREAS, the President of the Association received necessary consent from the Association to enter into this Agreement; and

WHEREAS, the Developer, the Association and Wiedis enter into this Agreement to set forth each party's agreements with respect to the development on the Property.

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, as further described herein, the mutual receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. In exchange for the promises and covenants of the Developer in this Agreement, the Association and Wiedis hereby agree to dismiss the Petition for Review of the BZA in BZA Case No. 18330 filed on August 23, 2012 and shall not institute or participate in any lawsuit, hearing, appeal, petition or other proceeding to prevent the development proposed by the Developer in the case, including the additional height and floor area ratio approved by the BZA; provided, however, the Association and/or Wiedis expressly reserve the right to challenge any construction and/or development activities at the Property that were not authorized by the Order or are inconsistent with this Agreement.

2. The Developer agrees to reduce the height of the Residential Building by at least twelve (12) inches from the height approved in BZA Case No. 18330. The roof elevation of the Residential Building will be reduced to a maximum of 197 feet, 10 inches. The Developer further agrees to lower the elevation of the parapet of the Residential Building, which is approved at elevation 199 feet, 6 inches, so that it will be equal in height to or lower than the existing parapet of the Erie.

3. The Developer shall obtain a reliance letter from the Zoning Administrator of the Department of Consumer and Regulatory Affairs ("Zoning Administrator") confirming that the proposed modifications stated in paragraph 2 above are within the scope of the plans approved in BZA Case No. 18330 because the modification reduces the extent of the relief requested and does not create any other area of nonconformity. If a reliance letter is not obtained or for some other reason the BZA must review and approve the reduction in height of the Residential Building set forth in paragraph 2 above, the Association and Wiedis agree to support the requested modification and further agree not to appeal any order approving such modification to BZA Case No. 18330.

4. The Developer agrees to install and maintain a "green screen" of planted material on the north façade of the Residential Building's mechanical penthouse, generally as depicted in the plans approved in BZA Case No. 18330.

5. The Developer agrees that the mechanical penthouse and all rooftop structures, railings, equipment, furnishings and improvements on top of the Residential Building shall be set back at least twenty (20) feet from the northern lot line of the Property. The Developer also agrees that any railings surrounding the roof terrace areas on the Residential Building shall not exceed three (3) feet in height, or the minimum height required by any code, whichever is greater. The railing shall be constructed of steel or similar material with posts spaced at least every three (3) feet and horizontal newel bars between the posts at least every three and one-half (3½) inches.

6. The Developer shall include in the Declaration and/or Bylaws of the condominium to be established within the Residential Building the following: (a) a restriction prohibiting the placement of partitions, screens or other improvements within the roof terrace area used exclusively by the four unit owners with appurtenant roof terraces on the portion of the roof of the Residential Building fronting on Champlain Street; (b) a prohibition against any alterations or additions to the mechanical penthouses, rooftop structures, railings and equipment on top of the Residential Building that would be situated closer than twenty (20) feet from the northern lot line of the Property; (c) a prohibition against railings surrounding the roof terrace areas that exceed three (3) feet in height, or the minimum height required by any code, whichever is greater; and (d) a requirement that the association of the condominium maintain the green screen of planted material on the north façade of the mechanical penthouse as part of its duties to maintain common areas.

7. If a party institutes litigation regarding compliance with the terms of this Agreement, then the prevailing party in such litigation shall be awarded all costs and reasonable attorneys' fees incurred by outside counsel for the prevailing party at trial and on appeal in connection with such litigation.

8. The Developer, Association and Wiedis hereby agree to sign the Stipulation of Dismissal attached hereto as Exhibit A upon execution of this Agreement, such Stipulation of Dismissal having already been signed by the District of Columbia. Upon full execution of the Agreement and the Stipulation of Dismissal, the Agreement and Stipulation of Dismissal shall be placed into escrow with William Hoffman, Linowes and Blocher ("Escrow Agent"). At such time, the Developer shall immediately seek the Zoning Administrator Reliance Letter referenced in Paragraph 3. Following initial confirmation by the Zoning Administrator, as evidenced by delivery of a proposed Zoning Administrator Reliance Letter to the Zoning Administrator, but not later than March 1, 2013, the Developer shall deposit One Hundred and Fifty Thousand Dollars (\$150,000) ("Settlement Amount") with the Escrow Agent. Upon delivery of the Zoning Administrator Reliance Letter or issuance of an order by the BZA approving the modification referenced in Paragraph 2, if required, to the Escrow Agent, the Escrow Agent shall release the Settlement Payment to Laurie B. Horvitz, Esq., counsel for the Association, and shall release the Stipulation of Dismissal to Christy Shiker, counsel for the Developer, for immediate filing with the District of Columbia Court of Appeals. All parties hereby authorize release by the Escrow

Agent of the Settlement Payment and the Stipulation of Dismissal in accordance with the provisions herein. The parties further covenant and agree to jointly request an extension and stay of briefing and other deadlines in the D.C. Court of Appeals case so as to provide the parties with sufficient time to implement this settlement.

9. Nothing contained in this Agreement creates any obligations or responsibilities on the part of Developer with regard to any aspect of the development of the Residential Building or use of the Property not specifically described herein. Nothing in this Agreement waives any rights of the Association or Wiedis unless expressly provided herein.

10. The terms of the Agreement shall continue in full force and effect as an agreement among the parties.

11. If any provision of this Agreement shall be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions hereof shall not in any way be affected or impaired, and such remaining provisions shall continue in full force and effect. Nothing herein will supersede laws and regulations of the District of Columbia, or prevent the parties hereto from seeking enforcement of said laws and regulations in any forum.

12. This Agreement constitutes the entire agreement between the parties with respect to the subject matter described herein.

13. All parts of this Agreement shall be governed by and construed in accordance with the laws of the District of Columbia.

14. The terms of this Agreement contained herein are binding on the Developer, the Association and Wiedis.

15. No change or modification of this Agreement or any waiver of the provisions hereof shall be valid unless it is in writing and signed by the parties to be bound by the change or modification hereto. Waiver from time to time of any provision or of any default hereunder shall not be deemed to be a full waiver of such provision or waiver of any other provision hereunder or a waiver of any earlier or later default. The timeframes set forth in this Agreement may be extended by mutual agreement of the parties.

16. All notices and communications hereunder shall be in writing and deemed duly given if personally delivered or mailed by certified mail, return receipt requested, postage prepaid

If to the Developer: Lacy Rice
Federal Capital Partners
1000 Potomac Street, NW
Suite 120
Washington, DC 20007

With a copy to: Christine Moseley Shiker, Esq.
Holland & Knight, LLP
800 17th Street, N.W.
Suite 1100
Washington, DC 20006

And if to the Association: The Erie Condominium Association
Attention: President
2351 Champlain Street, NW
Washington, DC 20009

With a copy to: Laurie B. Horvitz, Esq.
Law Office of Laurie B. Horvitz, LLC
4520 East West Highway, Suite 700
Bethesda, MD 20814

And if to Wiedis: Richard Wiedis
2351 Champlain Street, NW, Unit P1
Washington, DC 20009

With a copy to: Laurie B. Horvitz, Esq.
Law Office of Laurie B. Horvitz, LLC
4520 East West Highway, Suite 700
Bethesda, MD 20814

And if to Escrow Agent: William Hoffman
Linowes and Blocher
7200 Wisconsin Avenue, Suite 800
Bethesda, MD 20814

The parties hereto shall be responsible for notifying each other of any change of address. The name and contact information of the Developer's representative may be changed from time to time upon written notice to the Association.

17. Any dates specified in this Agreement which is a Saturday, Sunday or legal holiday shall be extended to the first regular business day after such date which is not a Saturday, Sunday or legal holiday. Any reference herein to the singular shall include the plural and reference to the male, female or neuter gender shall include reference to all other genders.

18. The date on which this Agreement is accepted by the last party to accept and sign this Agreement shall be inserted as the effective date of this Agreement under the first paragraph.

19. This Agreement may be executed in multiple counterparts, each of which shall constitute an original and all of which together constitute one and the same instrument.

20. This Agreement is intended for the sole benefit of the Parties. The three non-party unit owners in the Erie that have a rooftop terrace (i.e., Unit P-2, Unit P-3 and Unit P-4) are third-party beneficiaries to this Agreement. No other third party may rely on this Agreement.

Signatures Follow

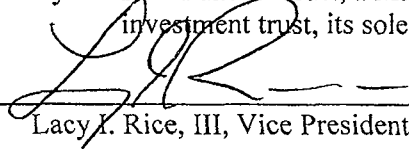
IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

FCP Champlain, LLC

FCP CHAMPLAIN, LLC,
a Delaware limited liability company

By: FCP Champlain Member, LLC, a Maryland limited liability company, its Class A Member and Manager

By: FCP Fund II Trust, a Maryland real estate investment trust, its sole Member

By: 
Lacy X. Rice, III, Vice President

Altus Realty Partners LP

By: _____
Charlie Kehler
Altus Realty Partners LP

The Erie Condominium Association:

By: _____

Its: _____

Richard Wiedis

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

FCP Champlain, LLC

FCP CHAMPLAIN, LLC,
a Delaware limited liability company

By: FCP Champlain Member, LLC, a Maryland limited liability company, its Class A Member and Manager

By: FCP Fund II Trust, a Maryland real estate investment trust, its sole Member

By: _____
Lacy I. Rice, III, Vice President

Altus Realty Partners LP

By: _____
Charlie Kehler
Altus Realty Partners LP

The Erie Condominium Association:

By: Richard N. Wiedis
Its: President

Richard Wiedis

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

FCP Champlain, LLC

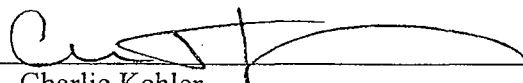
FCP CHAMPLAIN, LLC,
a Delaware limited liability company

By: FCP Champlain Member, LLC, a Maryland limited liability company, its Class A Member and Manager

By: FCP Fund II Trust, a Maryland real estate investment trust, its sole Member

By: _____
Lacy I. Rice, III, Vice President

Altus Realty Partners LP

By:  _____
Charlie Kehler
Altus Realty Partners LP

The Erie Condominium Association:

By: _____

Its: _____

Richard Wiedis

Exhibit A

Stipulation of Dismissal

DISTRICT OF COLUMBIA COURT OF APPEALS

ERIE CONDOMINIUM ASSOCIATION

And

RICHARD WEIDIS,

Petitioners,

v.

DISTRICT OF COLUMBIA BOARD OF
ZONING ADJUSTMENT,

Respondent,

And

FCP CHAMPLAIN, LLC,

Intervenor.

No. 12-AA-1405
Board of Zoning
Adjustment Order
No. 18330

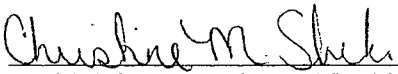
STIPULATION OF DIMISSAL

Pursuant to this Court's Rule 13(b)(2), the parties stipulate to the dismissal of this petition as settled, with each party responsible for payment of its own costs and fees incurred during the petition for review and petitioner responsible for payment of any costs still due to this Court.

Respectfully Submitted,

HOLLAND & KNIGHT LLP

By:



Paul J. Kiernan, D.C. Bar No. 385627

Christine M. Shiker, D.C. Bar No. 473610

Attorneys for Intervenor

800 17th Street, N.W.

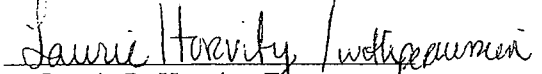
Suite 1100

Washington, D.C. 20006

(202) 955-3000

LAW OFFICE OF LAURIE B. HORVITZ, LLC

By:



Laurie B. Horvitz, Esq.

D.C. Bar No. 384702

Attorney for Petitioners

4520 East West Highway

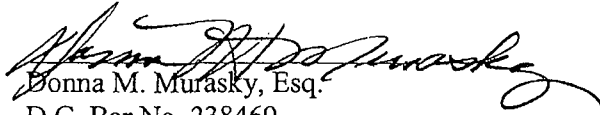
Suite 700

Bethesda, MD 20814

(301) 961-6429

DISTRICT OF COLUMBIA OFFICE OF ATTORNEY GENERAL

By:

A handwritten signature in black ink, appearing to read "Donna M. Murasky", written over the printed name.

Donna M. Murasky, Esq.

D.C. Bar No. 238469

Attorney for Respondent

One Judiciary Square

441 Fourth Street, N.W.

6th Floor South

Washington, D.C. 20001

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Stipulation of Dismissal was mailed first class, postage pre-paid, this ____ day of _____, 2012, to:

DC Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, D.C. 20001

Laurie B Horvitz
Law Office of Laurie B. Horvitz, LLC
Attorney for Petitioners
4520 East West Highway, Suite 700
Bethesda, MD 20814

Erie Condominium Association
2351 Champlain Street, N.W.
Washington, D.C. 20009

Richard Weidis
2351 Champlain Street, N.W., Unit P-1
Washington, D.C. 2009

Office of Attorney General
1100 15th Street, N.W.
Suite 800
Washington, D.C. 20005-1707

Advisory Neighborhood Commission 1C
c/o Wilson Reynolds, Chairman
P.O. Box 21009
Washington, D.C. 20009

Donna M. Murasky, Esq.
Deputy Solicitor General
Office of the Solicitor General
Office of the Attorney General
for the District of Columbia
One Judiciary Square
441 Fourth Street, N.W.
6th Floor South
Washington, D.C. 20001

Christine M. Shiker
Holland & Knight, LLP

TAB B

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR**



November 16, 2011

Christy Moseley Shiker
Holland & Knight LLP
2099 Pennsylvania Avenue, NW - Suite 100
Washington, DC 20006

Re: Brass Knob: 2329 and 2335 Champlain Street, NW (Lots 103 and 816, Square 2563)

Dear Ms. Shiker:

This is to confirm the substance of our discussions on September 12, 2011, regarding the proposed development of the property located as 2329 and 2335 Champlain Street, NW (Lots 103 and 816 in Square 2563) (the "Site"). You requested that I review whether certain revisions could be made to the project previously approved by the Board of Zoning Adjustment ("BZA").

Background

The Site is zoned R-5-B and is located within the Reed Cooke ("RC") Overlay District. The Site is improved with an existing two-story building that is currently vacant. Development of the Site has been contemplated and proposed for many years. Most recently, the BZA approved an application in Order No. 17431, dated November 28, 2006, to permit an addition to and conversion of the existing building to residential use with the following areas of zoning relief: (1) a special exception under § 1404 to allow an increase in height from 40 feet to 50 feet in the RC Overlay; (2) a variance from §2001.3 to allow an addition to a nonconforming structure (including an increase in lot occupancy from 60% to 92.8%); (3) a variance from §402 to allow an increase in FAR from 1.8 to 2.66; and (4) a variance from §406 from the court width requirements. By BZA Order No. 17431-A dated December 2, 2008, the BZA approved a minor modification to the previously approved project to allow changes including a reduction in the size and configuration of the units; the elimination of the penthouses for the 4th floor units and use of space for resident's lounge, fitness room, restrooms and access for all residents; a reduction in the area of the penthouse; and an accommodation of mechanical equipment in each unit.

Subsequently, the ownership of the Site changed and a modification to the approved BZA case was submitted in late 2010. In Case No. 18167/17431-B, the BZA approved an increase in the number of units from 22 to 31, modifications to the interior and exterior façade of the building, reduction in the lot occupancy relief, and reconfiguration of the parking garage

resulting in a reduction of parking spaces from 21 to 20 spaces. Order No. 18167/17431-B also extended the BZA approval through December 12, 2012.

Proposed Development and Areas of Relief

You informed that your client has the Site under contract to purchase. Your client would like to create a more light-filled project, with a central courtyard and slightly reduced size floor plate. The proposed changes include the following: (1) a re-design of the interior unit layout and penthouse to accommodate the central courtyard; (2) a reduction in the number of units from 31 units to 27 units; (3) a reduction in the number of parking spaces from 20 spaces to 18 spaces; and (4) a redesign of the interior unit layout and penthouse to accommodate the central courtyard. The plans you provided to me dated 10/13/11 entitled "Champlain Street Residences" indicate that the general design and architectural treatment of the exterior façade, including the proposed materials, are the same as that approved in BZA Case No. 18167/17431-B. In addition, you explained that there would be no impact on any area of relief previously granted by the Board, as follows:

Special Exception for Height: The Board approved a building having a height of 50 feet in BZA Case Nos. 17431, 17431-A, and 18167/17431-B. The proposed design maintains a maximum height of 50 feet in accordance with the approved plans.

Variance for Non-Conforming Structure § 2001.3/Lot Occupancy § 403: BZA Case No. 17431 and 17431-A approved a lot occupancy of 92.8%. In BZA Case No. 18167/17431-B, the BZA approved a lot occupancy of 88.22% on the first two levels and 60% on the 3rd and 4th levels. The proposed design further reduces the lot occupancy to 80% on the first two levels and maintains 60% on the 3rd and 4th levels.

Variance for FAR § 402: BZA Case Nos. 17431, 17431-A, and 18167/17431-B each approved a maximum FAR of 2.66. The proposed project proposes a slightly reduced FAR of 2.64.

Variance for Courts § 406: In each of the previous BZA cases, variances were granted for courts to different extents. You presented plans to me evidencing that all proposed courts within the project now fully comply with the Zoning Regulations. Thus, this relief is no longer necessary. Specifically, the courts included in the project satisfy the requirements as follows:

Court # and Location	Required and Provided Width (based on height of court)	Required and Provided Area (if applicable)
Court #1 - Central Interior Courtyard - Closed Court	Required Width: 20' 2" Provided Width: 25' 1"	Required Area: 816 sf Provided Area: 861 sf
Court #2 - Rear of Building	Required Width: 6'	Not applicable

starting at 3 rd Floor - Irregularly Shaped Open Court	Provided Width: 18'	
Court #3 - Front of Building starting at 3 rd Floor - Open Court	Required Width: 6' Provided Width: 14' 6"	Not applicable
Court #4 - Auxiliary Interior Courtyard - Closed Court	Required Width: 16' 0" Provided Width: 21' 2"	Required Area: 512 sf Provided Area: 523 sf

In addition to the courts identified above, the project incorporates a court niche at the northwest corner of the building at the primary street entrance. This space is approximately 11 feet, 6 inches by 6 feet and serves as an indentation, recess or decorative architectural treatment of the exterior wall which opens onto a street. No portion of the court niche may be farther than three feet from a point where the court niche is less than three feet, pursuant to Section 406.3 of the Zoning Regulations. This court niche is identical to that shown on the plans approved in BZA Case No. 18167/17431-B.

Proposed Development and Other Zoning Requirements

You informed me that all other aspects of the proposed development comply with the Zoning Regulations. We specifically discussed the following zoning requirements:

Parking: In the R-5-B District, parking is required at a rate of 1 space for each 2 dwelling units. With the 27 units proposed, the total parking required would be 14 parking spaces. However, you informed me, and the BZA Orders confirm, that no parking is required for the Site due to the existence of 25 parking credits.

Loading: No loading is required for apartment houses having less than 50 dwelling units pursuant to Section 2201.1. Because this project will have 27 units, no loading is required.

Roof Structures: The roof structure continues to have a maximum height of 11 feet, 2 inches. The roof structure is set back from each exterior wall a distance at least equal to its height above the roof upon which it is located. Consistent with past interpretations, no set back is required from a party wall or from an interior court yard as neither of those walls constitutes an exterior wall. The proposed use of the roof structure is consistent with that approved by the BZA in Case No. 18167/17431-B.

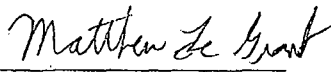
Inclusionary Zoning: This project is exempt from the requirements of Chapter 26 (Inclusionary Zoning) pursuant to Section 3202.6 of the Zoning Regulations.

November 16, 2011

Page 4

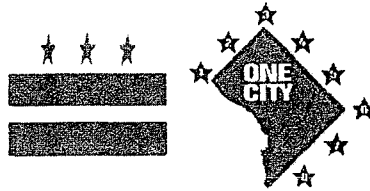
Based on my consideration of the foregoing, I believe that the proposed modifications are within the scope of the plans approved by the BZA. The proposed modifications reduce the extent of the variances approved by the BZA and do not create any other area of nonconformity. Therefore, upon proper presentation of plans, I will approve a building permit application for this proposed development with the modifications described above and as shown on the plans that you presented to me as being in compliance with BZA Order No. 18167/17431-B.

Please let me know if you have any further questions.

Sincerely, 
Matthew Le Grant
Zoning Administrator

TAB C

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR**



December 17, 2012

Norman M. Glasgow, Jr.
Steven E. Sher
Director of Zoning and Land Use Services
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W. - Suite 100
Washington, D.C. 20006

Re: 1442 Pennsylvania Avenue, S.E.

Gentlemen:

This is to confirm the substance of our discussions on Wednesday, October 17, 2012, and Monday, October 22, 2012, concerning the development of the above-referenced property located at the northwest corner of the intersection of Pennsylvania Avenue and 15th Streets, S.E. The site is known as Lot 49 in Square 1065NE. The property is zoned C-2-A.

In Order No. 17860, dated January 8, 2009, the Board of Zoning Adjustment (BZA) approved variances from the floor area ratio requirements (§771), the rear yard requirements (§774) and the parking requirements (§2101.1) to allow the construction of a two story commercial building on the subject property. In Order No. 17860-B, dated March 8, 2011, the BZA approved a two-year extension of the validity of the order, such that the approval is valid through January 8, 2013, by which time an application for a building permit must be filed. The plans submitted to the BZA, dated July 8, 2011, were marked as Exhibit 9 of the record. A copy of those plans is attached.

You advised that the developer has proposed to revise the plans to put a different façade on the building and to make other minor changes to the design. A copy of the revised plans, dated October 22, 2012, is also attached.

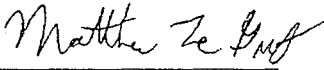
The revised plans require no greater relief than was approved by the BZA. The gross floor area of the building has actually been reduced, from 14,554 square feet (2.0 FAR) to 13,081 square feet (1.80 FAR). The rear yard required (15 feet) remains the same and the rear yard provided (none) remains the same. The number of parking spaces required (a total of 29 for the retail use on the ground floor and office use on the second floor) remains the same and the number provided (none) remains the same. Our review of the revised plans indicates that no additional relief is required from any other portion of the Zoning Regulations.

Because the changes to the plans do not affect the relief required by the Board (and the extent of the FAR variance is actually reduced) and because the revised plans do not require any additional areas of relief, I hereby confirm that you may proceed with the revised plans without

December 17, 2012

Page 2

the need to seek any further approval from the BZA. Please let me know if I may be of further assistance.

Sincerely, 
Matthew Le Grant
Zoning Administrator

Attachments: - Approved BZA#17860 Plan Set
 - Revised Plan Set dated 10-22-12

TAB D

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR**



October 11, 2011

By US Mail and Email PDF

John T. Epting
Goulston & Storrs
1999 K Street, NW, 5th Floor
Washington, DC 20006

**Re: 300 – 320 Riggs Road, NE (Lot 52 of Square 3748) (the “Property”) – BZA
Order No. 17600, 17600-A, and 17600-B (collectively, the “Orders”) –
Compliance with Orders**

Dear Mr. Epting:

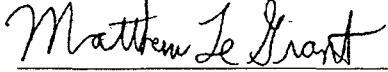
The purpose of this letter is to confirm my interpretation of the applicability of the Orders to the revised project scheme for the Property, as discussed at our meeting of September 21, 2011. It is my understanding that the project has evolved from approximately 420 residential units and approximately 85,000 square feet of grocery and retail space to approximately 345 residential units and approximately 130,000 square feet of grocery and retail space. While the location of the uses and parking has shifted within the site, the project remains a mixed use retail/residential project with parking and loading. The height remains approximately 50 feet and the FAR has been slightly reduced from approximately 2.5 FAR to approximately 2.31 FAR. Upon review of the original plans and current plans dated September 20, 2011, I find that the current plans are in accordance with the approval of the Board of Zoning Adjustment (“BZA”) under the Orders consistent with 11 DCMR Section 3125. The project remains a “mixed use commercial / residential” building as described in the Orders. The Orders did not contain any other conditions or further description of the project.

The basis for the variance relief granted by the Orders has not changed from that reviewed and approved by the BZA. The variance relief standard was deemed satisfied by the BZA due to the unique constraints that still impact the Property. The site is affected by a significant grade change that was deemed by the Board to be a unique circumstance that created a practical difficulty, as noted on Pages 291-292 of the transcript from the March 20, 2007 hearing on this case (“**Transcript**”). A portion of the Transcript is attached to this letter.

Since the revised project plans function the same as the prior plans and the site conditions remain the same, the property owner still requires variance relief for the 55 foot loading berth provided for a residential building under 11 DCMR Section 2201.1. The property owner will still provide a 30 foot loading berth for the residential component of the project. Further, the

proposed 30 foot loading berth remains in compliance with the Zone Plan as determined by the BZA on Page 295 of the Transcript. The demand for the 55 foot loading berth is still not likely since the project will not attract large scale residential trucks, as noted by the Board on Page 293 of the Transcript. The BZA's conclusion that the variance did not impair the Zone Plan remains intact.

If you have any questions about this matter, please do not hesitate to contact me.

Sincerely, 
Matthew Le Grant
Zoning Administrator

Attachment --Excerpt of 3-20-2007 BZA Transcript

File: Det let re 300 Riggs Rd NE - BZA #17600 to Epting 10-11-2011

TAB E

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR**



July 14, 2011

Norman M. Glasgow, Jr.
Steven E. Sher
Director of Zoning and Land Use Services
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W. - Suite 100
Washington, DC 20006

Re: 627 H Street, N.W., Square 453, Lot 59 – Revision to Design

Gentlemen:

This is to respond to your question concerning the above-referenced property located on the north side of H Street between 6th and 7th Streets, N.W. The property is currently vacant and is proposed to be redeveloped with an office building with retail uses on the ground floor. The property has been variously described as 627 H Street, 625 H Street and 627-631 H Street. The property has been subdivided into a single record lot, as referenced above. The zoning which applies to the property is C-3-C in the Downtown Development (DD) District Overlay.

The development as proposed required relief from the Board of Zoning Adjustment (BZA), for a special exception from the roof structure requirements of §411, a special exception to reduce the rear yard requirements of §774, a special exception to reduce the number of required parking spaces by no more than 25%, a variance from the accessibility requirements of §2117.4 and a variance from the loading and service delivery loading space requirements of §2201. By Summary Order No. 17673, dated October 17, 2007, the Board granted the requested variances and special exceptions for the project, pursuant to Exhibit No. 40, plans and elevations. By Order No. 17673A, dated September 17, 2009, the Board granted a two year extension of the original approval, meaning that the applicant has until October 17, 2011, to file an application for a building permit under the approval.

Since the BZA approved the application and the extension, the property has been acquired by a new owner. The owner has retained the same architect to move forward with construction documents for the project. At the owner's direction, the architect has revised the plans to reverse the elevation of the building; i.e., the office entry on the ground floor and the core of the building above have been moved to the north side of the property from the south side. In all other respects, the plans remain the same. The "flip" in the elevation results in no further or different relief from the BZA.

July 14, 2011

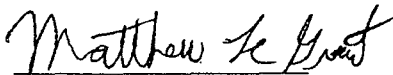
Page 2

Because the property is located in the area known as Chinatown, the design of the building is subject to review under the Chinatown Design Guidelines. That review is conducted by the Office of Planning (OP), pursuant to the Mayor's Order implementing the Design Guidelines. The OP approved the revised plans on May 24, 2011. A copy of those approved plans is attached. In approving the plans, the OP reviewer commented as follows:

1. The applicant is submitting a revision to the previously approved 2007 Chinatown Design Review Application. The applicant is the new owner of the property, MR Gallery Square LLC c/o Monument Realty. The original Architects, Cunningham Quill Architects, were retained and provided the proposed design documents for the application.
2. The proposal will "flip" the original footprint and floor plans of the tower. The exterior facade will become the mirrored image of the original design as shown in the attached drawings. The rich Chinese architectural features in the original elevations will be retained in the revised building elevations.

Given the nature of the design change, as described by OP, the approval of the plans by OP and the fact that the original relief granted by the BZA remains unchanged and no additional relief is required, I conclude that you may proceed with these plans without further review by the BZA. Accordingly, I hereby confirm that I will approve for zoning purposes plans for a building permit to build the building as shown on the attached plans. My ruling is for zoning purposes only. You will have to comply with all applicable requirements of the Building Code and any other District rules and regulations which may apply.

Please let me know if I may be of further assistance.

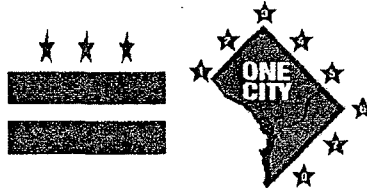
Sincerely, 
Matthew Le Grant
Zoning Administrator

Attachments

File: Det Let re 627 H St NW for revised design to Glasgow 7-14-2011

TAB F

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR**



June 18, 2012

Norman M. Glasgow, Jr.
Steven E. Sher
Director of Zoning and Land Use Services
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W. - Suite 100
Washington, DC 20006

Re: 1700 New York Avenue, NW - Addition to the Corcoran - Square 171, Lot 34

Gentlemen:

This is to confirm the substance of our discussion on Thursday, April 26, 2012, concerning the proposed addition to the Corcoran Gallery. The addition would be for an office building which would be located on the New York Avenue side of the property which is presently used as a surface parking lot. The proposed development has received conceptual approval from the Commission of Fine Arts and has been approved by the Board of Zoning Adjustment pursuant to Order No. 18227, dated June 24, 2011.

Part of the relief granted by the BZA was a variance from the parking requirements. A total of 83 parking spaces were required. The plans submitted to the BZA showed a two level underground garage with 44 conforming on-site parking spaces and an additional 38 tandem spaces and spaces in the vault in public space, for a total in the garage of 82 spaces.

You advised me that, during the process of preparing the sheeting and shoring and building permit construction drawings, the architects and engineers discovered that the conditions that limited the below-grade excavation and layout of the parking facilities are more difficult than previously thought. First, the GSA steam tunnel that runs down New York Avenue incorporates an extension towards the property that limits excavation within a portion of the proposed vault space. Because the Applicant is required to maintain a certain distance from the GSA steam tunnel, the parking garage must eliminate six proposed vault spaces.

Second, based on the area of excavation, the Building Code requires an additional egress stair to reduce the common path of travel distance from the far southwest corner - generally between the United Unions' building and the Site -- on the B3 and B2 levels. This additional stair required a redesign of a portion of the below-grade parking garage and is based on the irregular shape and small size of the Site. This change eliminated two zoning compliant parking spaces and one non-zoning space but also allowed for the addition of a compact space on the B3 level.

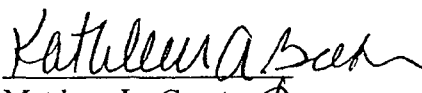
Finally, the eastern portion of the parking garage was reconfigured on the B-3 level as a result of changes to the ramping system required for a code compliant garage exhaust system and an expansion of the proposed sump pump system. This reconfiguration resulted in the loss of three zoning compliant spaces and one compact space, but allowed for the addition of two non-zoning spaces.

Accordingly, the proposed plans for the below-grade parking garage on two levels would now allow for only 38 zoning compliant spaces, 1 compact space, and 33 non-zoning parking spaces located within tandem and/or vault spaces, for a total of 72 spaces. The applicant has filed a request for a modification of the approved variance with the BZA to provide parking as set forth above. That case is scheduled for public hearing on June 26, 2012.

In the event that the BZA does not approve the requested change in the number of parking spaces, you advised that the Applicant could build an additional partial level of a parking garage, such that the total number of spaces provided would be exactly the same as shown to the BZA in the original application: 44 conforming on-site parking spaces and an additional 38 tandem spaces and spaces in the vault in public space, for a total in the garage of 82 spaces.

In that case, adding an additional level of parking would leave the case in the same posture as decided by the Board. There would be no change in the external appearance of the building and the same number of parking spaces would be provided. I therefore conclude that adding a third partial parking garage level would be consistent with the approval granted by the BZA and no further action by the Board would be required.

Please let me know if I may be of further assistance.

Sincerely, 
Matthew Le Grant
Zoning Administrator

File: Det Let re 1700 NY Ave NW - Corcoran- to Sher 6-18-12

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR**



July 14, 2011

Norman M. Glasgow, Jr.
Steven E. Sher
Director of Zoning and Land Use Services
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W. - Suite 100
Washington, DC 20006

Re: 627 H Street, N.W., Square 453, Lot 59 – Revision to Design

Gentlemen:

This is to respond to your question concerning the above-referenced property located on the north side of H Street between 6th and 7th Streets, N.W. The property is currently vacant and is proposed to be redeveloped with an office building with retail uses on the ground floor. The property has been variously described as 627 H Street, 625 H Street and 627-631 H Street. The property has been subdivided into a single record lot, as referenced above. The zoning which applies to the property is C-3-C in the Downtown Development (DD) District Overlay.

The development as proposed required relief from the Board of Zoning Adjustment (BZA), for a special exception from the roof structure requirements of §411, a special exception to reduce the rear yard requirements of §774, a special exception to reduce the number of required parking spaces by no more than 25%, a variance from the accessibility requirements of §2117.4 and a variance from the loading and service delivery loading space requirements of §2201. By Summary Order No. 17673, dated October 17, 2007, the Board granted the requested variances and special exceptions for the project, pursuant to Exhibit No. 40, plans and elevations. By Order No. 17673A, dated September 17, 2009, the Board granted a two year extension of the original approval, meaning that the applicant has until October 17, 2011, to file an application for a building permit under the approval.

Since the BZA approved the application and the extension, the property has been acquired by a new owner. The owner has retained the same architect to move forward with construction documents for the project. At the owner's direction, the architect has revised the plans to reverse the elevation of the building; i.e., the office entry on the ground floor and the core of the building above have been moved to the north side of the property from the south side. In all other respects, the plans remain the same. The "flip" in the elevation results in no further or different relief from the BZA.

July 14, 2011

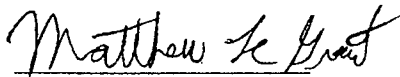
Page 2

Because the property is located in the area known as Chinatown, the design of the building is subject to review under the Chinatown Design Guidelines. That review is conducted by the Office of Planning (OP), pursuant to the Mayor's Order implementing the Design Guidelines. The OP approved the revised plans on May 24, 2011. A copy of those approved plans is attached. In approving the plans, the OP reviewer commented as follows:

1. The applicant is submitting a revision to the previously approved 2007 Chinatown Design Review Application. The applicant is the new owner of the property, MR Gallery Square LLC c/o Monument Realty. The original Architects, Cunningham Quill Architects, were retained and provided the proposed design documents for the application.
2. The proposal will "flip" the original footprint and floor plans of the tower. The exterior facade will become the mirrored image of the original design as shown in the attached drawings. The rich Chinese architectural features in the original elevations will be retained in the revised building elevations.

Given the nature of the design change, as described by OP, the approval of the plans by OP and the fact that the original relief granted by the BZA remains unchanged and no additional relief is required, I conclude that you may proceed with these plans without further review by the BZA. Accordingly, I hereby confirm that I will approve for zoning purposes plans for a building permit to build the building as shown on the attached plans. My ruling is for zoning purposes only. You will have to comply with all applicable requirements of the Building Code and any other District rules and regulations which may apply.

Please let me know if I may be of further assistance.

Sincerely, 
Matthew Le Grant
Zoning Administrator

Attachments